ISSUES

The issues to be determined by this decision are:

- Whether the Claimant's average weekly wage should be increased to $1101.96 in WC 4-977-328;

- Whether the Respondents properly terminated Claimants temporary total disability benefits in WC 4-977-328 due to her failure to accept a modified duty job;

- Whether Respondents' petition to reopen WC 4-910-076, due to an alleged overpayment of benefits should be granted; and if the claim is reopened, whether the Respondents may recover the overpayment by reducing benefits payable in WC 4-977-328.

- The Claimant asserted that the Final Admission of Liability (FAL) filed in WC 4-910-076 is invalid thus reopening would be unnecessary.

FINDINGS OF FACT

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

1. The Employer operates a hotel and spa located in Avon, Colorado. The Claimant worked at the spa as a massage therapist.

2. On January 28, 2013, the Claimant suffered an admitted work injury to her right wrist (WC 4-910-076). Claimant primarily underwent medical treatment at Vail Valley Medical Center with Lucia London, a certified nurse practitioner. Claimant also had surgery on her right wrist performed by Dr. Viola.

3. On March 24, 2014, Ms. London evaluated the Claimant. She completed a report documenting that Claimant had reached maximum medical improvement with no impairment or restrictions.

4. On April 10, 2014, the Respondents filed a FAL. The FAL states that the date of MMI is March 24, 2014, and in the section entitled "Remarks and basis for permanent disability award" states that, "There are no impairment benefits based on "London's" report of 3-24-14." The report attached to the FAL is the March 24, 2014 report referenced in paragraph 2 above. Ms. London, who is not a physician, signed the

report. There is no indication that an authorized treating physician reviewed Ms. London's recommendations or that the Respondents referred Claimant to a level II accredited physician for an evaluation regarding permanent impairment.

5. On March 9, 2015, the Claimant suffered a work injury to her left shoulder (WC 4-977-328). The Respondents admitted liability, and the Claimant has undergone medical treatment again primarily at Vail Valley Medical Center with Ms. London.

6. Claimant was eventually referred to Dr. William Sterett, an orthopedic surgeon. On July 14, 2015, Dr. Sterett performed surgery on Claimant's left shoulder.

7. On July 31, 2015, Dr. Sterret imposed work restrictions to include no lifting, carrying, pushing, pulling more than 10 pounds; and no overhead lifting. He also indicated Claimant should wear her sling for one more week then wean off of it.

8. On August 20, 2015, the Employer sent a letter to Dr. Sterret asking him to approve a modified duty job as a Spa Front Desk Attendant. The modified duty job was based on the restrictions Dr. Sterret imposed on July 31, 2015, stated in paragraph 7 above. Dr. Sterret signed the letter and dated it August 20, 2015. The Employer indicated that the modified duty job began on August 27, 2015.

9. Dr. Sterret signed the August 20, 2015 letter and faxed it back to the Employer in the morning around 9:48 a.m. according to the date and time fax stamp at the top of the letter.

10. Also on August 20, 2015, the Claimant called Dr. Sterret to report that she had a set back and her pain had increased. She also expressed concern that her work restrictions were not appropriate for her. Dr. Sterret electronically signed the note at 11:41 a.m.

11. The ALJ acknowledges that the timing of the new 2-pound restrictions is suspicious but there was no credible or persuasive evidence, such as testimony from Dr. Sterret or Ms. London, that Claimant deliberately urged either of them to modify her restrictions after receiving the August 20, 2015 modified duty job offer.

12. According to Dr. Sterret's August 28, 2015 record, Claimant recovered from her surgery rather slowly. Dr. Sterret imposed work restrictions to include no lifting of more than 2 pounds more than two times per hour and no overhead lifting or overhead work, and no typing.

13. The Claimant also saw Ms. London on August 28, 2015. Ms. London's report indicates that Claimant was residing in Denver so her family could help her out. Ms. London noted that Claimant's restrictions included lifting, carrying, pushing and pulling 0-2 pounds with her left arm; no reaching away from the body; no overhead work; and no typing.

14. On September 3, 2015, the Insurer had Claimant personally served at her physical therapist's office in Denver with the August 20, 2015 modified duty job offer, which offered her a job at the spa in Avon, Colorado. The letter indicated that Claimant must start the modified duty job three business days from the receipt of the letter which fell on September 8, 2015. The Insurer relied upon the restrictions Dr. Sterret imposed on July 31, 2015.

15. The Claimant testified that she had no notice of the August 20, 2015 modified duty job offer until it was personally served upon her on September 3, 2015, although the original letter states that it was sent by regular mail and e-mail.

16. The Claimant did not report to work to begin the modified duty job on or before September 8, 2015. The Claimant testified that the restrictions included in the September 3, 2015 modified duty job offer were no longer valid. Claimant's attorney sent a letter to Respondents' attorney stating that Claimant had re-located to Denver and that due to the change in work restrictions, the job offer was no longer valid.

17. On September 16, 2015, Dr. Sterret again changed Claimant's restrictions to no lifting more than 15 pounds more than two times per hour, no overhead lifting or work, and no typing. Dr. Sterret also indicated that Claimant should not need to use a sling at work. Dr. Sterret did not examine or talk to the Claimant on September 16, 2015 prior to modifying her work restrictions.

18. The Respondents filed a General Admission of Liability terminating Claimants temporary total disability effective September 8, 2015. Respondents relied upon the modified duty job offer dated August 20, 2015, and personally served upon Claimant on September 3, 2015.

19. On September 28, 2015, Dr. Sterret approved a modified duty job of Spa Desk Agent with no lifting greater than 10 pounds; no overhead lifting; and no typing with her left arm. Dr. Sterret's signature indicated that he agreed the modified duty job was within the restrictions he had imposed on September 16, 2015.

20. On October 2, 2015, the Insurer had Claimant personally served with the modified duty job offer dated September 30, 2015 enclosing Dr. Sterret's approval of the modified duty job dated September 28, 2015. The offer letter informed the Claimant that she must begin the modified duty job three business days after receiving the letter. Three business days after October 2 was October 7, 2015. Claimant did not report for work on October 7, 2015.

21. Paige Bowers, the Employer's spa manager, testified that the Employer closed completely every October for an undetermined amount of time until ski season. The wage records supplied by the Respondents show Claimant earned no wages October 2014.

22. Claimant had moved to Denver just before she had surgery in July 2015 because she needed assistance recovering from the surgery. Claimant owned a home in Eagle County. Claimant testified that she felt she could no longer afford to live there due to her injury.

23. Claimant was undergoing physical therapy in the Denver area but still traveling to Vail for her monthly visits with the physicians. She indicated that she scheduled appointments with both Dr. Sterret and Vail Valley Medical on the same day to avoid multiple trips from Denver to Vail.

24. The Employer has a property in the Denver area that is owned by the same management company. Claimant testified that she would have been able to accept an offer of modified duty employment in the Denver area had it been offered.

25. Dr. Sterett has not yet placed Claimant at maximum medical improvement, and Claimant still has work restrictions.

26. Based on the foregoing, the Respondents have failed to prove that termination of TTD effective September 8, 2015 was appropriate under the circumstances. The ALJ finds that the job offer made on October 2, 2015 was a valid job offer but that Claimant, as a practical matter, could not accept it. As such, Claimant remains entitled to TTD.

27. Respondents admitted for an AWW of $810.04, which the Respondents assert is inflated and Claimant asserts is too low.

28. In WC 4-910-076, the Respondents admitted for an AWW of $1,165.69. Claimant urges the ALJ to adopt a method of calculating her AWW that would result in a wage closer to $1,165.69. Claimant supplied wage information for an eight-week period reflecting that she earned $8,815.71 immediately before her injury. Claimant's wage calculation fails to recognize that the Employer closes for several weeks each year. In 2014, the Employer closed for eight weeks during which Claimant earned no wages. Claimant testified that she had side work during those weeks, but provided absolutely no testimony or evidence as to how much she earned thus that loss of earning capacity cannot be considered.

29. Claimant also alleged that in all of 2014 and 2015 through March 9, 2015, she earned less than normal because she was still recovering from her January 2013 injury. Claimant provided no documentary evidence to support her assertion. The fact that Respondents admitted for a higher wage in WC 4-910-076, does not prove that Claimant's AWW should be higher in her subsequent claim.

30. The Respondents urge the ALJ to calculate Claimant's AWW based on 52 weeks of income Claimant earned from March 8, 2014 through March 6, 2015. Claimant earned a total of $30,781.45 over that period which results in an AWW of $591.95. The ALJ finds that $591.95 more accurately reflects Claimant's average wage.

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).

WC 4-910-076 –Petition to Reopen and Overpayment

4. Section 8-42-107(8)(b)(I), C.R.S., states that an authorized treating physician shall determine when the injured worker reaches MMI. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The plain language of the statute requires that a *physician* determine when a Claimant as reached MMI. There is no dispute that Lucia London is not a physician. As such, Ms. London had no authority to determine Claimant had reached MMI on March 24, 2014, and she certainly had no authority to determine permanent medical impairment as she is not a physician, and cannot have obtained the appropriate accreditation by the DOWC. Because no authorized treating physician has placed the Claimant at MMI, the FAL is void and the claim remains open. Further, the overpayment issue is rendered moot because without an MMI determination, the ALJ cannot ascertain whether the Respondents overpaid any benefits to the Claimant.

WC 4-977-328 – Termination of TTD

5. Section 8-43-105(3)(d)(I), C.R.S., requires termination of TTD once the attending physician releases a claimant to modified duty work, the employer offers, in writing, the modified duty work and the claimant fails to begin such employment. Section 8-42-105(3), C.R.S., provides that upon the occurrence of one of four enumerated conditions TTD benefits shall cease. The termination of TTD benefits under any one of the four enumerated conditions is mandatory. *Burns v. Robinson Dairy, Inc., 911 P.2d 661* (Colo. App. 1995).

6. WCRP Rule 6 provides that respondent may unilaterally terminate claimant's TTD without a hearing by filing an admission of liability together with a certified letter to the claimant containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.

7. While it is true that the September 3, 2015 letter was valid and in compliance with DOWC Rule 6 when prepared by the Respondents, it became invalid when Dr. Sterret reduced Claimant's lifting capacity to 2 pounds on August 28, 2015. Dr. Sterret did not review the Spa Desk Agent job with a 2-pound restriction in mind prior to the Employer offering Claimant the modified duty job on September 3, 2015. Thus, the unilateral termination of TTD effective September 8, 2015 was improper.

8. The Respondents made a second modified duty job offer on October 2, 2015, when the Insurer had Claimant personally served with the offer dated September 30, 2015 enclosing Dr. Sterret's approval of the modified duty job dated September 28, 2015. The offer letter informed the Claimant that she must begin the modified duty job three business days after receiving the letter. Three business days after October 2 was October 7. The Claimant failed to report to work on October 7, 2015. The ALJ concludes that the October 2, 2015 modified duty job offer complied with Rule 6 of the DOWC Rules of Procedure.

9. Once it has been established that the offer of modified duty was valid and in compliance with Rule 6 and § 8-42-105(3)(d)(I), C.R.S., the appropriate inquiry is whether the offered employment is reasonably available to the claimant under an objective standard. *See Ragan v. Temp Force*, W.C. No. 4-216-579 (ICAO June 7, 2006).

10. Section 8-42-105(3)(d)(I), C.R.S., creates no explicit prescriptions or restrictions on the type of modified employment Respondents may offer other than that the attending physician must approve the employment. *Ragan, supra.* In *Belanger v. Keystone Resorts*, Inc., W.C. No. 4-250-114 (ICAO October 9, 1997) ICAP acknowledged that the location of a claimant's residence is a relevant factor in determining whether the refusal to accept the employment is reasonable. However, ICAP held that the residence factor must be viewed against the totality of the

circumstances, including the claimant's decision to relocate. *See also Loya v. Colorado Roofing Contractors, Inc*., W.C. No. 4-530-597 (ICAO July 22, 2004).

11. As found above, the modified duty job was not reasonably available to the Claimant. The Claimant moved from Vail to Denver due, in part, to her work injury. She needed assistance recovering from the work-related shoulder surgery and she did not have the financial means to continue residing in Vail. In addition, the imminent closure of the Employer's spa following the modified duty job offer would not provide any impetus to the Claimant to move back to Vail. She would have been unemployed within a week or two of commencing the modified duty job, and unable to perform massages for private clients during the shutdown. Under the circumstances presented, the ALJ concludes that Claimant reasonably refused to accept the modified duty job in Vail. Respondents remain liable for TTD commencing on September 9, 2015 and ongoing until terminated by operation of law.

Average Weekly Wage

12. Section 8-42-102(2), C.R.S., requires a claimant's average weekly wage to be calculated upon the monthly, weekly, hourly, daily or other remuneration the claimant was receiving at the time of the injury. Section 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 claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

13. The Claimant has presented no persuasive evidence that her AWW should be increased whereas Respondents proved by a preponderance of the evidence that they erroneously admitted for an inflated wage. Over a 52-week period from March 8, 2014 through March 6, 2015, Claimant earned a total of $30,781.45. This period of time includes the weeks when the Employer shuts down and Claimant earns no wages. It also reflects the fairest approximation of Claimant's wage loss given that she did not prove that she earned any additional wages during the Employer's shutdown nor did she prove she was earning less than usual due to her 2013 work injury. Thus, Claimant's AWW is $591.95.

ORDER

It is therefore ordered that:

1. Claim number WC 4-910-076 remains open; and the issue of overpayment in that claim is moot.

2. Respondents' unilateral termination of TTD in WC 4-977-328 is reversed. Claimant remains entitled to TTD commencing on September 9, 2015 and ongoing until terminated by operation of law.

3. Claimant's AWW in WC 4-977-328 is $591.95.

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 30, 2016

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

W.C. No. 4-944-056-01

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No further hearings have been held in the above-captioned matter. On March 29, 2016, thwe Claimant filed a "Motion for Clarification of Order Dated 03/21/2016," which the ALJ will construe as a timely motion for a corrected order. The Claimant was appropriately confused by paragraph B of the Order portion of the decision, which is, in fact, inconsistent with the overall decision. Consequently, the Full Findings of Fact, Conclusions of Law are adopted in full with the exception of the herein below modification of the Order portion. Adoption of the Final Admission **is not appropriate** under the circumstances.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/23/16, Courtroom 1, beginning at 1:30 PM, and ending at 4:15 PM).

This matter involves the Respondents' request to overcome the Division Independent Medical Examination (DIME) opinion of David Yamamoto, M.D. , an occupational medical physician to the effect that the Claimant had not reached maximum medical improvement (MMI) because the Claimant needed more psychiatric/psychological evaluations and/or treatment. The Respondents assert that the medical report provided by Gary S.Gutterman, M.D., a board certified psychiatrist indicates that the Claimant had achieved MMI on January 25, 2016; and, Dr. Gutterman's psychiatric opinion establishes by clear and convincing evidence that the DIME opinion of Dr. Yamamoto, with respect to psychiatric MMI has been overcome.

Respondent's Exhibits A through M were admitted into evidence, without objection. Claimant's Exhibits 1 through 15 were admitted into evidence, without objection.

ISSUE

The issue to be determined by this decision concerns whether the psychiatric conclusion made by Dr Gutterman that the Claimant reached MMI on January 25, 2016 establishes clear and convincing evidence to overcome the determination made by DIME Dr. Yamamoto, issued on September 23, 2015, that the Claimant had not achieved MMI regarding psychiatric health associated with the initial injury.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was injured on February 22, 2014 when he fell from a ladder during a firefighting training exercise for the Employer fire department. The Claimant fell approximately 14 feet and fractured his right ankle and foot.

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated July 10, 2015, based on the opinion of authorized treating physician (ATP) Dean Plok, M.D., admitting for medical benefits; an average weekly wage (AWW) of $1,500; temporary total disability (TTD) benefits of $437.71 per week (reduced 50%, based on an alleged safety violation) from February 23, 2014 through March 17, 2014; and, scheduled permanent partial disability (PPD) of 21% of the right lower extremity (RLE). There was a timely objection and request for a DIME. Dr. Yamamoto was appointed as the DIME Examiner.

3. On February 24, 2014, Dr. Prok examined the Claimant and concluded that the Claimant had a pain rating of 8/10 in the foot and ankle and Dr. Prok referred the Claimant to Gregg A. Koldenhoven, M.D., of the Front Range Orthopedics and Spine Clinic.

4. Dr. Koldenhoven examined the Claimant on February 24, 2014 and confirmed that the Claimant had foot fractures. Dr. Koldenhoven performed surgery on the Claimant's right foot on March 4, 2014.

5. The Claimant underwent physical therapy and had his pain monitored by Drs. Koldenhoven, Olsen, Aspergren, and Prok between March 2014 and May 2015.

6. Dr. Prok placed the Claimant at MMI on July 1, 2015.

Division Independent Medical Examination (DIME) of David Yamamoto, M.D.

7. Dr. Yamamoto is fully Level 2 Accredited by the Division of Workers' Compensation (DOWC). On September 23, 2015, Dr. Yamamoto performed the DIME and subsequently issued a report. He recommended consideration of a trial of injection therapy for lumbar discomfort. He further found that the Claimant was not at MMI because he was experiencing anxiety, panic attacks, depression, and symptoms of Post Traumatic Stress Disorder (PTDS), all psychiatric/psychological conditions. Dr. Yamamoto recommended that the Claimant undergo a psychological evaluation, counseling, and a referral to a psychiatrist for treatment of anxiety, PTSD, and depression. The Claimant was referred to Dr. Gutterman. The ALJ infers and finds that DIME Dr. Yamamoto considered the Claimant at MMI for all purposes other than psychiatric MMI.

8. On December 17, 2015, Dr. Koldenhoven conducted a physical examination and stated, "Consider MMI at present with potential for further intervention later in life."

9. Dr. Prok issued a report on January 4, 2016, indicating that the Claimant wanted to undergo medial branch block for the bilateral L4-5 and L5-S1 facets to provide short term relief.

10. On January 25, 2016, the Claimant underwent the psychiatric evaluation conducted by Dr. Gutterman, as recommended by DIME Dr. Yamamoto. Dr. Gutterman concluded after 45 minutes of psychiatric consultation that the Claimant had reached MMI from a psychiatric perspective. The ALJ finds that Dr. Gutterman's opinion concerning psychiatric MMI makes it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant is **not** at MMI is in error.

Ultimate Findings

11. Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and, Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion, which creates an inference that Dr. Yamamoto would defer to Dr. Gutterman on psychiatric matters..

12. Based on substantial evidence, the ALJ makes a rational choice, between conflicting medical opinions, to accept Dr. Gutterman's opinion and to reject Dr. Yamamoto's opinion with respect to psychiatric MMI.

13. The Respondents have proven, by clear and convincing evidence that Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error. Therefore, the Respondents have overcome DIME Dr. Yamamoto's opinion in this regard by clear and convincing evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's, (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion.

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 two conflicting medical opinions, the ALJ made a rational choice to accept the opinion of Dr. Gutterman on MMI and to reject the DIME opinion of Dr. Yamamoto in this regard..

Burden of Proof

c. Under Colorado law, a party disputing a DIME physician's opinion must meet the burden of proof by a showing of clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 38 (Colo. App. 2000). "The finding regarding MMI and permanent medical impairment of an DIME examiner in a dispute arising under subparagraph (II) of paragraph (b) may be overcome only by clear and convincing evidence. § 8-42-107(8)(III), C.R.S..

d. Clear and convincing evidence is defined as, "[T]hat evidence which is stronger than a 'preponderance of the evidence,' and which is unmistakable and free from serious or substantial doubt." *People v. Lane*, 581 P.2d 719, 722 (Colo. 1978); *Metro Moving and Storage Co. v. Gussert, supra*; *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). 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). As found, it has been established that it is highly probable, unmistakable and rfree from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error.

e. There is no dispute that the Claimant reached MMI on all non-mental health injuries, however, there is but one MMI date for all injuries resulting from a specific compensable event, and psychiatric MMI is a component thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant reached maximum medical improvement on January 26, 2016 on all issues as a result of the opinion of Division Independent Medical Examination David Yamamoto, M.D. having been overcome by clear and convincing evidence, by virtue of the opinion of psychiatrist, Gary S. Gutterman, M.D.

B. Any and all issues, including the issues of permanent impairment and safety violation, are reserved for a future hearing.

DATED this _____ day of March 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

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

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

Wc.cord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

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

SUPPLEMENTAL ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On December 5, 2015, Full Findings of fact, Conclusions of Law and Order was mailed to the parties. On December 8, 2015, the Respondents mailed their Petition to Review and Request for Transcript. On January 12, 2016, a written, verbatim transcript of the November 17, 2015 hearing was lodged with the Office of Administrative Courts. On February 3, 2016, the Respondents filed their Brief in Support of Petition to Review. On February 23, 2016, the Claimant filed her Brief in Opposition to Petition to Review, at which time the matter was ready for the issuance of a Supplemental Order. Administrative Law Judge (ALJ) Edwin L. Felter, Jr. hereby issues the following Supplemental Order.

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

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection. A transcript of the evidentiary deposition of Guadalupe Ledezma, Ph.D., clinical psychologist, was received in lieu of Dr. Ledezma's testimony at hearing. A transcript of the November 17, 2015 hearing was lodged with the Office of Administrative Courts on January 12, 2016.

At the commencement of the hearing, the Claimant withdrew the issue of medical maintenance benefits and penalties against the Respondents. Also, the parties agreed to strike the Final Admission of Liability (FAL), dated November 4, 2011. The parties further stipulated to reasonably necessary and causally related medical maintenance care by ATPs, with the exception of ongoing care by Dr. Ledezma, and the ongoing prescription of Zoloft, an anti-depressant. Citing and arguing the holding in *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002), the gravamen of the Respondents argument that the ALJ compensated a medical benefit for "compensation neurosis," which as herein below determined is misplaced because the facts in *Jarosinski* are clearly distinguishable from the facts in the present case.

ISSUE ON APPEAL

The sole issue to be determined by this decision concerns whether the Claimant's ongoing psychological care and medication recommended by her authorized treating physician (ATP), Lon Noel, M.D., and her authorized treating psychologist, Dr. Ledezma, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of August 31, 2000; specifically, does the treatment result from an unbroken chain of causation from the original injury of August 31, 2000, which ultimately resulted in the Claimant being declared permanently and totally (PTD) disabled; or, as the Respondents argue, is the ongoing treatment by Dr. Ledezma and the Zoloft prescription the result of "litigation neurosis,".dealt with in *rosinski.*

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

SUPPLEMENTAL FINDINGS OF FACT

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

Preliminary Findings

1. On August 31, 2000, the Claimant sustained admitted injuries to her right wrist and hand during the course and scope of her employment. As a result of her right

upper extremity (RUE) injury, in 2001, the Claimant developed an injury in her left upper extremity (LUE) (Claimant's Exhibit 1).

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

3. On May 15, 2001, Dr. Johnsrud diagnosed the Claimant as having an adjustment disorder with somatic reactivity and characteristics of a dependent personality (Claimant's Exhibit 3). As found in the original Findings, the ALJ rejects Dr. Johnsrud's ultimate opinions because they are contrary to the weight of the evidence.

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

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

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

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

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

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

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

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

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

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

14. On October 13, 2004, the undersigned ALJ issued Specific Findings of Fact, Conclusions of Law and Order declaring the Claimant to be permanently and totally disabled (PTD), [which the Respondents re-affirmed by Final Admission of Liability (FAL) dated November 4, 2011], stating, "Respondents shall pay the costs of continuing maintenance medical benefits, under the *Grover* case, to maintain medical stability as recommended by Dr. Gray and prescribed by Dr. Noel including maintenance psychological treatment under Dr. Ledezma" (Claimant's Exhibit 8).

<u>The Present Situation</u>

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

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

a direct and unbroken causal link from the original admitted work-related injury and the Claimant's interaction with the Respondents' adjuster that created her fear and stress over losing her PTD benefits and this interaction did **not ,** under any stretch, amount to the type of "litigation stress" discussed in *Jarosinski*.

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

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

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

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

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

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

Independent Medical Examination by Stephen Moe, M.D.

23. The Respondents contested the referral to and treatment from Dr. Ledezma. The Respondents requested an Independent Medical Examination (IME), which was performed by Stephen Moe, M.D., a psychiatrist. Dr. Moe is of the opinion that the Claimant's current psychological status is not causally related to her work injuries of 2000 and 2001. As found herein below, the ALJ rejects Dr. Moe's ultimate opinion on causality because it is contrary to the weight of the evidence, and the ALJ makes a rational choice to accept ATP Dr. Noel's and Dr. Ledezma's opinions instead of Dr. Moe's opinions.

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

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

Dr. Ledezma's Evidentiary Deposition

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

27. Dr. Ledezma testified that the treatment she provided in May and June of 2015 was strictly limited to issues related to the Claimant's work-related injuries and chronic pain (Ledezma Depo. p. 8, lines 9-13; p. 10, lines 17-22; p. 11, lines 19-22; p. 51, lines 23-25; p. 66, lines 13-4).

28. According to Dr. Ledezma, the Claimant's situation is chronic by nature. She stated that the depression and anxiety that the Claimant is having is primarily related to issues around being physically limited and having to depend on other people for assistance with a lot of activities of daily living, and feeling basically that there is no sense of improvement forthcoming. Dr. Ledezma stated that this has been really

emotionally devastating for the Claimant (Ledezma Depo. pp. 8-9, lines 25 & 1-9; pp. 56-57, lines 19-25 & 1; p. 57, lines 7-8).

29. According to Dr. Ledezma, it's not necessarily one specific thing that will cause the Claimant to have more depression or problems sleeping. It is a cumulative effect of basically realizing that as time goes on, she's noticing more and more problems here and there that are impacting her self-esteem, her quality of life, etc. (Ledezma Depo. p. 51, lines 13-18). By necessary implication, the ALJ finds these problems directly related to the admitted compensable injury in an unbroken chain of causation.

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

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

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

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

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

The Claimant's Testimony at Hearing

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

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

37. The Claimant's testimony reveals that the receipt of a letter caused her to contact her attorney. Once the Claimant spoke with her attorney, she found out, pursuant to the undersigned ALJ's Order of years before, that she had the right to return to her psychologist when she had an inability to cope with her pain and disability. [Hearing Transcript, pp. 14-17 and my decision of October 13, 2004 (Exhibit 8 and *See* Finding of Fact No. 19)].

Independent Medical Examination (IME) by Stephen Moe, M.D.

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

39. Dr. Moe was of the opinion that the Claimant has suffered from chronic disorder involving a blend of depression and anxiety since the mid-1990s, where she presented with symptoms associated with stress. It was recommended at that time that the Claimant get treatment and she declined. The ALJ finds that Dr. Moe's opinions in this regard are not adequately supported and he does not take cognizance of an "aggravation and acceleration" of a preexisting condition

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

41. During his testimony, Dr. Moe agreed that the death of the Claimant's brother and the disabling condition of her mother could cause a **situational** depression

and that it is not unusual for patients who suffer from chronic pain to experience depression and anxiety.

Authorized Treating Psychologist Guadalupe Ledezma, Ph.D.

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

43. Dr. Ledezma further stated that there was no indication of any ongoing prior psychological issues or problems that were treated or identified prior to her 2000 injury, other than a medical report from 1995 that noted that the Claimant was taking care of her diabetic and blind mother and the death of Claimant's brother (Ledezma Depo. p. 16, lines 16-18; p. 17, lines 11-13). The ALJ finds treating psychologist Dr. Ledezma's opinions, in this regard, far more credible and persuasive than Dr. Moe's opinions.

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

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

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

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

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

The Claimant's Testimony

49. The Claimant's testimony reveals that the receipt of the letter caused her to contact her attorney. Once Claimant spoke with her attorney, she found out, pursuant to the Order, that she had the right to return to her psychologist when she had an inability to cope with her pain and disability. (Hearing Transcript pp. 14-17 and Judge Felter's Order of October 13, 2004, Exhibit 8 and Finding of Fact ¶

Ultimate Findings

50. Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was **situational.** For this reason, the continuing need for Zoloft and psychological treatment is directly causally related to the admitted injury of August 31, 2000 and its sequelae, in an unbroken chain of causation.

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

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

53. The renewed psychological treatment is directly caused, in an unbroken chain, by the continuing problems associated with Claimant's original physical and psychological injuries from the combined 2000 and 2001 events.

DISCUSSION

Respondents' Argument on Appeal

The ALJ notes at the outset that Respondents have raised the inapplicable issue of "litigation stress" for the first time on appeal. Citing *Jaronsinski v. Indus. Claim Appeals Office, supra,* in their Brief in Support of Petition to Review, the Respondents argue that the Claimant's interaction with the adjuster which caused her to fear losing her PTD benefits broke the causal link from the original admitted injury and the present need for psychological treatment by Dr. Ledezma and the Claimant's continued need for Zoloft, and was analogous to "litigation neurosis," as discussed in *Jarosinski.* The ALJ finds *Jarosinski* inapposite to the present case. The facts in *Jarosinski* could not be more sharply contrasted to the facts in the present case.

In *Jarosinski,* for starters, the ALJ denied a re-opening and was ultimately affirmed. The Claimant suffered stress after the ALJ issued the written order. The Court of Appeals noted that "litigation stress" involves stress caused by adverse rulings and the claimant having to watch surveillance film of "her apparently inconsistent and possibly fabricated complaints. In affirming ICAO, the Court noted that psychological problems caused by an insurance carrier exercising its statutory rights to defend a claim occurs outside the course and scope of employment. The Court held that.problems resulting from litigation "stress" and the entry of an adverse order were not sufficiently similar to quasi course of employment injuries to justify compensation."The Court also noted that proof of causation is an evidentiary issue of fact and the ALJ's findings must be upheld if supported by substantial evidence, thus, the reviewing authorities did not disturb the ALJ's denial of compensability for the "litigation stress." In a nutshell, the claimant was depressed because she lost the case. The facts in the present case are more than distinguishable from the facts in *Jarosinski.*

Interestingly, the Court noted that adjustment practices may give rise to tort liability for bad faith claims. With the Respondents' disingenuous argument, they would skate on the workers' compensation claim and escape bad faith liability. *See* § 8-44-206, C.R.S. The Guaranty Fund is a special statutory creature that exists to promptly pay **indemnity and medical** benefits. It may not be sued for bad faith claims practices. The Respondents' argument would make the Claimant like Philip Nolan, the lady without a remedy.

The Claimant's Argument in Opposition to the Petition to Review

The cause of Claimant's psychological injury is a question of fact for determination by the ALJ. *Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). Consequently, a reviewing tribunal must uphold the ALJ's determination if supported by substantial evidence in the record. §8-43-301(8), C.R.S. This standard of

review requires the reviewing tribunal to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002).

Additionally, the industrial injury does not have to be the sole cause of a claimant's disability before the claimant can recover benefits. *Lidner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), rev'd on other grounds*; Askew v. Indus. Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996); *Horton v. Indus. Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996). Accordingly, the ALJ's finding that the Claimant also experienced "stress" and ongoing uncertainty about the possible loss of her PTD benefits does not preclude an ALJ from ordering a respondent to pay the costs of ongoing psychological care. *See also Briles v. Montrose Memorial Hospital,* W.C. No. 4-522-095 [Indus. Claim Appeals Office (ICAO), April 30, 2004].

As found herein above, the fear and anxiety about the Claimant losing her source of income (PTD benefits) triggered the renewed visits to Dr. Ledezma in 2015, when she received a letter in 2015 that caused her to contact her attorney. Once the Claimant spoke with her attorney, she found out, pursuant to the Order of 2004, she had the right to return to her psychologist when she had an inability to cope with her pain and disability. (Hearing Transcript pp. 14-17; and, the Order of October 13, 2004, Exhibit 8 and Finding of Fact ¶ 18). The ALJ, more specifically found that the credible testimony of Claimant and Dr. Ledezma (in the 2004 Order) reflected that the Claimant, who is permanently and totally disabled, needs care from Dr. Ledezma to cope with the pain and decreased functionality caused by her injuries. (Finding of Fact ¶¶ 18 and 25-28) Therefore, the renewed psychological treatment is caused by the continuing problems associated with Claimant's original physical and psychological injuries from the combined 2000 and 2001 events. The issue of causation was previously determined by the Division Independent Medical Evaluating (DIME) physician's conclusion that the mental problems were components of Claimant's overall impairment which simply constituted part of the diagnostic assessment that comprises the DIME process. *Qual-Med Inc, v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Since the DIME physician's opinion concerning causation is an inherent part of the "rating," and must be accepted absent "clear and convincing evidence" to overcome the opinion, if both her physical and mental problems caused the Claimant's disability, then the Respondents are liable for those consequences because they did not challenge the finding within the time permitted. (Exhibit 8, Finding of Fact ¶ 19, and Conclusion of Law ¶ **m**, Order of October 13, 2004).

By failing to challenge this finding, the Respondents voluntarily relinquished a known right and waived their right to challenge causation. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984); *Ewing v. Colorado Farm Mutual Casualty*, 133 Colo. 447, 296 P.2d 1040 (1956). A waiver may be implied by conduct which manifests an intent to relinquish the right to challenge the finding of causation. *Obodov v. Foster*,

105 Colo. 254, 97 P.2d 426 (1939). Therefore, the Respondents are estopped from raising this issue. *See Donahue*, *supra*.

SUPPLEMENTAL CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

Substantial Evidence

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

Pre-Existing Condition

c. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). Despite the Respondents' argument that the Claimant could easily have benefited from psychotherapy treatment and medication, and been on Zoloft for the past 20 years, she did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

Maintenance Medical Care (*Grover Medicals;* Zoloft Prescription

d. A claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural

consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law*, § 13.00 (1997). As found, the increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The call from the adjuster in 2014 and ongoing uncertainly about the possible loss of her benefits increased the Claimant's anxiety. As found, The ALJ drew a plausible inference and found that fear and anxiety about the Claimant losing her source of income triggered the renewed visits to Dr. Ledezma in 2015. There is no persuasive evidence that the Claimant's need for psychological treatment is based on a subsequent intervening event. The totality of the evidence, including the Claimant's testimony, demonstrated that the need for psychotherapy treatment and medication recommended by Dr. Ledezma and ATP Dr. Noel are reasonably necessary and causally related to the admitted injury of 2000 and the sequelae thereof.

Alleged "Litigation Stress"

e. The Respondents have raised the inapplicable issue of "litigation stress" for the first time on appeal. Citing *Jaronsinski v. Indus. Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002) in their Brief in Support of Petition to Review, the Respondents argue that the Claimant's interaction with the adjuster which caused her to fear losing her PTD benefits broke the causal link from the original admitted injury and the present need for psychological treatment by Dr. Ledezma and the Claimant's continued need for Zoloft, and was analogous to "litigation stress," as discussed in *Jarosinski.* As found, the holding and the facts in *Jarosinski are* inapposite to the present case. The facts in *Jarosinski* could not be more sharply distinguished from the facts in the present case.

f. As found, the fear and anxiety about the Claimant losing her source of income (PTD benefits) triggered the renewed visits to Dr. Ledezma in 2015, when she received a letter in 2015 that caused her to contact her attorney. Once the Claimant spoke with her attorney, she found out, pursuant to the Order of 2004, she had the right to return to her psychologist when she had an inability to cope with her pain and disability. (Hearing Transcript pp. 14-17; and, the Order of October 13, 2004, Exhibit 8 and Finding of Fact ¶ 18).

g. The cause of Claimant's psychological injury is a question of fact for determination by the ALJ. *Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). Consequently, a reviewing tribunal must uphold the ALJ's determination if supported by substantial evidence in the record. §8-43-301(8), C.R.S.. This standard of review requires the reviewing tribunal to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). As found, the ALJ made a finding of evidentiary (basic) fact that the cause of the Claimant's

renewed need for psychological treatment from authorized psychologist Dr. Ledezma was from an unbroken chain of causation from the original admitted injury of 2000, which resulted in the Claimant being declared permanently and totally disabled..

h. Indeed, an industrial injury does not have to be the sole cause of a claimant's disability before the claimant can recover benefits. *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), rev'd on other grounds*; Askew v. Indus. Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996); *Horton v. Indus. Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996). Accordingly, the finding that the Claimant also experienced "stress" and ongoing uncertainty about the possible loss of her PTD benefits does not preclude ordering the Respondents to pay the costs of ongoing psychological care. *See also Briles v. Montrose Memorial Hospital,* W.C. No. 4-522-095 [Indus. Claim Appeals Office (ICAO), April 30, 2004].

Burden of Proof

i. 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 sustained her burden on the ongoing need for psychological treatment at the hands of Dr. Ledezma and the Zoloft prescription.

SUPPLEMENTAL ORDER

IT IS, THEREFORE, ORDERED THAT:

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

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

DATED this_____day of March 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

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

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

_____
Court Clerk

Wc.suppord

ISSUES

- Was Claimant's right to seek additional medical benefits and temporary disability benefits foreclosed by the failure to appeal ALJ Harr's finding that the Division-independent medical examination physician placed Claimant at maximum medical improvement on February 28, 2013?

- Is the Claimant entitled to an award of medical benefits to treat her right knee symptoms?

- Is Claimant entitled to an award of temporary total disability benefits commencing February 28, 2013 and continuing?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 though 13 were received in evidence. Respondents' Exhibits A through AA were received in evidence.

2. 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.

3. On December 1, 2008 Claimant underwent left knee surgery described as a plica resection of the medial compartment and a lateral retinacular release. On December 11, 2009 Claimant underwent a second left knee surgery described as a microfracture of the left medial femoral condyle chondral lesion.

4. On June 16, 2010 authorized treating physician John Hughes, M.D., placed the Claimant at maximum medical improvement (MMI). Dr. Hughes assessed left knee sprain, left knee arthrosis post microfracture and persistent postsurgical patellofemoral arthritis.

5. Claimant requested a Division-sponsored independent medical examination (DIME) to review Dr. Hughes's findings.

6. William Watson, M.D., performed the DIME on November 23, 2010. During the course of the DIME Dr. Watson noted that claimant walked with an "antalgic gait, quick on the left." In addition to examining Claimant's left knee Dr. Watson examined Claimant's *right* knee. With regard to the right knee Dr. Watson noted pain on patellar compression, grinding and crepitation with flexion/extension and tenderness over the lateral patella. Dr. Watson assessed the following: (1) Status post lateral

release and plica resection of the left knee; (2) Status post chondroplasty and microfracture of the medial femoral condyle; chondral lesion; (3) Chondromalacia patella of the right knee, rule out internal derangement. Dr. Watson opined Claimant was not at MMI. With regard to the left knee Dr. Watson recommended Claimant undergo a repeat MRI to assess the medial condylar cartilage defect. With regard to the right knee Dr. Watson noted Claimant had first complained of right knee pain to Dr. Robinson on February 10, 2010, to Dr. Hughes on May 5, 2010 and to Dr. Parry on August 10, 2010. Dr. Watson opined Claimant's right knee symptoms were attributable to her altered gait and excessive weight bearing that were caused by the November 1, 2007 accident. Dr. Watson opined Claimant should undergo x-rays and an MRI of the right knee and follow-up with her orthopedic surgeon.

7. Dr. Watson's November 2010 finding that Claimant had not reached MMI was not contested by either Claimant or Respondents.

8. On January 4, 2011 Claimant was seen by Dr. Hughes. Dr. Hughes wrote that Claimant's "emerging right knee symptoms" were consistent with degenerative chondromalacia patella and not attributable to the November 1, 2007 industrial injury.

9. On January 7, 2011 Claimant returned to her surgeon, Walter Robinson, M.D. Dr. Robinson recommended Claimant undergo bilateral MRI's of her knees to assess chondral defects.

10. In September 2012 Charles Gottlob performed a third surgery on Claimant's left knee. Dr. Gottlob had intended to perform a unicompartmental resurfacing arthroplasty but decided against the procedure upon detecting significant chondromalacia on the central weight bearing portion of the lateral femoral condyle.

11. On February 28, 2013 Dr. Gottlob noted Claimant had undergone an Orthovisc injection with minimal relief. Dr. Gottlob placed Claimant at MMI.

12. On May 28, 2013 Claimant returned to Dr. Watson for a follow-up DIME. Dr. Watson issued a written report in which he listed his impressions as: (1) Status post arthroscopy of the left knee times 3 with the most recent arthroscopy showing grade 4 chondromalacia of the lateral compartment and chondral defect in the medial compartment; (2) Chondromalacia of the patella of the right knee. Dr. Watson wrote that he agreed with Dr. Gottlob's finding that Claimant reached MMI on February 28, 2013. He further stated that his opinion was "unchanged on the right knee from my previous report." Dr. Watson assessed a 21% lower extremity rating for Claimant's left knee. On February 28, 2013 Dr. Watson also completed a Division IME Examiner's Summary Sheet on which he indicated Claimant reached MMI on February 28, 2013 with 21% lower extremity impairment.

13. On June 13, 2013 the Insurer filed a Final Admission of Liability (FAL). The FAL admitted for temporary total disability (TTD) benefits from December 1, 2008 through February 27, 2013. The FAL admitted Claimant reached MMI on February 28,

2013 and admitted for permanent partial disability (PPD) benefits, based on Dr. Watson's 21% lower extremity impairment rating, commencing February 28, 2013. The FAL also admitted for ongoing medical benefits "as related to the injury post MMI."

14. On June 18, 2013 Claimant filed an Application for Hearing listing the issues as medical benefits, TTD benefits commencing March 1, 2013, PPD benefits, and permanent total disability benefits. Claimant also endorsed "other issues" including whether she was at MMI, whether her right knee problems were related to the November 2007 injury and whether additional medical treatment was reasonable and necessary.

15. On October 23, 2013 ALJ Harr conducted a hearing concerning Claimant's application for hearing. ALJ Harr issued Findings of Fact, Conclusions of Law, And Order (FFCL) dated January 2, 2014. In the FFCL ALJ Harr listed the issues as follows: (1) Whether Dr. Watson determined that Claimant's right knee condition was a component of her admitted left knee injury; (2) Whether Claimant proved by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment of the left knee injury aggravated the chondromalacia patella of the right knee; (3) Whether claimant proved by a preponderance of the evidence that she was entitled to an award of medical benefits, temporary disability benefits and PPD benefits related to the right knee condition.

16. In the January 2, 2014 FFCL ALJ Harr determined as fact that it is more probably true than not that Dr. Watson, the DIME physician, found Claimant's symptoms of right knee chondromalacia patella are not related to the left knee injury. In support of this determination ALJ Harr initially found that Dr. Watsons' reports "were equivocal regarding causation of [the] chondromalacia patella disease process in claimant's right knee." Specifically, ALJ Harr noted that in the November 23, 2010 DIME report Dr. Watson recommended diagnostic tests and an evaluation to rule out symptoms of (right knee) internal derangement. However, in the May 28, 2013 follow-up DIME report Dr. Watson no longer recommended evaluation of the right knee, placed the Claimant at MMI, rated the injury based only on left knee impairment and "did not condition MMI upon treatment of the right knee." ALJ Harr inferred from this evidence that Dr. Watson determined that the "chondromalacia patella disease affecting claimant's right knee is not a component of her left knee injury."

17. ALJ Harr next found that Claimant failed to prove it is highly probable that Dr. Watson "was incorrect in his determination that claimant reached MMI, with no permanent impairment of the right knee." In support of this determination ALJ Harr credited the opinion of Dr. Hughes that Claimant's "right knee symptoms are the result of a concurrent and unrelated degenerative condition that was not in any way accelerated or aggravated by the work related left knee injury." Having determined Claimant failed to overcome by clear and convincing evidence Dr. Watson's DIME finding that Claimant was at MMI, ALJ Harr denied the claim for medical benefits, temporary disability benefits and PPD "related to [Claimant's] right knee condition."

18. Claimant appealed ALJ Harr's FFCL to the ICAO. Claimant argued in her brief that, among other things, ALJ Harr misinterpreted the follow-up DIME report and that Dr. Watson's "ultimate opinion" was that the right knee symptoms were caused by the admitted left knee injury. In support of this assertion Claimant explicitly cited that portion of the follow-up DIME report in which Dr. Watson stated that his opinion concerning the right knee was unchanged from the November 29, 2010 DIME report. As a corollary to this argument Claimant reasoned that ALJ Harr mistakenly found she was at MMI because she never received any treatment for the injury-related right knee symptoms. In a Final Order dated June18, 2014 the ICAO affirmed ALJ Harr's FFCL and concluded that ALJ plausibly interpreted the evidence to mean that Dr. Watson found Claimant to be at MMI and her right knee symptoms were not related to the left knee injury.

19. Claimant appealed the ICAO's June 18, 2014 Final Order to the Court of Appeals.

20. On December 11, 2014 the Court of Appeals issued its opinion in *Samuels v. Industrial Claim Appeals Office,* Colo. App. No. 14 CA1281 (not selected for publication). On appeal Claimant argued that ALJ Harr "erred as a matter of law in determining that the follow-up DIME report was ambiguous and that the DIME physician had changed his opinion and no longer considered claimant's right knee problems to be related to the admitted lift knee injury." The court rejected this argument finding that "when viewed in the context of the surrounding circumstances" the follow-up DIME report (May 28, 2013 report) was "ambiguous." Specifically the court concluded that the follow-up DIME could be interpreted as "determining an impairment rating solely as to claimant's left knee, while reiterating that claimant's right knee was still to be evaluated and treated." Alternatively, the court stated that the report could be interpreted as "suggesting that the DIME physician had decided to exclude claimant's right knee symptoms as a component" of the left knee injury. Thus, the court concluded that resolution of the ambiguity presented in the follow-up DIME presented a question of fact for the ALJ.

21. The Court of Appeals next considered whether the record supported ALJ Harr's finding that "the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." In so doing the court noted that a DIME physician's "opinions concerning MMI and permanent impairment inherently require him or her to assess as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the work injury." The court found "no evidence in the record to support [ALJ Harr's] finding that the DIME physician had ultimately excluded the right knee symptoms as a component of the left knee injury." The court explained that ALJ Harr's finding that in the follow-up DIME report Dr. Watson "changed" his opinion concerning the cause of the right knee symptoms was "directly at odds with [Dr. Watsons's] statement that his opinion was *un*changed from his previous report." (Emphasis in original). The court also concluded the record did not support ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations." The court explained that the mere fact the follow-up DIME report was susceptible to more than one interpretation did not alone support

ALJ Harr's finding that "one possible interpretation versus any other reflected the DIME physician's true opinion."

22. In light of these conclusions the court set aside the ICAO's Final Order affirming ALJ Harr's January 2, 2014 FFCL. The court remanded the case with directions to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and "conduct such additional proceedings as may thereafter be necessary and appropriate." The court specifically authorized the taking of "such additional evidence as is necessary to carry out the requirements" of its order.

23. Subsequently the ICAO entered an Order of Remand setting aside ALJ Harr's January 2, 2014 order and remanding the matter for "further proceedings consistent with the opinion of the Court of Appeals."

24. By the time the matter was remanded to the OAC ALJ Harr had retired. Consequently the matter was reassigned to ALJ Cannici to carry out the instructions of the Court of Appeals.

25. On March 30, 2015 ALJ Cannici entered Findings of Fact, Conclusions of Law, and Order on Remand (Order on Remand). ALJ Cannici did not conduct any additional evidentiary proceedings prior to issuing the Order on Remand. ALJ Cannici described the issue to be determined as whether Dr. Watsons' May 28, 2013 follow-up DIME report "reflects that Claimant's right knee injury was a component of her admitted left knee injury."

26. In the Order of Remand ALJ Cannici found that Dr. Watson's May 28, 2013 follow-up DIME report was "ambiguous." In support ALJ Cannici found the May 28 follow-up DIME report placed Claimant at MMI on February 28, 2013, awarded only a "left knee impairment rating" and did not contain any language conditioning MMI on provision of further treatment for the right knee. PALJ Cannici also found that in the May 28 follow-up DIME report Dr. Watson wrote that his opinion concerning Claimant's right knee "was unchanged from his November 23, 2010 report." ALJ Cannici then resolved the "ambiguity" in the follow-up DIME report. He found that because Dr. Watson stated in the follow-up DIME report that his opinion concerning Claimant's right knee was "unchanged" from the November 2010 report Dr. Watson "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." Thus, ALJ Cannici concluded that Dr. Watson's "ultimate DIME opinion was that Claimant's right knee injury was component of her admitted left knee injury." However, ALJ Cannici's Order on Remand did not purport to award or deny any specific benefits.

27. On April 17, 2015 Claimant filed a Request for Corrected Order or Petition to Review Order on Remand. This pleading requested ALJ Cannici to issue a "corrected, revised or amended" order to reflect that "any issue not addressed by the [Order on Remand] is reserved for determination at a later date." Apparently ALJ Cannici declined to issue a corrected order and the matter was transmitted to the ICAO for consideration of Claimant's petition to review.

28. On May 29, 2015 Dr. Gottlob referred Claimant to Sheba Shah, M.D., for further treatment. Dr. Shah is located in Arizona and the ALJ infers that Dr. Gottlob made the referral because Claimant had moved to Arizona.

29. On September 29, 2015 the ICAO entered an Order concerning the Claimant's petition to review the Order on Remand. Citing § 8-43-301(2), C.R.S., the ICAO ruled that it lacked jurisdiction to review the Order on Remand because it "did not award or deny specific benefits." However, the ICAO went on to state that the parties were disputing "the effect of the [Order on Remand] on future litigation." The ICAO stated that this dispute was "hypothetical and speculative" and any order that it might issue would be "merely advisory." Finally, the ICAO concluded that ALJ Harr's January 2, 2014 FFCL and ALJ Cannici's Order on Remand did not constitute "awards" of benefits that would serve to close the claim in the absence of a "reservation clause." The ICAO reasoned that ALJ Harr's order had been set aside and therefore was not an "award." The ICAO also explained that the Order on Remand was not an "award" because it did not grant or deny any benefits.

30. On June 23, 2015, while the petition to review the Order on Remand was still pending, Claimant filed an application for hearing listing the issues as medical benefits, TTD benefits commencing February 28, 2013 and "entitlement to benefits in light of" ALJ Cannici's finding that the right knee symptoms are causally related to the left knee injury. On July 23, 2015 Respondents filed a response to the application for hearing listing additional issues that included the following: (1) The claim was closed; (2) Issue preclusion; (3) Claim preclusion; (4) The ALJ did not reserve any issues for future determination in the prior findings of fact conclusions of law and order which closed the claim; (5) Claimant was at MMI pursuant to DIME.

31. Dr. Shah examined Claimant on August 11, 2015. Dr. Shah opined that Claimant "developed compensatory pain in the right knee as a consequence of the left knee issues." Dr. Shah noted Claimant had relocated to Arizona to care for her parents and had not had "active care" since leaving Colorado. Dr. Shah recommended Claimant undergo an x-ray and MRI of the right knee. She also referred Claimant for an orthopedic evaluation for "further recommendations on surgical versus non-surgical care."

32. At the hearing held on November 5, 2015 Claimant's counsel stated that Respondents had authorized an MRI of the right knee and this study had been carried out. However, according to Claimant's counsel Claimant has not had an orthopedic evaluation since the MRI study was done.

33. At the hearing held on November 5, 2015 Claimant's counsel stated that the issues include Claimant's entitlement to TTD benefits and medical benefits for treatment of the right knee. Claimant's counsel explained that from Claimant's perspective PALJ Cannici had determined the Claimant's right knee symptoms are causally related to the left knee injury but did not address the issue of what benefits were owed as a result of the right knee condition. Respondents' counsel stated that from Respondents' perspective Claimant's request for additional benefits cannot be

granted because the claim is "closed." Respondents' counsel argued that in the follow-up DIME Dr. Watson found Claimant had reached MMI. Respondents' counsel interpreted ALJ Cannici's Order on Remand as finding that although the right knee symptoms are related to the left knee injury the Dr. Watson found that no additional treatment is necessary. Therefore, Respondents' counsel reasoned that is at MMI.

34. It is Dr. Watson's opinion as the DIME physician that Claimant has not reached MMI for all conditions causally related to the industrial injury of November 1, 2007 industrial injury. PALJ Cannici has determined that Dr. Watson's true opinion, as evidenced by the follow-up DIME report, is that Claimant's right knee symptoms are causally related to the underlying industrial injury.

35. It is Dr. Watson's opinion as the DIME physician that Claimant needs additional medical treatment for the right knee injury. In the November 23, 2010 report Dr. Watson opined Claimant needed treatment of the right knee to include x-rays, an MRI and follow-up with an orthopedic surgeon. In the follow-up DIME report Dr. Watson indicated his opinions concerning the right knee were unchanged from the November 2010 DIME report. The ALJ infers from the follow-up DIME report that Dr. Watson is still of the opinion that Claimant needs treatment for his right knee.

36. The ALJ understands from comments of Claimant's counsel that some of the right knee diagnostic studies recommended by Dr. Watson have been performed. However, the evidence establishes that Claimant has not undergone an orthopedic evaluation of the right knee. As late as August 2015 Dr. Shah credibly opined that Claimant still needs orthopedic evaluation of the right knee.

37. Taken together, Dr. Watson's opinions that Claimant's right knee symptoms are causally related to the November 2007 left injury and that Claimant needs additional treatment for the right knee constitute a DIME finding that Claimant *has not* reached MMI for the industrial injury. Specifically, Dr. Watson has found Claimant needs additional evaluation of the injury-related right knee condition. Respondents did not argue at the hearing nor do they argue in their position statement that the undersigned ALJ should alter ALJ Cannici's finding that Dr. Watson's true opinion is that Claimant's right knee condition is causally related to the industrial injury. Neither do Respondents assert that they have presented clear and convincing evidence to overcome Dr. Watson's opinion that the right knee symptoms are causally related to the industrial left knee injury. Respondents do not argue they have presented clear and convincing evidence to overcome Dr. Watson's DIME opinion that Claimant needs further treatment for the right knee. Consequently, the Respondents have not sought to overcome Dr. Watson's true opinion that Claimant is not at MMI.

CONCLUSIONS OF LAW

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

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

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

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

MMI AND RESPONDENTS' "CLOSURE" ARGUMENTS

Claimant contends that she is entitled to an award of TTD benefits commencing February 28, 2013 and an award of medical benefits for treatment of her right knee. Claimant reasons that the Court of Appeals decision effectively determined that the May 28, 2013 DIME report was "ambiguous" regarding the question of whether the right knee is a component of the 2007 left knee injury. Claimant construes the court's order to mean ALJ Harr's finding that Claimant reached MMI because the DIME found the right knee symptoms were not causally-related to the left knee injury has been set aside and is of no force and effect. Claimant reasons that neither ALJ Harr's FFCL nor the opinion of the Court of Appeals has "closed" the issues of MMI and Claimant's right to additional benefits. Moreover Claimant construes ALJ Cannici's Order on Remand as favorably resolving the question of the cause of the right knee symptoms. However, Claimant contends that the Order on Remand failed to resolve the underlying questions of MMI and her consequent right to additional benefits.

In contrast, Respondents contend that Claimant is not entitled to any additional medical or TTD benefits because these issues have been "closed" and Dr. Watson's DIME finding that Claimant reached MMI is binding on the ALJ and the parties. Respondents argue that ALJ Harr found Claimant is at MMI and Claimant "did not appeal that determination." Consequently Respondents assert that the opinion of the Court of Appeals "in no way impacted the MMI determination from the DIME physician or Judge Harr's order pertaining to MMI." According to Respondents the only real effect of the court's order and ALJ Cannici's Order on Remand was to render Respondents liable for post-MMI medical treatment of the right knee. (Respondents' Position Statement at p. 13).

As a corollary Respondents contend that Claimant mistakenly argues the "finding of causation regarding Claimant's right knee is a determination that Claimant's work-related injuries are not at MMI." Respondents reason that there is a distinction between determining that a condition is related to a compensable injury and a determination the condition is at MMI. Respondents assert that ALJ Cannici's Order on Remand merely determined the causation issue with regard to the right knee but did not alter ALJ Harr's finding that Claimant reached MMI.

Considering the facts and procedural posture of this case the ALJ agrees with Claimant's arguments and rejects Respondents' arguments. The ALJ concludes that ALJ Harr's determination that Dr. Watson found the right knee symptoms are not causally related to the left knee injury was integral to ALJ Harr's finding that Dr. Watson placed Claimant at MMI on February 28, 2013. Further, because the Court of Appeals set aside ALJ Harr's finding that the right knee is unrelated to the left knee injury the court necessarily set aside ALJ Harr's finding that Claimant reached MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Hence, A DIME physician's finding concerning MMI is entitled to presumptive weight when the opinion is challenged by either party.

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005). A finding that a claimant needs additional medical treatment to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining a claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's "true opinion" concerning MMI. *MGM Supply Co. v. Industrial Claim Appeals Office, supra*; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. An ALJ may consider all statements made by a DIME physician for the purpose of determining the DIME physician's true opinion concerning MMI. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Respondents' assertions notwithstanding, Claimant has consistently appealed ALJ Harr's finding that the Dr. Watson placed her at MMI. As determined in Findings of Fact 15 through 17, the matter originally went to hearing before ALJ Harr concerning Claimant's request for additional medical and temporary disability benefits. ALJ Harr necessarily recognized that the question of MMI turned on a determination of Dr. Watson's true opinion concerning the cause of the right knee symptoms. Indeed, ALJ Harr wrote that the first issue for his determination was whether Dr. Watson found Claimant's right knee symptoms are a component of the admitted left knee injury. As determined in Finding of Fact 16 ALJ Harr found Dr. Watson's follow-up DIME report was "equivocal" concerning the cause of Claimant's right knee symptoms. ALJ Harr interpreted the follow-up DIME report to mean that Dr. Watson concluded Claimant's right knee symptoms are not related to the left knee injury, but instead to degenerative chondromalacia. That ALJ Harr based his order on the relationship between the cause of the right knee symptoms and MMI is evidenced by the fact that he placed the burden on Claimant to prove by clear and convincing evidence that her "altered gait or excessive weight bearing during treatment for her left knee aggravated the chondromalacia patella condition of her right knee."

As determined in Findings of Fact 20 through 22, the Court of Appeals ultimately agreed with ALJ Harr that the Dr. Watson's follow-up DIME report was "ambiguous" concerning whether or not Claimant's right knee symptoms are causally related to the industrial injury. However, the Court found that ALJ Harr's "choice to adopt one possible interpretation of the follow-up DIME report over other possible interpretations" was not supported by the record. Consequently the court set aside the ICAO's order affirming ALJ Harr's FFCL and remanded the matter to "reconsider and make record-supported findings regarding the meaning of the follow-up DIME report" and to conduct

"such additional proceedings as may thereafter be necessary" including the taking of additional evidence.

It is clear from the Court's opinion that it considers the cause of Claimant's right knee symptoms to be a matter for initial determination by the DIME physician as part of the statutorily mandated process for determining MMI. Indeed, the court explicitly noted that MMI determinations require the DIME physician to determine whether various components of the claimant's medical condition are causally related to the work injury and that the DIME physician's causation findings can be overcome only by clear and convincing evidence. Moreover the court emphasized that resolution of the MMI issue in this case depends on "record-supported findings" resolving the ambiguity in the May 28, 2013 follow-up DIME report. As the court explained the "ambiguity" in the follow-up DIME arises because the follow-up DIME can be read in two ways concerning whether or not the right knee symptoms are related to the left knee injury. Because the court recognized that the causation issue is at the very core of the DIME physician's ultimate opinion concerning MMI it necessarily set aside ALJ Harr's finding that the DIME physician placed the Claimant at MMI.

It follows that the Respondents' incorrectly argue that the issues of additional TTD and medical benefits have been been "closed" by Claimant's alleged failure to appeal ALJ Harr's determination that she reached MMI. To the contrary, Claimant contended all the way through the Court of Appeals that ALJ Harr incorrectly found the DIME physician placed her at MMI for all injury-related conditions. The basis of Claimant's argument was that the DIME physician's true opinion was that she was not at MMI because the right knee symptoms are causally related to the left knee injury and she needs additional treatment for the right knee. The court agreed with Claimant to the extent it concluded ALJ Harr's determination that Dr. Watson placed Claimant at MMI for all injury-related conditions is not supported by ALJ Harr's findings of fact

To the extent that Respondents argue that ALJ Harr's order is of any current legal significance on the issue of MMI, the ALJ disagrees. The Court of Appeals explicitly set aside the ICAO's order affirming ALJ Harr's order and remanded for new findings of fact on the issue of MMI and for additional proceedings, including the taking of additional evidence. The court's order constitutes a "general remand" that authorizes entirely new findings and conclusions with respect to MMI so long as they do not conflict with the court's order. *See Musgrave v. Industrial Claim Appeals Office*, 762 P.2d 686 (Colo. App. 1988).

EFFECT OF ALJ CANNICI'S ORDER ON REMAND

Respondents also contend that in the Order of Remand ALJ Cannici found Claimant reached MMI. Therefore, Respondents reason Claimant is not entitled to an award of additional benefits. As support for this argument Respondents cite that portion of the Order on Remand in which ALJ Cannici found that the follow-up DIME report contained no recommendation for treatment for the right knee, did not condition MMI on further treatment for the right knee, placed Claimant at MMI and provided a rating for the left knee only. The ALJ disagrees with this argument.

Respondents' argument misconstrues ALJ Cannici's findings. Consistent with the opinion of the Court of Appeals, ALJ Cannici found the follow-up DIME report was "ambiguous" with regard to the cause of the right knee symptoms. In support of this finding ALJ Cannici noted that the follow-up DIME report did not expressly recommend any treatment for the right knee, did not condition MMI on treatment of the right knee and appeared to place Claimant at MMI for the left knee. Conversely ALJ Cannici also found that in the follow-up DIME report Dr. Watson wrote that his opinions concerning the right knee were unchanged from the opinions expressed in the November 23, 2010 DIME report. Of course, in the November 2010 DIME report Dr. Watson had opined the right knee symptoms were causally-related to the left knee injury and that Claimant needed treatment for the right knee. Thus, ALJ Cannici recognized, as did the Court of Appeals, that the follow-up DIME report was ambiguous because it is subject to conflicting inferences concerning whether or not the DIME physician found the Claimant's right knee symptoms are related to the left knee injury. ALJ Cannici resolved this conflict and found as a matter of fact that "Dr. Watson's ultimate DIME opinion was that Claimant's right knee injury was a component of her admitted left knee injury."

Further, ALJ Cannici's Order on Remand does not contain any *explicit* finding purporting to determine whether or not Claimant has reached MMI. Rather ALJ Cannici limited the Order on Remand to resolving the "ambiguity" in the follow-up DIME report.

MMI DETERMINATION AND CLAIM FOR MEDICAL BENEFITS TO TREAT RIGHT KNEE

Claimant contends she is entitled to an award of additional medical benefits to treat the right knee condition. Claimant contends that her entitlement to additional medical treatment (other than maintenance treatment) is dependent on a finding that she is not at MMI. The Claimant contends that authority to determine she has not reached MMI is inherent in the remand order issued by the Court of Appeals. The ALJ agrees with Claimant's arguments.

As set forth above, Claimant has always maintained that she has not reached MMI because the right knee symptoms are causally related to the industrial injury and because she needs additional treatment for the right knee to cure and relieve the effects of the 2007 industrial injury. ALJ Harr denied the request for medical treatment of the right knee because he found that the DIME physician opined the right knee symptoms were not causally related to the injury and Claimant failed to overcome that determination by clear and convincing evidence. Claimant ultimately appealed to the Court of Appeals ALJ Harr's conclusion that the DIME physician "changed" his November 2010 opinion concerning the cause of the right knee symptoms. The court remanded the case for new "record-supported findings" to resolve the ambiguity in the follow-up DIME report and for such additional proceedings as might prove necessary and appropriate.

As determined above, a DIME physician's finding concerning whether or not a claimant has reached MMI is binding unless overcome by clear and convincing evidence. A DIME physician's finding concerning MMI necessarily includes

determinations of whether the claimant's medical conditions were caused by the industrial injury and whether additional treatment is likely to improve the claimant's condition.

Here, ALJ Cannici has already determined, pursuant to the instructions of the Court of Appeals, that it is Dr. Watson's DIME opinion that Claimant's right knee symptoms are causally related to the industrial injury. As determined in Finding of Fact 37, Respondents do not argue that the undersigned ALJ should interfere with ALJ Cannici's determination. Neither do Respondents argue that they have overcome Dr. Watson's causation finding by clear and convincing evidence. Similarly Respondents do not argue they presented clear and convincing evidence to overcome Dr. Watson's opinion that Claimant needs additional treatment for the right knee including an orthopedic evaluation.

As determined in Finding of Fact 37, Dr. Watson's findings that the right knee symptoms are causally related to the November 2007 industrial injury and that Claimant requires additional treatment are tantamount to a finding Claimant has not reached MMI. Because Respondents do not contend that they have presented clear and convincing evidence to overcome Dr. Watson's finding that Claimant has not reached MMI that finding is binding on the parties and the ALJ. *Cordova v. Industrial Claim Appeals Office, supra.*

In these circumstances Claimant is entitled to an award of additional medical benefits to treat the right knee symptoms including referral to and treatment by an orthopedic specialist.

CLAIM FOR ADDITOINAL TTD BENEFITS

Claimant contends she is entitled to an award of TTD benefits commencing February 28, 2013 until she is determined to have reached MMI. The ALJ agrees with this argument.

Where respondents file an admission of liability admitting for TTD benefits they are bound by that admission and must pay accordingly. Section 8-43-203(2)(d), C.R.S. The filing of an admission for TTD benefits amounts to an admission that Claimant has sustained the initial burden of proof to establish a right to TTD benefits. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000). Once admitted TTD benefits must ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S., including the occurrence of MMI. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

Here, Respondents filed an FAL admitting Claimant was entitled to TTD benefits commencing December 1, 2008. The FAL terminated the TTD benefits on February 28, 2013, the date Claimant reached MMI according to Respondents' interpretation of Dr. Watson's follow-up DIME report. However, as determined above, Dr. Watson's true opinion was that Claimant did not reach MMI on February 28, 2013, and Respondents

have not overcome that opinion by clear and convincing evidence. Consequently, Respondents have not shown any legal basis for terminating Claimant's TTD benefits on February 28, 2013. Consequently, Claimant is entitled to an award of TTD benefits commencing February 28, 2013 and continuing until terminated in accordance with law or order. TTD benefits shall be paid at the statutory rate based on the admitted average weekly wage.

ORDER

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

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

2. Insurer shall provide reasonable and necessary medical benefits for treatment of Claimant's right knee condition including the provision of an orthopedic evaluation.

3. Insurer shall pay temporary total disability benefit at the statutory rate and based on the admitted average weekly wage commencing February 28, 2013 and continuing until terminated in accordance with law or order.

4. Issues not determined by this order are reserved for future determination.

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

DATED: March 14, 2016

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she is permanently and totally disabled as a result of her October 28, 2010 industrial injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to the following specific medical maintenance treatment recommended by Dr. Bloch: neuropsychological testing; right hip MRI; right leg EMG testing; and massage therapy.

STIPULATIONS

Claimant is currently receiving Social Security Disability Benefits. Any benefits awarded to Claimant would be subject to an offset for receipt of those benefits. Any entitlement to future medical maintenance benefits not specifically included in Exhibit 9 is reserved for future determination.

FINDINGS OF FACT

1. Claimant is 34 years old and resides in the Denver metropolitan area, specifically in Aurora, Colorado. Claimant drives a motor vehicle and has a valid Colorado driver's license.

2. In 2010 Claimant was employed by Employer as a lead ramp service agent when she sustained a compensable industrial injury on October 28, 2010. A baggage cart pinned Claimant against a belt loader and she suffered injuries to her right hip and lower extremity.

3. Claimant has undergone three surgeries for her right hip since the date of injury, with the most recent surgery being a revision right hip arthroscopy in January of 2013.

4. Claimant has been treated by doctors at OccMed Colorado throughout the claim including Dr. Raschbacher, Dr. Smith, and Dr. Bloch. Currently Dr. Bloch is her primary authorized treating provider. Claimant's right hip surgeries were performed by Dr. White and Dr. Kelly.

5. On November 4, 2014 Claimant was evaluated by Cynthia Kelly, M.D. Claimant reported continued hip pain. Dr. Kelly noted full range of motion of Claimant's hip with mild complaints of pain at the end of internal rotation and adduction. Dr. Kelly

noted that Claimant's muscle tone in the right thigh compared to the left was symmetric and thigh circumference was symmetric. Dr. Kelly opined that Claimant had an excellent radiographic response to the surgery, and opined that Claimant was using her right lower extremity more than Claimant admitted to based on the muscle tone and circumference of the musculature of Claimant's thigh. Dr. Kelly opined that she was unsure whether Claimant would benefit from a total hip arthroplasty based on Claimant's x-rays and not really knowing what Claimant's pain generator was. *See* Exhibit B.

6. On May 4, 2015 Claimant underwent an independent medical evaluation performed by Douglas Scott, M.D. Claimant reported that her right hip popped and was painful. Claimant reported with any activity she had pain after 30 minutes. On physical examination, Dr. Scott noted that the range of motion in Claimant's right hip flexion was limited by pain to 100 degrees with left hip flexion to 145 degrees. He also noted that right hip abduction was decreased compared to the left with Claimant reporting acute sharp pain similar to a muscle spasm. Dr. Scott noted that right hip extension was decreased compared to the left and that right external rotation was less than the left with Claimant reporting it "hurt." Dr. Scott noted that as a result of her work injury from October 28, 2010 Claimant was diagnosed with a right hip labral tear, underwent a right hip arthroscopy on May 18, 2011, developed osteonecrosis of the right femoral head and had a subsequent surgery to address this, then had a revision right hip arthroscopy surgery to revise the first labral tear repair. Dr. Scott noted that Claimant did not fully respond to the surgical treatment and continued to complain of pain with limits in her right hip range of motion. He noted that in many respects Claimant had failed surgical treatment of her right hip condition. Dr. Scott opined that Claimant's condition was probably stable at this time and that it was appropriate to consider whether maximum medical improvement could be declared. He also noted there was a question as to whether or not a total hip arthroplasty was appropriate and should be performed. Dr. Scott recommended Claimant be referred for a 24-month Division IME to address maximum medical improvement (MMI), ratable permanent impairment, maintenance treatment, ongoing opiate pain medication prescriptions and/or weaning, reasonable and necessary massage treatment, and whether or not a total hip arthroplasty is reasonable, appropriate, and necessary. *See* Exhibit A.

7. On May 23, 2015 Dr. Scott issued a supplemental report. Dr. Scott opined that Claimant had reached MMI and that her hip condition was stable. *See* Exhibit A.

8. On June 18, 2015 Claimant was evaluated by Dr. Bloch. Dr. Bloch noted that Claimant's gait was without antalgia, Claimant sat comfortably in a chair, Claimant was able to rise from the chair without problems, and that Claimant walked about the exam room and clinic without any significant difficulty. Dr. Bloch placed Claimant at MMI and provided an impairment rating of 17% scheduled lower extremity. Dr. Bloch provided permanent work restrictions of no lifting more than 10 pounds, no standing or walking more than 2-4 hours per day, and no crawling, kneeling, squatting, or climbing. Dr. Bloch recommended maintenance treatment that included follow up with Claimant's hip surgeon and referral to a pain management specialist for medication management

and weaning. Dr. Bloch opined that no further medical maintenance should be considered necessary. *See* Exhibit C.

9. On July 7, 2015 Respondents filed a final admission of liability consistent with the 17% scheduled impairment rating of the lower extremity that also provided for maintenance medical treatment that was reasonable and necessary as outlined by Dr. Bloch's June 18, 2015 report. *See* Exhibit F.

10. Claimant timely objected to the final admission of liability.

11. On October 5, 2015 Claimant was evaluated by Kevin Page, PA-C. PA Page noted that Claimant was at MMI and was under maintenance currently. PA Page noted that Claimant should be under maintenance for pain management and should be transferred to long-term pain management outside their clinic.

12. On October 27, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported ongoing pain. Dr. Bloch opined that her case required more workup including an EMG of the right lower extremity, a repeat hip MRI for stability, a three-phase bone scan to make sure there is no CRPS, and a neuropsychological evaluation. Dr. Bloch noted he would be hard pressed to say that Claimant needed a hip replacement without any current imaging. Dr. Bloch opined that otherwise, Claimant was still at MMI and would have ongoing tests while at MMI but should the tests show anything positive it could change the MMI status. Dr. Bloch requested referrals for Claimant to have neuropsychological testing, an MRI of her right hip, an EMG of her right leg, and massage therapy.

13. On November 10, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported not doing well and having increased pain. Dr. Bloch opined that Claimant was still at MMI, that he would refer Claimant for pain management, and noted that they had asked for an EMG, a repeat MRI, and a neuropsychiatric evaluation as testing post MMI to make sure that none of the findings would challenge Claimant's MMI status. *See* Exhibit 11.

14. On November 11, 2015 John Macurak authored a vocational evaluation report. Mr. Macurak noted that he reviewed medical records, conducted a transferable skills review, and performed labor market research in the Denver area. Mr. Macurak noted he conducted his vocational research using work restrictions for Claimant that included: no lifting over 10 pounds; no bending greater than 10 times per hour; no pushing/pulling over 10 pounds of force; walking up to 1 hour per day; standing up to 1 hour per day; sitting 2-4 hours per day. Mr. Macurak opined that Claimant had attempted a return to regular employment activities but that to date had not had any job offers or interviews. Mr. Macurak noted that Claimant was not able to qualify for work assignments advertised in the local newspaper or help wanted ads. Mr. Macurak opined that due to Claimant's physical limitations and work restrictions, in addition to her pain impairment and limited educational background, Claimant was unlikely to secure any modified sedentary employment opportunities in the Denver or Colorado job

markets. Mr. Macurak opined that Claimant was not employable within her current physical abilities and level of skills. He relied on Claimant's physical limitations, inability to transfer her skills into entry level clerical assignments, lack of updated training and knowledge, and work restrictions in forming his opinion. *See* Exhibit 8.

15. Mr. Macurak's opinions are not credible or persuasive. Notably, Mr. Macurak relied on work restrictions that do not match the Claimant's current work restrictions. Mr. Macurak also relied on Claimant's reports that she had been actively seeking work and applying for jobs, which is not accurate. Claimant did not begin any search for employment until November of 2015. Further, Mr. Macurak discounted Claimant's prior ability to use computers, complete and pass training required annually by her employer, ability to multi-task while the lead ramp agent, and her prior vocational certificate as a nail technician that showed her ability to complete and pass training.

16. On November 16, 2015 surveillance video of Claimant was obtained by investigator Cory Shorts. Mr. Shorts also testified at hearing. On November 16, 2015 Claimant was observed for approximately 2.5 hours when she drove from her home to pick up a friend, drove to Costco, pumped gas, shopped at Costco, drove to a restaurant and waited in the car while her friend went in, and drove back to her home. At Costco, Claimant was observed walking around pushing a shopping cart with no apparent difficulty. Claimant was observed lifting a 50 pound bag of ice melt into the cart without assistance. *See* Exhibit E.

17. On November 17, 2015 surveillance video of Claimant was again obtained by Mr. Shorts. Claimant was observed outside her home shoveling, pounding, and breaking apart snow with a shovel. There was no apparent difficulty observed with Claimant walking on the snowy/icy surface. *See* Exhibit E.

18. On November 19, 2015 Katie Montoya authored a vocational assessment report. Ms. Montoya noted that she interviewed Claimant on November 6, 2015, completed research, and reviewed records. Claimant reported to Ms. Montoya that she was in constant pain, could not do anything, and was on pain pills. Claimant reported if she tried to do anything, she could not recover and that she limps and hurts all the time. Claimant reported not being able to maintain more than 20 minutes of activity. Claimant reported her prior work history included: working for United Airlines in cabin services, cleaning and dumping lavatories; working at the front desk of a Marriott hotel; working in a watch shop changing batteries; and working for Employer as lead ramp agent. Claimant reported with her work for Employer she ran a crew of two to four others and handled two to three airline gates and was responsible for bringing in planes, hooking up and connecting planes, and multi-tasking a variety of duties. Claimant reported to Ms. Montoya that one week prior, she had gone to Work Force to attempt to apply for jobs and reported that she planned to do testing with the Division of Vocational Rehabilitation. Claimant reported she could only lift a bottle of water or a notebook. *See* Exhibit D.

19. Ms. Montoya noted Claimant's permanent work restrictions provided by Dr. Bloch on June 18, 2015 when Claimant was placed at MMI included lifting up to 10 pounds with standing and walking 2-4 hours per day and no kneeling, squatting, or crawling. Ms. Montoya noted that although Claimant reported limitations in academic functioning and ADHD, Claimant was able to multitask and function in her work for Employer. Ms. Montoya identified a production position where an individual deals with products that are 6 pounds or less and where an individual could sit or stand as needed that would meet Claimant's restrictions. Ms. Montoya also identified a security attendant position, a cashier position, and a front desk position that would be within Claimant's limitations and available to Claimant. *See* Exhibit D.

20. On November 20, 2015 Ms. Montoya issued an addendum to her report after she had the opportunity to review surveillance video of Claimant. Ms. Montoya opined that Claimant was much more active than reported at the interview. Ms. Montoya noted that Claimant reported significant limitations and inability to do much of anything when the video showed fluid movements and showed Claimant lifting a bag that seemed likely to weigh quite a bit more than 10 pounds or more than a notebook. *See* Exhibit D.

21. Ms. Montoya testified at hearing consistent with her written reports. Ms. Montoya opined that Claimant has the capacity to return to work. Ms. Montoya noted that Claimant's nail technician certificate was relevant because it showed that Claimant was able to complete training to obtain the certificate. Ms. Montoya noted in addition to her nail technician certificate, Claimant had skills that she obtained from prior employment that were transferrable including multitasking, timeliness, and safety and awareness. Ms. Montoya noted that if Claimant's restrictions were lessened to what was recommended by Dr. Scott after Dr. Scott reviewed the surveillance video, this would open up even more vocational options. Ms. Montoya opined that Claimant is able to do the full range of sedentary work and that Claimant would be a semi-skilled worker classification. Ms. Montoya noted her difference of opinion with Mr. Macurak and believed that Mr. Macurak used incorrect restrictions that were given to Claimant before Claimant reached MMI and noted that Claimant had no restriction on sitting.

22. Ms. Montoya's opinions are found credible and persuasive. Ms. Montoya used the applicable work restrictions in place, accounted for the discrepancies in Claimant's reported ability and her demonstrated ability based on past work experience, and was able to find several jobs in the Denver market that Claimant is able to perform. Ms. Montoya is more credible and persuasive than Mr. Macurak.

23. Dr. Scott also testified at hearing consistent with his reports. Dr. Scott opined that Claimant was at MMI as of May 23, 2015. Dr. Scott reviewed additional records including the surveillance video prior to the hearing. Dr. Scott opined that Claimant's restrictions should be lessened to allow for lifting up to 25 pounds from waist to chest. Dr. Scott noted that Dr. Kelly opined that Claimant's surgery was good and that Claimant was using her hip more than Claimant admitted. Dr. Scott recommended for maintenance care that Claimant get off opioids and be referred to a pain

management specialist, that Claimant have a psych evaluation, and that Claimant be referred to her hip surgeon for follow up treatment and/or MRI if the surgeon felt it was appropriate. Dr. Scott opined that massage therapy should not be included in maintenance treatment as it was passive treatment and Claimant was in need of active treatment for her chronic pain. Dr. Scott opined that the EMG study was not reasonable and necessary as there were no indications that Claimant had CRPS or sympathetically mediated pain. Dr. Scott also opined that a neuropsychological evaluation was not appropriate since that type of evaluation was done to assess cognitive function which was not at issue in Claimant's case and he opined instead that a referral for psychological evaluation was appropriate for Claimant's case. He also opined that an MRI was not necessary unless Claimant's treating surgeon felt it was necessary and opined that Claimant should be referred back to her surgeon for that determination.

24. Claimant's testimony, overall, is not found credible or persuasive. Claimant reported to Ms. Montoya not being able to lift more than a bottle of water or notebook when interviewed on November 6, 2015 yet Claimant is shown in surveillance video lifting a 50 pound bag of ice melt into a shopping cart a few weeks after her interview with Ms. Montoya. Additionally, Claimant's range of motion in her right hip was noted to be inconsistent between providers based on Claimant's report of pain and limitations. Claimant testified she has only one to two good days per month, yet back to back days of surveillance show her performing much more activity than she states she is capable of. Claimant also reported to Mr. Macurak that she had been seeking employment, yet Claimant did not make any efforts to obtain employment until the week prior to her evaluation with Ms. Montoya in November of 2015. Despite Claimant's reports that she is not good with computers, Claimant regularly uses social media which involves typing, uploading, and posting photographs. Claimant also completed and passed required training with Employer that was performed via computer. Claimant also reported that after doing much of anything in the way of activity that it takes her two days to recover. Despite this, Claimant was very active on November 16, 2015 while out and about running errands and shopping for 2.5 hours and the next day Claimant was not recovering, but was observed outside shoveling snow. Claimant reported not driving much and having to push on her right leg while driving to help put pressure on the gas and brake pedals. Despite this, Claimant admitted to driving to California for a recent trip. Claimant's testimony and reports are inconsistent and not credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Permanent Total Disability

To prove her claim that she is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. *See §* 8-40-201(16.5)(a) and 8-43-201, C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the 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 claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether the 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).

Claimant has failed to meet her burden to establish that she is permanently and totally disabled. Claimant has failed to show that she is unable to earn any wages in the same or other employment. The vocational assessment and opinions offered by Ms. Montoya are credible and persuasive and show that there are a variety of employment opportunities available to Claimant in the Denver metropolitan area. Claimant's mental ability, physical ability including her current work restrictions, and her education history show that she is capable of gainful employment. Here, the opinions of Ms. Montoya are persuasive that employment is reasonably available to Claimant given her work restrictions and her abilities. The opinions of Mr. Macurak have been considered and rejected. Mr. Macurak relied on incorrect work restrictions and failed to account for the variety of past work history that show skills Claimant is capable of. Further, Claimant's own testimony regarding her ability to work and her physical limitations is not found credible or persuasive.

Medical Treatment

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

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Here, Claimant has requested specific treatment that includes: right hip MRI; neuropsychological evaluation; right leg EMG; and massage therapy. Claimant has failed to establish by a preponderance of the evidence that these treatments are reasonable and necessary to maintain her condition or relieve her ongoing symptoms. The opinions of Dr. Scott are found credible and persuasive in this regard. Although Claimant may have established that a referral to her hip surgeon might be appropriate to determine whether or not she needs a repeat right hip MRI, she has not yet established that a right hip MRI is

reasonable or necessary. Similarly, although psychological testing may have been shown to be appropriate, Claimant failed to show that a neuropsychological evaluation is reasonable and necessary. The opinion of Dr. Scott that a neuropsychological evaluation is done to assess cognitive function which is not at issue in Claimant's case and that psychological testing would be more appropriate is found persuasive. Claimant also failed to establish that an EMG study would be reasonable and necessary and the opinion of Dr. Scott is credible and persuasive that the EMG study would not be reasonable and necessary as there were no indications of sympathetically mediated pain or CRPS. Dr. Scott is also persuasive that massage therapy is not reasonable and necessary as Claimant is in need of active and not passive treatment.

The requests for these treatments from Dr. Bloch do not establish or show why he believes these treatments to be both reasonable and necessary or why he believes these treatments would relieve the effects of the injury or prevent further deterioration of Claimant's condition. Claimant was unable to meet her burden to show that these specific treatments, at this time, are reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show that she is permanently and totally disabled. Her claim for permanent total disability benefits is denied and dismissed.

2. Claimant has failed to meet her burden to show an entitlement to the following specific medical maintenance treatment: neuropsychological evaluation; right hip MRI; right leg EMG testing; and massage therapy.

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

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

DATED: March 24, 2016 /s/ Michelle E. Jones

_____

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

ISSUES

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

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

PROCEDURAL STATUS

The ALJ issued Findings of Fact, Conclusions of Law and Order on February 12, 2016 (mailed on February 17, 2106). Respondents filed a Motion for Corrected Order on or about March 1, 2016. Claimant filed an Objection to the Motion for Corrected Order on March 8, 2016, opposing the Motion. The undersigned ALJ issued a Procedural Order, which granted the Motion for Corrected Order (in part) and denied the motion (in part).

Respondents have conceded they are obligated to provide maintenance medical benefits. As found, *infra,* Claimant has adduced sufficient evidence to demonstrate his condition has worsened and he requires treatment. However, there is insufficient evidence in the record to establish the nature and extent of this treatment. Accordingly, the ALJ has found Respondents are required to return Claimant to his ATP for this determination.

FINDINGS OF FACT

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

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

3. Claimant was initially seen at the Windsor Family Clinic by D. McGuire, PA-C on December 23, 2010, two days after the collision. At that time, Claimant

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

complained of neck pain and stiffness, as well as describing numbness in the 3rd, 4th and 5th fingers in his left hand. The finger numbness had resolved. Claimant was diagnosed with a cervical strain, provided with pain medication and told to use alternating ice and heat on his neck.

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

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

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

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

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

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

10. On April 20, 2012, Claimant was examined by William Basow, M.D. to whom he was referred by his attorney. Claimant's course of treatment was reviewed, including nine (9) PT sessions which he reported did not relieve his symptoms. Claimant was having intermittent symptoms in the forearm and fingers, as well as pain

in the left neck and trapezius. Claimant had normal strength and sensation upon examination, with no neurological abnormalities noted. Dr. Basow's assessment was chronic neck pain without radicular symptoms. Claimant was to begin PT and chiropractic treatments. Claimant had no work restrictions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. Claimant returned to Dr. Donner on May 21, 2014, who reviewed the results of his MRI. Dr. Donner noted he had very limited neck movement. Claimant was noted to be smoking cigarettes. Dr. Donner's assessment was progressive severe neck pain with radiculopathy at C5-6 and C6-7, where there were degenerative

changes, stenosis and herniated discs. Dr. Donner recommended and noted Claimant wanted to proceed with a two-level anterior cervical discetomy, nerve root decompression and placement of artificial discs.

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

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

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

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

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

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

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

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

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

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

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

38. On examination, Dr. Reiss noted Claimant was not in any apparent distress. He had 0 degrees of neck extension, with full flexion, right rotation 70% of

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

normal and left rotation 50% of normal. Dr. Reiss noted Claimant's symptoms were primarily axial neck pain and opined that Claimant's symptoms were a continuation from his original injury. Dr. Reiss did not recommend a 2 level disc replacement procedure for Claimant's pain complaints. The ALJ credited the opinions of Dr. Reiss, particularly with regard to his conclusion that this procedure was not likely to help Claimant's symptoms.

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

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

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

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

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

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

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

46. The ALJ finds Claimant's need for treatment is result of his industrial injury as opposed to degenerative processes in his cervical spine.

47. The ALJ notes that although Claimant has been evaluated on several occasions since he reached MMI, he has not received active treatment since that time. The ALJ finds Claimant should be reevaluated regarding his need for additional treatment. Claimant is entitled to medical benefits, at a minimum, to maintain MMI.

48. The ALJ finds Dr. Donner made his surgical recommendation after Claimant was determined to be at MMI by the ATP, Dr. O'Connell and the DIME examiner, Dr. Stieg.

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

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

CONCLUSIONS OF LAW

Generally

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

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

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

Reopening

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

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

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

As found, Claimant's degenerative condition in his cervical spine was asymptomatic before 12/21/10 and then developed symptoms as a direct result of the MVA. Claimant adduced evidence that his level of functioning was worse and he had increased pain, as shown by the Oswestry cervical spine index survey he completed in 2014. The ALJ drew the reasonable inference that Claimant's increased pain in his cervical spine required additional treatment. Accordingly, the ALJ was persuaded that Claimant's condition has worsened and his claim should be reopened.

In the initial Findings of Fact, Conclusions of Law and Order, the ALJ noted there was no evidence presented as to when the last medical benefit was "due and payable", under 8-43-303(2)(b), C.R.S. That is still the case. In addition, Respondents 12/5/13 FAL admitted for *Grover* medical benefits, but Claimant has not been in active treatment since approximately March, 2013. Thus, it was unclear whether a Petition to Reopen was required in the case at bench[4]. These Corrected Findings of Fact, Conclusions of Law and Order have been issued to confirm Claimant's entitlement to medical benefits.

At this time, Respondents are obligated by the FAL to provide *Grover* medical benefits to maintain MMI. Respondents are also obligated to provide these benefits by this Order. As found, Claimant requires medical treatment, at a minimum, to maintain MMI. At least one physician (Dr. Reiss) made specific treatment recommendations and characterized this treatment as maintenance treatment. In addition, since Claimant has not been in active treatment since March, 2013 and has not completed several modalities of conservative treatment, there needs to be further evaluations by his authorized treating physicians and to what type of treatment he requires. There was no

[4] The initial Findings of Fact Conclusions of Law and Order noted at p. 13: "Assuming, *arguendo* that it has been longer than two (2) years since Respondents provided the last medical benefit, Claimant has made the requisite showing of a worsening of condition."

evidence before the ALJ on this subject and the ALJ declines to make any findings as to particular treatment Claimant may require. Therefore, the ALJ is limited his ruling to the finding that Claimant is entitled to continuing medical benefits to maintain MMI. Under this ruling, Claimant is not precluded from claiming he is not at MMI and seeking additional medical benefits to cure and relieve the effects of his industrial injury. However, those issues were not before the Court.

Based upon the totality of the evidence, the ALJ has determined Claimant requires additional treatment to maintain MMI. Respondents are required to provide those medical benefits.

Medical Benefits

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

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

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

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

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

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

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

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

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

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

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

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

However, an ALJ is not required to award or deny medical benefits based on the Guidelines.[5] In fact, there is generally a lack of authority as to whether the Treatment Guidelines require an ALJ to award of deny benefits in certain situations. The decision to award or deny medical benefits is addressed to the sound discretion of the ALJ. *Madrid v.Trtnet Group, Inc.*, W.C.4-851-315 (April 1, 2014).

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

> "Involves the insertion of a prosthetic device into the cervical intervertebral space with the goal of maintaining physiologic motion at the treated cervical segment. The use of artificial discs in motion-preserving technology is based on the surgeons preference and training" …[citing two reviews]…"There is strong evidence that in patients with single level radiculopathy or myelopathy cervical

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

artificial disc produces 2 year success rates at least equal to those of anterior discetomy and fusion (ACDF) with allograft interbody fusion and an anterior plate…"

"**a. Description**

…

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

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

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

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

2) **All of the following:**

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

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

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

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

"**d. Contraindications**:

…

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

…

- Multiple-level degenerative disc disease.

- Spondylolisthesis greater than 3mm."

In this case, at least one physician (Dr. Primack) was of the opinion that Claimant's symptoms were originally facetogenic in nature. Dr. Donner opined that Claimant's pain was discogenic, related to the facets and nerve compression. As found, the source of Claimant's pain should be clarified.

Also, Claimant had pain on extension and lateral bending. There is also a question whether Claimant has neurological compromise and symptoms that warrant surgery, as noted by Dr. Feldman. Further exploration of these issues is warranted before an invasive surgical procedure is performed. Moreover, Claimant has degenerative changes in his cervical spine, including spinal stenosis on multiple levels in the cervical spine, as shown on MRI. In addition, the 2014 MRI revealed at least one disc herniation which was greater than 3mm. Surgery is contraindicated under these circumstances.

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

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

Third and finally, the ALJ found that there was a question whether the proposed medical treatment would address the symptoms from the spondylitic changes in Claimant's cervical spine and reduce his symptoms. Dr. Castor questioned whether the proposed surgery would ameliorate Claimant's symptoms. Dr. Reiss' opinion was also persuasive on this subject. Dr. Donner's testimony did not refute this or establish that the benefits were outweighed by some of the contraindications of surgery. The ALJ was not persuaded that is reasonable and necessary at this time. For these reasons, Claimant failed to prove that the surgery proposed by Dr. Donner was reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is GRANTED.

2. Pursuant to Respondents' 12/5/13 FAL and this Order, Respondents shall provide medical benefits to Claimant, who may return to Dr. O'Connell or other ATP for treatment.

3. Claimant's request for authorization of a two-level cervical discectomy, nerve root decompression and disc replacement 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 18, 2016

Digital signature

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

ISSUES

1. Whether the Claimant is entitled to recover the aggregate amount of death benefits under both Mississippi's and Colorado's workers' compensation laws.

2. Whether Respondents correctly calculated the Social Security offset pursuant to the statutory formula.

3. Whether Respondents correctly calculated the interest payment to Dependent Claimants.

4. Whether Respondents correctly paid Dependent Claimants.

UNDISPUTED FINDINGS OF FACT

The ALJ finds the following facts are undisputed:

1. Decedent perished in a work accident in Pueblo, Colorado on October 27, 2010. At that time, the deceased employee, his wife and their son were residents of Mississippi.

2. A claim for workers' compensation benefits was initially brought in the State of Mississippi and the Respondents admitted the claim under the Mississippi workers' compensation act and began paying benefits commencing on October 28, 2010. The Respondents' admitted for a compensation rate in that claim of $337.58.

3. The Dependent Claimants later made a claim for death benefits under the Colorado workers' compensation system. On April 3, 2013, ALJ Friend held that Colorado had jurisdiction over the claim but he did not determine the Decedent's average weekly wage under Colorado law, the equitable division of death benefits between Dependent Claimants, or offsets for the receipt of Social Security benefits or for workers' compensation benefits paid under the Mississippi claim.

4. On September 3, 2013, the Respondents filed a Fatal Case – General Admission in Colorado, admitting for the maximum temporary total disability rate of $1,216.00 for a TTD rate of $810.67.

5. On September 20, 2013, Respondents filed a Fatal Case – Amended General Admission, admitting for death benefits under the Colorado Workers' Compensation Act totaling $66,822.00 from October 28, 2010 to August 28, 2013 and death benefits from August 29, 2013 ongoing at weekly rate of $620.29.

6. The Amended General Admission asserted the Respondents were entitled to take a Social Security offset in the amount of $190.38 per week since the date of the incident forward based on each Dependent Claimant receiving Social Security benefits totaling $825.00 per person per month.

7. The Amended General Admission also takes into account a 50% offset for the receipt of Mississippi workers' compensation benefits in the amount of $168.79 per week.

8. Per the Amended General Admission, at the Respondents' admitted rate, the Dependent Claimants were entitled to receive $451.50 per week in Colorado death benefits. Multiplying the $451.50 weekly rate by the 148 week period from October 28, 2010 through August 28, 2013 yields $66,822.00.

9. Between the day after the decedent's death and the Respondents' filing of the General Admission of Liability in Colorado, the Respondents paid the Dependent Claimants $49,961.84 under the Mississippi workers' compensation system. Under the Colorado workers' compensation system, the Dependent Claimants would have received $66,822.00 for that same time period.

10. The difference between what the Dependent Claimants would have received and what they were actually paid is $16,860.16.

11. The Respondents' paid the Dependent Claimants 8% interest only on the $16,860.16 difference between what the Dependent Claimants were entitled under the Colorado workers' compensation system and the $49,961.84 that the Dependent Claimants received under the Mississippi workers' compensation system.

CONCLUSIONS OF LAW

1. Neither Mississippi law nor Colorado law allow a Claimant to collect duplicate workers' compensation benefits.

2. Mississippi law allows for a 100% offset of benefits paid to a Claimant when that Claimant receives workers' compensation benefits under another state's laws. *See, Southland Supply Co., Inc. v. Patrick,* 397 So.2d 77 (Miss. 1981)(Claimant, who received workers' compensation benefits under Mississippi law, was not precluded from seeking workers' compensation benefits under Louisiana law, and the trial court correctly awarded such benefits to full credit for any amounts previously paid under Mississippi's Workers' Compensation Act).

3. Pursuant to §8-42-114, C.R.S., death benefits paid to dependents of a deceased worker under the Colorado Workers' Compensation Act, are subject to the following:

> In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a

> maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 2989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

4. The calculation related to the offset for the Social Security benefits received by the Dependent Claimants shall use a 52 weeks per year and not 52.14 weeks as urged by the Dependent Claimants. Pursuant to §8-42-102(2)(a), C.R.S., when computing wages, the computation shall use 52 weeks and so 52 weeks is appropriate for computing offsets as well. The Division of Workers' Compensation likewise uses a 52 week period for calculating offsets in its published Adjuster's guide.

5. Accordingly, the Respondents correctly calculated the Social Security benefit offset in the amount of $190.38 per week.

6. The Respondents' admitted weekly compensation rate in the Mississipi claim was $337.58. A 50% offset for the receipt of Mississippi workers' compensation benefits amounts to $168.79 per week.

7. In accordance with §8-42-114, C.R.S., the Claimant's weekly temporary total disability (TTD) rate of $810.67 is reduced by 50% of the Claimant's Social Security survivors' benefit, or $190.38, and 50% of the weekly Mississippi workers' compensation payments, or $168.79.

($810.67 - $190.38 - $168.79 = $451.50)

Then, the $451.50 weekly past due death benefit figure is multiplied by 148 weeks, which is the length of time that the weekly workers' compensation death benefits were paid in Mississippi, resulting in a Colorado past due death benefit of $66,822.00.

($451.50 x 148 = $66,822.00)

8. Pursuant to §8-43-410(2), C.R.S, interest on an award of workers' compensation benefits shall be calculated as provided:

> Every employer or insurance carrier of an employer shall pay interest at the rate of eight percent per annum upon all sums not paid upon the date fixed by the award of the director or administrative law judge for the payment thereof or the date the employer or insurance carrier became aware of an injury, whichever date is later. Upon application and satisfactory showing to the director or administrative law judge of the valid reasons therefore, said director or administrative law judge, upon such

terms or conditions as the director or administrative law judge may determine, may relieve such employer or insurer from the payment of interest after the date of the order therefore; and proof that payment of the amount fixed has been offered or tendered to the person designated by the award shall be such sufficient valid reason.

9. On remand, and pursuant to instruction from the Colorado Court of Appeals, the Claimant's are entitled to receive interest of eight percent (8%) on the past due benefit amount of $66,822.00.

ORDER

It is therefore ordered that, as a matter of law, based upon the undisputed facts:

1. The Dependent Claimants are not entitled to recover $116,783.84, the full aggregate death benefits under both Mississippi's and Colorado's workers' compensation laws.

2. The Respondents correctly calculated the Social Security offset in the amount of $190.38. The Respondents also correctly calculated the offset for paid Mississippi workers' compensation benefits of $168.79.

3. The Respondents did not correctly calculate the amount of interest due to the Dependant Claimants as it was calculated on a past due benefit Colorado death benefit amount of $16,860.16.

4. The Respondents are to pay 8% interest pursuant to §8-43-410(2), C.R.S, on the Colorado past due benefit amount of $66,822.00.

5. The Respondents are entitled to a credit for amounts already paid for interest in this case, if any.

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 8, 2016

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

ISSUES

1. This matter is before the ALJ upon remand from a panel of the Industrial Claim Appeals Office, dated January 21, 2016, wherein the panel determined that the claim is compensable. The only issue to be determined upon remand is whether the claimant has established by a preponderance of the evidence that her medical treatment was reasonable, necessary and related to her work injury.

FINDINGS OF FACT

1. The claimant works as a warehouse worker for the respondent-employer and did so at all relevant times.

2. This claim has been found to be compensable by a panel of the Industrial Claim Appeals Office.

3. The claimant reported a work related injury to her right shoulder, right wrist, elbow and shin that occurred on December 11, 2012 when she slipped and fell in the parking lot adjacent to the building in which she worked at approximately 4:05 p.m. on December 11, 2012.

4. The following day the claimant reported the incident to her supervisor.

5. After filling out the appropriate workers' compensation forms the claimant was sent to Emergicare, the respondent's designated provider for workers' compensation injuries, where she first saw Dr. Patty Beecroft.

6. The claimant complained of back pain, neck pain, wrist pain, and shoulder pain. The claimant underwent x-rays of her shoulder and wrist; and was given work related diagnoses of right brachial plexus strain; right wrist contusion; and right sacroiliac strain.

7. The claimant was prescribed Ibuprofen 800 mg; methocarbomal 750 mg; and biofreeze cream.

8. The claimant had a follow-up appointment on December 22, 2012 at Emergicare with Dr. Douglas Bradley.

9. After initially providing medical care benefits to the claimant, on March 5, 2013, the respondent filed a Notice of Contest.

10. The claimant had been treating with Dr. Bradley from December 22, 2012 up to the date the Notice of Contest was filed.

11. Dr. Bradley last saw the claimant on February 22, 2013.

12. The claimant saw Dr. Simpson at Emergicare on March 5, 2013 at which time the claimant had been diagnosed with a partial thickness tear of the rotator cuff and biceps tendonitis and Dr. Simpson was recommending arthroscopic surgery.

13. The ALJ finds that the claimant has established that it is more likely than not that all of the treatment the claimant received at Emergicare and any referrals therefrom, was reasonable, necessary, and related to her industrial injury diagnoses.

CONCLUSIONS OF LAW

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

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

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

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a casual relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

5. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

6. The ALJ concludes that the medical records substantially document that the treatment received by the claimant at Emergicare and the referrals, was reasonable, necessary, and related to the claimant's compensable industrial injury.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that all of the treatment the claimant received at Emergicare and any referrals therefrom, was reasonable, necessary, and related to her industrial injury diagnoses.

ORDER

It is therefore ordered that:

The respondent shall pay for all of the reasonable, necessary, and related medical treatment received by the claimant as found above, as well as any additional treatment that is reasonable, necessary, and related designed to cure or relieve the claimant from the effects of her industrial injury.

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

DATE: March 25, 2016

/s/ original signed by:

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a change of condition that is causally-related to his industrial injury so as to warrant reopening his claim for additional medical benefits?

- Did Claimant prove by a preponderance of the evidence that a total knee arthroplasty constitutes reasonable and necessary medical treatment to cure and relieve the effects of his industrial injury?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 though 5 were admitted into evidence. Respondents' Exhibits A through N were admitted into evidence.

CLAIMANT'S TESTIMONY

2. Claimant testified that he has worked for the Employer for 35 years. He works as a "bus technician" and oversees the maintenance and repair of shuttles. The job is physically demanding and requires that he work on his knees and his back.

3. Claimant testified that on November 27, 2012 he injured his right knee when he stepped off a shuttle into a pothole. His knee "popped" and he felt immediate, excruciating pain. Claimant stated that Respondents admitted liability for the injury and he underwent a right medial meniscectomy surgery performed by Phillip Stull, M.D. He was then placed at maximum medical improvement (MMI) on May 29, 2013 and returned to work at full duty. Claimant testified that when he was placed at MMI his knee was still sore and he had to ice it every night.

4. Claimant testified that after he was placed at MMI on May 29, 2013 his knee "progressively started getting worse." He explained that between the date of MMI and October 21, 2013, when he went to see one of his treating physicians, Greg Smith, D.O., his right knee symptoms got worse "with the hurting, the giving out, popping, grinding."

5. Claimant testified that Dr. Smith referred him to Dr. Stull. Claimant recalled that he saw Dr. Stull on November 20, 2013 and that Dr. Stull performed a cortisone injection into his right knee. According to Claimant the injection temporarily relieved his symptoms. However, on January 8, 2014 Claimant returned to Dr. Stull for a second injection. After the January 8 injection Claimant recalled that his symptoms

were relieved for about a month and a half. He then returned to Dr. Stull who performed a third injection April 10, 2014. Claimant testified the third injection relieved his symptoms for about two weeks. He then returned to Dr. Stull on October 23, 2014 because his "pain and that was back again." Claimant testified that on October 23 Dr. Stull performed a fourth injection and discussed performing a total knee arthroplasty (TKA).

6. Claimant admitted that in 1996 he sustained a prior work-related right knee injury and underwent surgery for this injury. However, Claimant explained that after completing treatment for the 1996 injury he was released to return to work at full duty and did not receive any medical treatment for the knee until the November 27, 2012 injury. Claimant also testified that prior to November 27, 2012 he had not been diagnosed with arthritis in his knee, had not experienced any popping or grinding in his knee, had not received any cortisone injections and had not received a recommendation for a TKA.

7. At the hearing Claimant testified that he now experiences constant knee pain. He also testified that the knee locks up, gives out and is unstable when he goes up stairs. Claimant stated that he wishes to undergo the TKA recommended by Dr. Stull so that he can start enjoying his life again.

MEDICAL EVIDENCE

8. On November 27, 2012 Claimant was examined at Concentra by PA Glenn D. Peterson. Claimant complained of medial right knee pain and the inability to squat. Claimant related that he was a "bus mechanic and stepped in [a] hole in pavement walking between busses and strained" his right knee medially. Claimant also reported a history of "2 knee surgeries age 15, and 46." PA Petersen diagnosed a right knee strain. He imposed restrictions of no kneeling and/or squatting and required Claimant to wear a knee brace.

9. On November 30, 2012 PA Petersen assessed a sprain/strain of knee/leg at unspecified site and a right knee MCL sprain. PA Petersen referred Claimant for physical therapy (PT) and prescribed Vicodin.

10. On December 14, 2012 Steven Young, M.D., examined Claimant at Concentra. Claimant reported his symptoms were no better despite undergoing PT. Claimant mentioned a history of a "right MCL/meniscal surgical repair 15 years ago." Dr. Young assessed a sprain of the medial collateral ligament of the knee and prescribed an MRI. Dr. Young imposed restrictions of no climbing ladders or stairs, prohibited Claimant from squatting or kneeling, continued use of a brace and continued PT.

11. On December 21, 2012 Jonathan Bloch, D.O., examined Claimant at Concentra. Claimant reported he was having good and bad days with a slight improvement in his condition. Dr. Bloch noted Claimant was working "regular duty."

12. On December 28, 2012 Claimant underwent an MR arthrogram of the right knee. The radiologist's impressions included the following; (1) Complex tear of the posterior horn and posterior body of the medial meniscus without displaced meniscal fragment; (2) Moderate chondral thinning in the patellofemoral articulation and mild chondral thinning in the medial femorotibial articulation; (3) No cruciate or collateral ligament injury.

13. On January 4, 2013 Dr. Bloch again examined Claimant. Dr. Bloch reviewed the MRI results and assessed a knee strain, knee enthesopathy and a prior meniscal injury with "10% LE and 4% WP IR." Dr. Bloch imposed restrictions of no significant kneeling, crawling, squatting or climbing. Dr. Bloch referred Claimant to orthopedics for further "input."

14. On January 10, 2013 orthopedic surgeon Mark Failinger, M.D., examined Claimant on referral from Dr. Bloch. Dr. Failinger took a history, performed a physical examination (PE) and reviewed the recent MRI. Claimant reported that he twisted his right knee on November 27, 2012 and that he had undergone a prior knee surgery in 1997. Dr. Failinger noted that the MRI showed "medial compartment high-grade chondromalacia with evidence of previous meniscectomy without an obvious new tear but some degenerative changes." He also noted there was "some patellar chondromalacia." Dr. Failinger assessed the following: (1) Right knee status post previous medial meniscectomy with medial compartment degenerative joint disease with recent flare; (2) Right knee minimally symptomatic patellar chondromalacia. Dr. Failinger opined that "this is arthritis and not a new meniscus tear." He explained that the arthritis was "down to the bone" in the medial tibial plateau and the medial femoral condyle was "getting quite thin." Dr. Failinger opined that Claimant should wear a medial unloader brace and undergo a cortisone injection. Dr. Failinger stated that viscosupplementation might help and that a "scope is a possibility to help him but it is not even 50% in my opinion."

15. On February 13, 2012 Claimant was examined at Occ Med, Colorado (Occ Med). It is not clear whether Claimant was examined by PA-C Jim Keller, Dr. Smith or both. The office note was signed by PA Keller and Dr. Smith. The February 13 office note states Claimant was a "transfer patient from Concentra sent for a second opinion." Claimant reported that he had experienced swelling and pain medially since twisting his right knee when stepping off of a bus on November 27, 2012. Claimant mentioned that he had a "medial meniscal repair of the same knee in 1997 that was asymptomatic" until the November 2012 injury. The note states that Dr. Failinger opined the MRI was "misread and that [Claimant] did not have a tear and just had postsurgical meniscal changes with some degenerative joint disease." Occ Med assessed Claimant with a sprain/strain of the right knee and a torn right medial meniscus. Occ Med referred Claimant to Dr. Stull for a second opinion and instructed Claimant to wear his knee brace and continue the work restrictions.

16. Dr. Stull, an orthopedic surgeon, examined Claimant on March 14, 2013. Claimant reported symptoms of "persistent locking catching pain and swelling" since he twisted his knee in November 2012. Dr. Stull reviewed "operative pictures" of a

previous knee arthroscopy performed by Dr. Lindberg in "1996." Dr. Stull commented that the pictures show that Dr. Lindberg treated Claimant with "microfracture for a small chondral defect on the medial femoral condyle" and that the medial meniscus appeared to be in intact. Dr. Stull was "somewhat surprised" that Dr. Failinger "recommended against knee arthroscopy despite the fact that an MRI of December 2012" showed a "meniscus tear and some mild arthritic changes." Dr. Stull reviewed the MRI images and agreed with the radiologist's interpretation. Dr. Stull's impressions included a torn medial meniscus and mild arthritis of the right knee. Dr. Stull recommended "right knee arthroscopy, partial meniscectomy, debridement and related procedures."

17. On April 11, 2013 Dr. Stull performed surgery described as the following: (1) Right knee arthroscopy with partial medial and partial lateral meniscectomy; (2) Extensive arthroscopic debridement and chondroplasty of the knee. Dr. Stull's operative notes contained the following observations made during the course of surgery; (1) Patellofemoral joint showed significant arthritic changes; (2) Large bucket handle irreparable tear of the posterior horn of the medial meniscus; (3) Notable arthritic changes of the medial compartment with grade III and IV medially on the tibial plateau and diffusely grade II and III on the femoral condyle; (4) Small degenerative tear of the posterior horn of the lateral meniscus. Dr. Stull wrote that a "thorough and extensive chondroplasty and debridement was performed throughout the knee with particular attention being paid to the arthritic changes in the medial femoral condyle, the medial tibial plateau, the patellofemoral joint including the retropatellar surface and the trochlear groove."

18. On April 18, 2013 Dr. Stull noted that Claimant reported he was "doing well and having minimal pain." Dr. Stull noted that Claimant exhibited full range of motion (ROM) on PE. Dr. Stull's impression was that Claimant was "doing well." Dr. Stull referred Claimant to begin PT.

19. On May16, 2013 Dr. Stull noted that Claimant reported he was "doing well" and was "back at work." On PE of the right knee Dr. Stull noted full ROM. Dr. Stull's impression was that Claimant was "doing well." Dr. Stull released Claimant from formal care and permitted Claimant to perform activities as tolerated.

20. On May 21, 2013 PA-C Keller examined Claimant at Occ Med. Claimant reported that he was "pain free" and the only "precaution" was "a little bit of concern going up and down stairs and kneeling." Claimant reported he was using knee pads at work and "tolerating it well." Claimant was not taking any medications and believed he could be released without restrictions.

21. On May 29, 2013 Dr. Smith, who is board certified in family medicine and level II accredited, examined Claimant at Occ Med. Dr. Smith opined Claimant reached MMI on May 29 with a 22% lower extremity rating for the right leg. The impairment rating was based on 7% impairment for reduced ROM and 16% impairment for the "bilateral meniscal tears and chondromalacia." Dr. Smith recommended post-MMI maintenance treatment in the form one year of surgical management by Dr. Stull and one year of "medical management" by Dr. Smith.

22. On October 21, 2013 Claimant returned to Occ Med where he was examined by PA-C Keller. Claimant reported that he had not had any new injuries but had experienced increasing right knee pain "for the last two months." Claimant further reported he had some difficulty traversing stairs but the knee had "not locked up or given way" and he did not feel "unstable." Claimant was "quite concerned" because he had "not had any real knee pain" since the impairment rating on May 29, 2013. On PE Claimant demonstrated full ROM with "subjective discomfort medially" on full flexion. There was no crepitus or instability. PA-C Keller referred Claimant to Dr. Stull for another examination.

23. On November 30, 2013 Dr. Stull again examined Claimant. Dr. Stull noted Claimant was "6 months status post right knee arthroscopy" and that "upper findings" revealed "fairly notable arthritic changes in the medial compartment of his knee." Claimant reported "some persistent medial sided symptoms with activity, pain and intermittent swelling." Dr. Stull's impression was right knee symptoms related to known osteoarthritis of the medial compartment. Dr. Stull performed a cortisone injection and recommended that Claimant elevate and ice the knee, take anti-inflammatory medicines and modify his activities.

24. Claimant returned to Dr. Stull on January 8, 2014. Claimant reported that his knee pain had worsened and requested another injection. Dr. Stull assessed degenerative arthritis of the right knee. Dr. Stull performed another injection.

25. Claimant returned to Dr. Stull on April 10, 2014. Dr. Stull noted Claimant received a "good response" to the previous cortisone injection. However, Claimant's symptoms had reportedly returned with medial and retropatella grinding popping pain and swelling. Dr. Stull's impression was moderate arthritic changes in the right knee. Dr. Stull performed another cortisone injection.

26. Claimant returned to Dr. Stull on October 23, 2014. Claimant's chief complaints were activity related pain, swelling and poor function of the right knee. Claimant advised Dr. Stull that he did not respond as well to the April 2014 injection as he had responded to previous injections. On PE Dr. Stull found the medial and patellofemoral compartments were "tender and crepitant." Dr. Stull noted Claimant "had 2 documented work injuries to his knee" and opined that Claimant's "arthritis appears to be related to his work and his work injuries." Claimant and Dr. Stull discussed "solutions" for treating the arthritis and Claimant "decided he would like to have his knee replaced." At Claimant's request Dr. Stull also performed another injection.

27. On November 6, 2014 Dr. Stull examined Claimant for a "new problem" involving his left knee. Claimant reported "6 or 7 months of knee pain came on gradually without injury." Claimant's symptoms were predominantly on the medial side of the left knee and included pain with activities, swelling, catching and clicking. Dr. Stull took x-rays which showed "mild medial joint space narrowing" but were otherwise unremarkable. Dr. Stull's impressions included mild arthritis of the left knee with a possible medial meniscus tear. Dr. Stull recommended Claimant undergo an MRI of the left knee. Additionally Dr. Stull noted that Claimant's right knee had worsened and

wrote that "this is our appeal to reopen the case on his right knee" for further treatment including a potential TKA.

28. On November 14, 2014 Claimant underwent an MRI of the left knee. The radiologist's impressions were: (1) Complex tear of the body and posterior horn of the medial meniscus; (2) Degenerative cartilage changes in the medial compartment and at the superior medial quadrant of the patella.

29. On December 11, 2014 Dr. Stull recommended that Claimant undergo arthroscopic surgery on the left knee. On January 15, 2015 Dr. Stull performed surgery described as follows: (1) Left knee arthroscopy with partial medial meniscectomy; (2) Extensive arthroscopic debridement of the knee, chondroplasty including multiple compartments. In the operative report Dr. Stull wrote that the patellofemoral joint showed notable arthritic changes and that the medial compartment showed "grade IV change on the more medial aspect of the medial tibial plateau with some exposed bone and diffuse grade II and III arthritis of the weightbearing aspect of the medial femoral condyle."

30. On April 30, 2015 Dr. Stull examined Claimant's left knee. Dr. Stull noted that Claimant was "13 weeks postop." The Claimant reported that his "progress" was slow and that his left knee was "still fairly sore at the end of his work day." Claimant requested pain medication and Dr. Stull prescribed Tramadol. Dr. Stull also recommended a Synvisc injection. On May 7, 2015 Dr. Stull performed a Synvisc injection to Claimant's left knee.

31. On May 26, 2015 Dr. Stull wrote a letter responding to an inquiry from Claimant's attorney. Dr. Stull wrote he has recommended a right knee TKA and opined to a reasonable degree of medical probability that the need for the TKA is "directly related to [Claimant's] Workmen's Compensation injury of November 2012." Dr. Stull opined that Claimant has been through extensive conservative treatment but "is quite disabled by his knee pain at this time." With regard to causation Dr. Stull noted Claimant was without significant right knee symptoms prior to the November 2012 injury. However, Dr. Stull wrote that after the 2012 injury Claimant "underwent a surgical meniscectomy; unfortunately his R knee pain had gradually worsened and his arthritis has progressed." Dr. Stull also noted Claimant underwent a previous right knee arthroscopy that resulted from a work related injury. For all of these reasons Dr. Stull opined that Claimant's "current need for the right knee replacement is related to work related injuries."

32. WCRP 17, Exhibit 6, the Lower Extremity Injury Medical Treatment Guidelines (MTG) address criteria for proving a causal relationship between "aggravated osteoarthritis" and a Claimant's employment. Exhibit 6 (2)(a)(ii) states that a "provider" must establish the "occupational relationship" between osteoarthritis and employment "by establishing a change in the patient's baseline condition and a relationship to work activities." Exhibit 6 (2)(a)(ii), concerning "other causative factors to consider," states as follows:

> Previous meniscus or ACL damage may predispose a joint to degenerative changes. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: meniscectomy; hemarthrosis at the time of the original injury; or evidence of MRI arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints and there should be a significant increase of pathology on the affected side in comparison to the original imaging or operative reports and/or the opposite un-injured side or extremity.

33. On August 6, 2015 John T. McBride Jr., M.D., performed an independent medical examination of Claimant at the request of Respondents. Dr. McBride is board certified in orthopedic surgery and is level II accredited. Dr. McBride authored a written report and testified at the hearing. The following findings of fact represent an amalgamation of Dr. McBride's written report and his testimony.

34. Dr. McBride opined to a reasonable degree of medical probability that Claimant's need for a right TKA is not causally related to the November 2012 industrial injury. Dr. McBride testified that a TKA is performed to treat "end-stage" osteoarthritis. Dr. McBride explained that Claimant's right knee osteoarthritis was documented to be present within a few months after the November 2012 injury as shown by the following: (1) the December 2012 MRI report documenting "moderate" osteoarthritis less than two months after the date of injury; (2) Dr. Failinger's January 2013 report noting that Claimant underwent a right knee meniscectomy in 1997 and documenting the presence of chondromalacia in the medial compartment of the right knee; (3) Dr. Stull's April 2013 operative report documenting the presence of grade III to IV chondromalacia. Dr. McBride stated that there is significant evidence in the medical literature that people who have a meniscus removed develop osteoarthritis "18 to 20 years later." Dr. McBride testified that Dr. Stull's April 2013 operative findings represent "what one would expect from a person who has had his meniscus removed 20 years prior." Dr. McBride opined that because Claimant's chondromalacia was present "less than one year" after the November 2012 injury "the arthritis was not significantly aggravated by the injury." Dr. McBride further testified that "stepping in a hole" caused Claimant to suffer a torn meniscus, but did not cause or aggravate the arthritis.

35. Dr. McBride testified that his conclusions are supported by application of the Lower Extremity Injury MTG. He explained that the MTG indicate that in order for an alleged industrial aggravation of osteoarthritis to be considered the cause of the need for a TKA there must be a "change in the radiographs (objective studies) from the time of injury to the time of the recommended total joint replacement." Dr. McBride explained that Claimant does not meet this requirement because the Claimant had bone-on-bone arthritis in January 2013, only one month after the injury. Dr. McBride further opined that the MTG require that in order to prove aggravation of osteoarthritis a Claimant must show the "new complaints" occurred at least 2 years from the date of the

aggravation. Dr. McBride opined that the records of Claimant's injury do not meet this criterion.

FINDINGS OF FACT CONCERNING CAUSATION

36. Claimant failed to prove it is more probably true than not that the alleged worsening of his right knee symptoms since MMI, and the consequent need for a right TKA, was proximately caused by the industrial injury of November 27, 2012. Consequently, Claimant failed to prove that the alleged need for a TKA was proximately caused by a change in his condition that is causally related to the injury of November 27, 2012. Rather, the persuasive and credible evidence establishes that any worsening of condition that occurred after Claimant was placed at MMI was probably caused by the natural progression of his pre-existing osteoarthritis.

37. Dr. McBride credibly and persuasively opined that the progression of Claimant's right knee symptoms since MMI and the consequent need for a TKA are not causally related to the industrial injury of November 27, 2012. Dr. McBride credibly explained that Claimant already had osteoarthritis of the right knee when he was injured in November 2012 as shown by the December 2012 MRI, Dr. Failinger's January 2013 report and Dr. Stull's operative report documenting findings of grade III and IV chondromalacia in the medial compartment. Dr. McBride persuasively opined that Dr. Stull's findings of chondromalacia are consistent with "what one would expect from a person who has had his meniscus removed 20 years prior." Dr. McBride persuasively opined that since Claimant's chondromalacia was documented to exist less than one year after the November 2012 injury it is not probable that the 2012 injury caused or aggravated Claimant's osteoarthritis.

38. Dr. McBride's opinion that the need for the TKA, if any, was caused by the natural progression of Claimant's pre-existing arthritis independent of the November 27, 2012 injury is consistent with and supported by the medical records. Specifically, the medical records establish that when Claimant was placed at MMI on May 29, 2013 he was essentially pain free. On May 16, 2013 Dr. Stull noted Claimant was "doing well, had full ROM and had returned to work. When PA Keller examined Claimant on May 21, 2013 Claimant reported he was "pain free" and had well-tolerated his return to work. When PA Keller examined Claimant on October 21, 2013 Claimant reported he had experienced increasing right knee pain "for the last two months." The ALJ infers from this evidence that after undergoing surgery in April 2013 and being placed at MMI in May 2013 Claimant's symptoms significantly abated and there was no noticeable worsening until at least late August 2013.

39. Moreover, the medical records refute Claimant's testimony that when he was placed at MMI his knee was still sore and he had to ice it every night. PA Keller's October 21, 2013 note documents that Claimant was "quite concerned" about increasing knee pain over the last two months because he "had not had any real knee pain" since he reached MMI on May 29, 2013. Further, Claimant's testimony that between May 29, 2013 and October 21, 2013 he developed "giving out," popping and grinding is refuted by PA Keller's medical October 21, 2013 note. PA Keller's October

21 note contains no mention of "popping and grinding" and also states that Claimant's knee had not "locked up or given way."

40. Dr. McBride also credibly and persuasively opined that Claimant failed to satisfy the criteria for proving aggravation of pre-existing osteoarthritis established by the lower extremity MTG. Dr. McBride explained that the Claimant's "new complaints" of pain, locking and functional problems presented less than 2 years after the November 2012 industrial injury. Moreover, Dr. McBride explained that Claimant failed to demonstrate an objective basis for finding an increase in right knee pathology when compared to the MRI findings of December 2012, Dr. Failinger's findings and Dr. Stull's surgical findings in April 2013. The ALJ finds that Dr. McBride's application of the MTG should be given substantial weight because the MTG specifically address the circumstances under which "aggravation" of osteoarthritis may be attributed to a previous traumatic injury.

41. The credible and persuasive evidence establishes that Dr. Stull believes Claimant's current right knee symptoms, which include retropatella grinding and popping, pain, swelling and "poor function" are attributable to "degenerative arthritis of the right knee." (Findings of Fact 23 through 26) Dr. Stull has also opined that the causes of the right knee arthritis include the 1996 injury to Claimant's right knee and the November 2012 right knee injury.

42. Dr. Stull's opinion that Claimant's November 2012 injury contributed to a worsening of Claimant's symptoms is not persuasive. Dr. Stull's opinion is based largely on the fact that Claimant was not experiencing right knee symptoms prior to November 2012. However, Dr. Stull's opinion does not persuasively address the lower extremity MTG criteria for finding that an injury aggravated pre-existing osteoarthritis. Dr. Stull did not explain whether or not there was any objective change in the Claimant's pathology between the November 2012 injury and the October 2014 recommendation for a TKA. Rather, Dr. Stull's analysis appears to rely largely on Claimant's subjective reports that his symptoms were increasing without identifying any objective change in the underlying pathology. Neither did Dr. Stull explain why the ALJ should disregard the lower extremity MTG's requirement that "new complaints" appear 2 or more years after the trauma that allegedly aggravated the osteoarthritis. Here, the Claimant's "new complaints" appeared in October 2013 when he went to see PA Keller. However, these new complaints (increasing pain of 2 months' duration) appeared less than 1 year after the November 2012 injury.

43. Evidence and inferences inconsistent with these findings of fact are not credible and persuasive.

CONCLUSIONS OF LAW

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

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

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

PETITION TO REOPEN

Claimant contends that his claim should be reopened and he should receive additional medical treatment in the form of a TKA. Claimant reasons that after he was placed at MMI in May 2013 his injury-related osteoarthritis worsened so as to warrant reopening and an award of additional medical treatment. Respondents argue, among other things, that the Claimant failed to prove that any post-MMI change in condition was causally related to the November 27, 2012 industrial injury. Rather, Respondents argue that any change in Claimant's condition was caused by the natural progression of his pre-existing arthritis uninfluenced by the effects of the November 2012 injury. The ALJ agrees with Respondents.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, 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).

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).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere fact that a body part affected by the industrial injury later needs additional treatment does not require the ALJ to conclude that the need for the treatment was caused by the industrial injury. Rather, the need for additional treatment may result from the natural progression of a pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Holguin v. Jim's Critter Cutter, LLC*, WC 4-737-191 (ICAO April 6, 2012); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert medical testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

Section 8-43-201(3), C.R.S., provides that the ALJ "may consider the medical treatment guidelines" when determining whether "certain medical treatment is reasonable, necessary, and related to an industrial injury." However, the ALJ is not required to use the MTG as "the sole basis for such determinations." Thus, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled considering the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined in Findings of Fact 36 though 42 Claimant failed to prove that any change in his condition that occurred after he was placed at MMI on May 29, 2013 was causally-related to the November 27, 2012 injury. Rather, the ALJ is persuaded by the opinions of Dr. McBride that any worsening of Claimant's condition after MMI was probably caused by the natural progression of his pre-existing osteoarthritis uninfluenced by the effects of the November 2012 injury. Specifically the ALJ is persuaded that if the November 2012 injury had aggravated the pre-existing arthritis there would have been an objective change in the Claimant's objectively identifiable pathology between the date of injury and the date the TKA was recommended. The ALJ is further persuaded by Dr. McBride's testimony that under the lower extremity MTG the osteoarthritis was probably not aggravated by the November 2012 injury because Claimant's new complaints appeared less than 2 years after the date of injury. Dr. Stull's opinions are not persuasive for the reasons stated in Finding of Fact 42.

Claimant's petition to reopen WC 4-913-621 must be denied. The ALJ need not reach the question of whether the proposed TKA would constitute reasonable and necessary treatment for Claimant's condition.

ORDER

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

1. Claimant's petition to reopen WC 4-913-621 is denied.

2. Claimant's request for additional medical benefits is denied.

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

DATED: February 29, 2016

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he suffered a work injury on April 1, 2013, in the course and scope of his employment for Employer; and

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to an order for reasonably necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant is a 71 year old man who began working for Employer on April 2, 2012. Employer operates a Laundromat. Ms. Carole King is the owner and operator of the Laundromat. Claimant is a former friend of Ms. King's father and Claimant worked for Ms. King as the night janitor at the Laundromat. Claimant duties included mixing cleaning solutions, sweeping and general cleaning. He worked on average 4-5 hours a night, five days a week, starting at 11:30 p.m. and working until 4:30-5:00 a.m.

2. On or about April 1, 2013, at between 1:30 and 2:30 a.m., Claimant testified that the following incident occurred: Claimant injured his left knee after bending down to pick up a piece of trash. Claimant had to crawl under a table to get at this debris. He could not reach the debris with a broom, so he got down on his hands and knees and as he got back up, he felt a sharp pain in his left knee. Claimant contends that the pain was so bad, he wanted to "take the knee out." On a scale of 1-10, he rated his pain as a 10/10.

3. Claimant further testified that he called Ms. King and told her what happened. Ms. King told Claimant to go home and rest. After a few days, Claimant testified that he could no longer take the pain, so he went to Kaiser. At Kaiser, Claimant alleges that his knee was swollen and bruised.

4. Claimant testified that he previously injured the same knee in the early 1990's when working for the Denver Newspaper Agency. After some care and treatment, Claimant testified that the knee was fine, up until the alleged incident in 2013.

5. Ms. King testified she hired Claimant as a night janitor around April 3, 2012. Ms. King agreed with Claimant's description of his duties.

6. Ms. King testified that Claimant called her around 4:30 a.m. the morning of March 31, 2013, reporting that he did not feel good and that he never felt like that before. Claimant did not mention a knee injury. Ms. King explained that it was Easter holiday and Claimant's early morning phone call was memorable for that reason. Ms. King testified that their conversation covered how much work he had completed and Claimant's promise to push the tables back against the wall before leaving. Ms King explained she would not have talked about work if she knew Claimant had just injured his knee. Ms. King told Claimant to go home and she would come in and finish his work. She told him to take the next few days off and then see how he felt.

7. On the following Wednesday and Thursday, when Ms. King did not hear from Claimant, she called him three times, with no response. She then called the police and asked them to perform a welfare check on Claimant. Ms. King feared Claimant had a heart attack.

8. On April 6, 2013, Claimant called Ms. King to report that he hurt his knee. At that time, Claimant did not indicate the injury was work related.

9. On May 23, 2013, Claimant called Ms. King to inquire why he was not getting paid. She told him it was because he had not been working. Then, he asked for help getting his knee care paid for and about Workers' Compensation. Ms. King told Claimant she would contact her workers' compensation carrier.

10. Thereafter on the advice of the insurance carrier, Ms. King advised Claimant, via certified letter, to seek medical treatment from Concentra or Lutheran. On May 24, 2013, an Employer's First Report of Injury was filed noting Claimant first reported the alleged injury to the Employer on May 23, 2013.

11. On April 8, 2013, Claimant was seen at Saint Joseph Hospital. Claimant testified that he called for an ambulance as he could not go downstairs to use the restroom and he was stuck in his apartment for several days without food. The ambulance crew put him in a chair, took him downstairs to the ambulance and then to the hospital. Records from Saint Joseph note that Claimant's history of present illness was "acute on chronic l(eft) knee pain. Unable to ambulate." Respondents Exhibit D, page 2. The mechanism of injury was reported to be unknown. Claimant reported a gradual onset of symptoms with no change in Claimant's symptoms over time. Claimant reported that he had pain in his left knee since kneeling on it about two weeks prior.

12. On April 8, 2013, Claimant's knee was drained and his condition improved. Medical records reflect that upon examination of the fluid drained from Claimant's knee, Claimant was diagnosed with pseudo gout. The diagnosis/ assessment reflected that Claimant had a pseudogout flare. There was no mention of a traumatic injury occurring at work in the history of illness that was provided by Claimant.

13. On June 8, 2013, Claimant reported to the emergency room at St. Anthony Hospital with long standing problems with his left knee with an exacerbation sustained in March.

14. In 2005, Claimant reported injuring his knee in a similar manner as alleged herein. Then he injured his left knee as his job required kneeling and stooping to change rolls of paper. He had pain in his knee after trying to get up.

CONCLUSIONS OF LAW

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

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

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

C. The ALJ concludes, based upon the totality of the evidence presented, that Ms. King's testimony was the more credible and persuasive than Claimant's testimony. If Claimant had reported hurting his knee at work on March 31 or April 1, 2013, it is unlikely Ms. King would have asked him to push the tables back in before he left. It is also unlikely Ms. King would call the police to perform a welfare check on Claimant. Instead, such actions are more consistent with Ms. King's testimony that Claimant did not report injuring his knee at work when they spoke early Easter morning in 2013. Ms. King's testimony is also consistent with the records from St. Joseph Hospital on April 8, 2013, which did not contain a report of Claimant injuring his knee at work.

ORDER

It is therefore ordered that:

Claimant's claim is denied and dismissed.

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

All matters not determined herein are reserved for future determination.

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

DATED: Marcg 11, 2016_____

DIGITAL SIGNATURE:

Margot W. Jones

_____

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

ISSUES

Whether the claimant has proven by a preponderance of the evidence that the recommendation for medical treatment for his current low back pain is causally related to the admitted industrial injury.

FINDINGS OF FACT

1. On September 17, 2013, the claimant sustained injuries to multiple body parts when he was confronted by a coyote while working for the respondent-employer.

2. At that time the claimant had been working for the respondent-employer for approximately eight and one-half years as a substation technician.

3. The claimant was called out on a call of an alarm going off at a substation the evening of September 17, 2013 at a location behind Peterson Air Force Base. The claimant had to park his truck some distance away from the substation and walk to the substation as it was muddy. When walking back to his truck, he came upon a coyote and as he backed away from the coyote that was coming toward him, he stepped in what he thought was a prairie dog hole with his left leg, "fell backwards, did the splits, landed straight on the back of my spine." The claimant called his supervisor who came and carried him out of the location. The claimant indicated that he thought it was approximately a mile and a half back to his truck.

4. The claimant did not realize how much pain he was in and what was hurt initially, but when he got to the emergency room that evening, the claimant had excruciating, sharp pain that seemed to be generating from his low-buttocks, mid buttocks that was like a sharp nerve, like someone stabbing him that traveled all the way down the side of his leg into his ankle. The claimant also injured his left shoulder where he experienced a similar sharp pain.

5. The claimant has continued to have problems with his left leg, buttocks, piriformis and pelvis, some problems of which originate in his low back. His problems have been essentially unchanged in the buttocks, left leg, piriformis and back since the injury. For the first four or five months, his shoulder pain was the pain that was the most

overpowering. He had surgery performed on his left shoulder by Dr. Weinstein in December of 2014. He still has pain in his shoulder, neck and trapezius and has headaches. He has developed post-traumatic stress disorder (PTSD) and is being treated for that condition by Dr. Gary Gutterman upon the referral from Dr. Lakin. He had an IME evaluation with Dr. Robert Kleinman, who agrees with Dr. Gutterman of the diagnosis of PTSD arising out of the September 17, 2013 injury. The depositions of both Dr. Gutterman and Dr. Kleinman confirm the diagnoses of PTSD. Dr. Kleinman is of the opinion that the claimant is a poor historian and is not credible. Dr. Gutterman testified that he believes the claimant is candid and credible and that it would be difficult to diagnose PTSD in an individual who is not credible as such diagnosis in large part relies upon the subjective history taken from the patient.

6. The claimant had previous back treatment with Dr. Walker at the Southern Colorado Clinic on July 3, 2013 for mid-back muscle spasms due to the ongoing traveling and driving in his vehicle, which was an F-350 loaded with tools and equipment. Dr. Walker took an x-ray, gave the claimant a shot of toradol and suggested to the claimant that he obtain a cushion for his truck and to perform stretching exercises. Within a few days of seeing Dr. Walker on July 3, 2013, the claimant's back pain resolved. The claimant was having no low back problems of an ongoing nature prior to the injury of September 17, 2013.

7. The claimant does not know what was causing his left leg, buttocks and hip pain and how it was related to his low back issues as the low back issues seemed to come and go, but that the left leg, buttocks and hip pain has been fairly constant and present since the occurrence of the injury. The claimant testified that the low back pain that he has now and the left leg, buttocks and hip pain is completely different than the muscle spasms that he had leading up to the July 3, 2013 visit with Dr. Walker. The complaints from the July 3, 2013 episode were more in the mid-back area.

8. The claimant had undergone a complete CDL physical sometime between July 3, 2013 and September 17, 2013. He described that physical in detail and that it was a physical in which everything was checked physically by the CDL examining physician. He had no physical issues including any issues with his low back or mid-back at that time.

9. Upon the occurrence of the on the job injury on September 17, 2013, the claimant was referred to the care and treatment of Dr. Terrence Lakin of the Southern Colorado Clinic. Dr. Lakin has been the claimant's ATP since the first visit on September 23, 2013 and continues to treat the claimant.

10. As it relates to the claimant's low back condition, Dr. Lakin testified about his opinion in his deposition taken on September 4, 2015. Dr. Lakin is the occupational physician at the Southern Colorado Clinic, which is a clinic for the care and treatment of injured workers referred to it by employers. Dr. Lakin is level 2 certified with the Colorado Division of Workers' Compensation. Dr. Lakin testified that in his opinion the claimant's case is an unusual one in that, while the medical treatment guidelines of the Division do a good job of identifying the run of the mill injuries, and the treatment therefore, the claimant's condition is an "outlier." Dr. Lakin believes that the claimant sustained a very complex, multi-level, musculoskeletal dysfunction at the time of his injury. Dr. Lakin stated that the MRI and the EMG performed on the claimant demonstrate an L5-S1 bulge and herniation with an annular tear and evidence of radiculopathy into his lower leg.

11. Dr. Lakin has watched the claimant in physical therapy and has seen the decompensation that occurs with the attendant muscle spasms, which he described as alternating compensatory mechanisms with the low back and pelvis trying to compensate. Dr. Lakin is of the opinion that the claimant, over the many appointments that he has had with him since September 23, 2013, has been consistent in his history regarding the problems with his low back. Dr. Lakin testified:

> Yes, over—over time, it's been—it has been consistent. I think there's been some waxing and waning, and, perhaps, focusing on one area more than the other. I think it was—my mind set was, initially, to treat him for a few injuries, and he developed into a more complex case, with some abnormal compensatory mechanisms that, the body was trying to adapt to his injuries.

12. Dr. Lakin is of the opinion that the claimant injured his lumbar spine on September 17, 2013 and the additional spasms occurring as a result of the claimant's compensatory mechanisms have compounded the issue. Dr. Lakin was questioned regarding the initial complaints of low back pain on the September 23, 2013 visit and the lack of low back complaints by the claimant being documented on visits between September 23, 2013 and the visit upon referral to Dr. Davis, an orthopedist at the Southern Colorado Clinic on December 5, 2013 and his continuing complaints of low back pain on December 10, 2013. Dr. Lakin stated that in his opinion such a presentation was

> pretty consistent with some compensatory mechanisms, and continued myofascial tightness in multiple areas. It's not what we usually see, but I don't think it's unusual, or unheard of, to develop, you know, waxing and waning, and more symptomatic pain, over time with something like this.

13. Dr. Lakin further indicated that between September 23, 2013 and December 10, 2013, most of the care and treatment that the claimant was receiving was directed towards the claimant's left knee, left elbow and left shoulder, as well as the issues related to the claimant's PTSD.

14. Dr. Davis examined the claimant on December 5, 2013 primarily on referral for examination of the claimant's left shoulder and left knee. Dr. Davis' report further shows examination of the claimant's low back. Dr. Davis' plan was to do some rehab exercise for the claimant's lumbosacral spine and observe his neurogenic symptoms, left thigh and it was hoped that those issues would resolve with time. If not, Dr. Davis suggested EMG and nerve conduction study for further workup as to the neurogenic etiology.

15. The claimant was referred by Dr. Lakin to Dr. Polvi. Dr. Polvi first saw the claimant on April 17, 2014. Dr. Polvi performed a complete and thorough physical examination on that date. Dr. Polvi's initial diagnosis was chronic left sacroiliac joint dysfunction with associated myofascial pain disorder affecting the left gluteal, paralumbar musculature with somatic referred left lower extremity paresthesias. Dr. Polvi continued to treat the claimant's low back and joint dysfunction in conjunction with Dr. Lakin and Dr. John Tyler between April 2014 and April 2015. Treatment consisted of joint mobilization therapy, trigger point dry needling, trigger point injections, manual therapy, and neuromuscular reeducation and kinetic activities.

16. The claimant was referred additionally by Dr. Lakin for care and treatment to Dr. John Tyler with the Colorado Institute for Pain Management. Dr. Tyler first saw the claimant on September 23, 2014. Dr. Tyler performed an initial physical examination of the claimant at that time and was of the opinion that the claimant had severe myofascial pain syndrome in the left parascapular and superomedial paracervical region with accompanying cerviogenic headaches and nearly resolved pain related to what sounded to Dr. Tyler to be pelvic obliquity and myofascial strain patterns to the surrounding hip and gluteal musculature and paralumbar musculature on the left side. Dr. Tyler continued to treat the claimant through May 5, 2015 pending the authorization for the first epidural steroid injection with Dr. Ross. The claimant was continuing to have ongoing low back pain, and Dr. Tyler was hopeful that the injection would resolve the obliquity that was causing some of the claimant's pain.

17. Dr. Lakin wrote a letter to counsel for both parties on June 6, 2015 and an additional letter of January 7, 2016 to counsel for the respondents explaining fully his position regarding the claimant's condition and his rationale as to why he believes the claimant's present low back condition is related to his admittedly compensable on the

job injury of September 17, 2013. Dr. Lakin stated that he did not concur "with Dr. Bisgard's opinion and believe that more likely than not, [the claimant's] lumbar pain and left SI pain is a result of his injuries obtained during his work duties on September 17, 2013." Dr. Lakin further noted:

> [The claimant] indicated stabbing and aching pain in left SI and buttocks area on his initial examination. His multiple injuries have had very significant waxing and waning for multiple body parts regarding the quality and level of pain. But, the areas of pain have been rather consistent. I do not view him as trying to add or embellish complaints. He has a complex of injuries that have been difficult to isolate and treat separately, and this has taken time to recognize. As further treatment and modalities progressed, I believe he has developed a body compensatory pattern from his injuries that has been adding to dysfunction and pain at different levels. This is why his case has been unusual and has not followed usual presentations and outcome.

18. When asked for further clarification of his position as to what treatment he believed was presently required for the claimant's low back/S1 joint dysfunction, Dr. Lakin noted:

> As I thought I related in my deposition several months ago, I believe [the claimant's] injuries have resulted in a compensatory spinal alignment that most likely requires a stepwise approach of trigger point injections and myofascial release, starting at the left paralumbar and working up to his left upper thoracic and shoulder girdle. Again, much like a house with a foundation that is not level, one must address the foundation before one can have a lasting remedy for aligning window frames in the attic that break the window glass.

19. Dr. Elizabeth Bisgard authored pertinent reports of March 24, 2014 and May 23, 2015 and testified at the hearing on January 27, 2016. Dr. Bisgard notes in her report of March 24, 2014 that the claimant "is not having any back pain per se. The symptoms are in his left buttocks radiating into his lateral thigh over his iliotibial band associated with some numbness over the distal portion of his lateral thigh to his knee…We discussed the fact that several of the reports indicate that he has low back pain, but he clarified that the pain is not in his back but in his buttocks." Additionally, Dr. Bisgard testified that while she did not know about the results of the EMG before the time of the hearing, she was of the opinion that the claimant's complaints were consistent with problems in the piriformis not in the spine. Dr. Bisgard testified that she was not sure what the claimant's present condition is, as she has not examined him since March 24, 2014, but as far as treatment for his low back, she did not believe that

any treatment for the claimant's low back condition today would be related to the industrial injury of September 17, 2013.

20. The respondent's position that the claimant had no ongoing low back complaints between September 17, 2013 and December 5, 2013 is not supported by the record. The back complaints were sufficient enough for Dr. Lakin to refer the claimant to Dr. Davis and sufficient enough for Dr. Davis on December 5, 2013 to recommend therapy for the low back and if no improvement to suggest EMG investigation.

21. Whether the claimant has an independent low back condition which is causing the buttocks pain, piriformis complaints and the left lateral thigh numbness which was caused by the injury of September 17, 2013 or has a low back problem presently due to the injury and what Dr. Lakin describes as the compensatory mechanism, the ALJ finds that the claimant has had intermittent, waxing and waning low back component to his compensable on the job injury since the occurrence on September 17, 2013.

22. A review of the medial records of Dr. Tyler, Dr. Polvi, and Dr. Lakin shows that the treatment now being recommended by Dr. Lakin is the same type of treatment that Dr. Polvi and Dr. Tyler were providing to the claimant commencing in April of 2014. Those doctors recommended that, despite some improvement, it would be worthwhile to have the claimant undergo a trial of a SI injection with Dr. Scott Ross. It was at that point that the respondents questioned the causal relationship of the low back condition to the compensable on the job injury.

23. The complexity of the claimant's physical condition is further affected by the development of the claimant's PTSD as a result of the compensable injury. Dr. Gutterman first started treating the claimant on April 8, 2014. He has continued to treat him on a consistent basis since that initial visit for that condition. Dr. Gutterman has provided the claimant with various medications for his depression, nightmares, anxiety and sleep deprivation. The claimant complained of back pain when Dr. Gutterman first met with him. Dr. Gutterman has found the claimant to be forthcoming and credible. He further does not believe that the claimant embellishes or distorts his issues. The diagnosis of PTSD is based primarily on a patient's reliability and history. Dr. Gutterman, finding the claimant credible, thinks it is inconsistent for Dr. Kleinman to agree that he claimant has job related PTSD but to also state that the claimant is not credible.

24. Based upon the testimony and evidence presented, the ALJ finds the analyses and opinions of Dr. Lakin to be more credible and persuasive than analyses and opinions to the contrary.

25. Dr. Lakin has opined that the claimant's is a complex case and that, in addition to the specific injuries sustained on September 17, 2013, the claimant has developed compensatory mechanisms resulting in spasms that have caused further injury to the claimant's low back, buttocks, left thigh and piriformis areas. The notes of Dr. Tyler and Dr. Polvi indicate that the claimant was improving with the trigger point injections to the claimant's low back and piriformis areas when the claimant was getting the treatments with them. There is no indication in any of Dr. Lakin's reports that he is recommending any surgical intervention for the claimant's condition but that it is his opinion that the treatment should continue to be in the nature of trigger point injections and conservative treatment to improve the claimant's low back and piriformis condition.

26. The ALJ finds the claimant credible and that he has been consistent in terms of his pain complaints and the waxing and waning of those complaints.

27. The ALJ finds that the care and treatment to the claimant's low back as requested by Dr. Lakin is a continuation of the treatment commenced in April of 2014 by Dr. Polvi and is for the concomitant problems with the claimant's buttock pain, the piriformis syndrome and the left thigh numbness.

28. The ALJ notes that the Low Back Medical Treatment Guidelines advise that defining the pain generator of low back conditions is, at times, somewhat difficult. The ALJ finds that the claimant has been consistent in describing his ongoing pain complaints to Dr. Lakin and to Dr. Lakin's referrals.

29. The ALJ finds that the claimant has established that it is more likely than not that his low back condition is causally related to the admittedly compensable industrial injury of September 17, 2013.

CONCLUSIONS OF LAW

1. Facts in a workers' compensation case must be interpreted neutrally neither in favor of the rights of the claimant nor in favor of the rights of the respondents. See §8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. §8-43-201(1).

3. The purpose of the Workers' Compensation Act of Colorado in §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).

4. 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. The ALJ's decision need not address every item contained in the record. See *Magnetic Engineering, Inc., v. ICAO,* 5 P. 3d 385 (Colo. App. 2000).

5. The claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. §8-43-210, C.R.S. See, *Valley Tree Service V. Jimenez,* 787 P.2d 658 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier of fact after considering all of the evidence to find that a fact is more probably true than not. See *Page v. Clark,* 593 P.2d 792 (Colo. 1979).

6. 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 has been contradicted and the bias or prejudice of the witness. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936).

7. Whether the moving party has met its burden of proof is a question of fact for resolution by the ALJ whose determinations are to be based upon substantial evidence in the record. See *Suetrack USA v. Industrial Claims Appeals Office,* 902 P.2d 864 (Colo. App. 1995).

8. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Snyder v. Industrial claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis,* 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder,* supra. Proof of causation is a threshold

requirement that an injured employee must establish by a preponderance of the evidence before the request benefits are awarded. §8-41-301(1)(c) C.R.S. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). Whether the claimant has sustained his burden is a question of fact of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

9. 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 293 (1951). All results flowing proximately and naturally from an industrial injury are compensable. See, *Standard Metals Corp. V. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

10. 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).

11. The ALJ concludes that the claimant is credible.

12. The ALJ concludes that the analyses and opinions of Dr. Lakin are more credible and persuasive than analyses and opinions to the contrary.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that his low back condition is causally related to the admittedly compensable industrial injury of September 17, 2013 and that the respondent is responsible for medical care to cure or relieve the claimant from the effects of his injury.

ORDER

It is therefore ordered that:

1. The respondent shall pay for treatment to the claimant's back condition as recommended by Dr. Lakin.

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

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

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

DATE: March 15, 2016

/s/ original signed by:

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

ISSUES

- Did Respondent sustain its burden to overcome the DIME physician's opinion on maximum medical improvement (MMI)?
- What is the DIME physician's ultimate opinion regarding the date of MMI?
- Did Claimant prove by a preponderance of the evidence he was entitled to medical benefits after MMI.
- If Claimant is awarded medical benefits, is Respondent entitled to a change of physician changing from Dr. Greg Smith as the primary treating physician.

STIPULATIONS

The parties entered into a joint stipulation in which they agreed that the cervical spine surgery performed by Dr. Kleiner on December 2, 2013 was not related to left shoulder injury of August 5, 2013. This was approved by Order dated May 14, 2014.

Respondent confirmed that it accepted the determination by Dr. Fry that Claimant sustained a 0% permanent medical impairment[1]. Claimant did not dispute this finding, which was confirmed by his attorney of record at the beginning of the hearing.

FINDINGS OF FACT

1. Claimant has been employed by Respondent-Employer for thirty-seven (37) years as a ramp service agent.

2. Claimant's prior medical history was significant in that he previously treated for cervical spine and left upper extremity symptoms[2]. In particular, he was evaluated on October 10, 2008, by Jeffrey Kleiner, M.D., at which time his chief complaints were weakness and dysesthesias affecting his left upper extremity. Dr. Kleiner found limitations (70% of normal) in Claimant's range of motion ("ROM") in his cervical spine and diagnosed C7 radiculopathy. He ordered an EMG.

3. Craig Davis, M.D. examined Claimant on March 27, 2009. Claimant's symptoms were weakness and tingling in the left arm, including tingling and numbness in his three radial digits. Dr. Davis noted the electrodiagnostic testing revealed moderate left carpal tunnel syndrome ("CTS") bilaterally and evidence of left-sided

[1] This was noted in the Application for Hearing and confirmed by Respondent's counsel at the beginning of the hearing.

[2] Dr. Kleiner noted Claimant had chest pain and underwent a cardiac work-up in April 2008.

radiculopathy. Dr. Davis stated that, although Claimant had CTS, his symptoms were vague and not particularly bothersome. Dr. Davis opined Claimant's weakness in the triceps was related to C7 radiculopathy. Dr. Davis recommended a steroid injection.

4. On August 1, 2013[3], Claimant was evaluated by Howard Corren, M.D. at Potomac Primary Care. In his note, Dr. Corren documented Claimant had been seen in May 2013 for weakness and tingling in his left upper extremity. He was also seen on July 2, 2013 with more weakness and continued pain in the left upper extremity. Degenerative changes were seen on x-ray at C4, C5 and C6. An MRI showed foraminal narrowing at C3-4, C4-5 and C5-6. On examination, Claimant was unable to extend his arm against gravity. He had minimally decreased sensation of the left thumb pad and no reflex at the left bicep. Dr. Corren's impression was progressive weakness in the left upper extremity, most likely due to foraminal narrowing and nerve root impingement. Claimant was to see Dr. Kleiner for an orthopedic evaluation.

5. Prior to August 5, 2013, Claimant had symptoms in his left upper extremity, including weakness and tingling. He was diagnosed with degenerative changes, including foraminal narrowing in his spine at the C4, C5 and C6 levels.
Despite these symptoms, there was no evidence in the record Claimant lost time from work as a result.

6. On August 5, 2013, Claimant suffered an admitted industrial injury to his left shoulder which occurred while he was loading bags. Claimant's testimony established this was a discrete event, which caused an increase in his shoulder symptoms.

7. An Employer's First Report of Injury was completed by Adrianne Holbron on August 6, 2013. The E-1 stated Claimant injured his left shoulder while lifting bags into a cart.

8. Dr. Kleiner examined Claimant on August 8, 2013 and discerned profound weakness in his left upper extremity and left shoulder abductor. Dr. Kleiner thought this was related to the C5 nerve compression, as Claimant had severe foraminal stenosis at C4-5. He also noted supraspinatus atrophy and weakness on abduction, which could be related to a labral tear and cyst. Dr. Kleiner recommended an EMG and MRI of the left shoulder.

9. Claimant also went to OccMed Colorado (the ATP for Employer) on August 8, 2015 and was seen by "Jim", which refers to Jimmie Keller, PA-C, as noted infra. At that time, Claimant reported pain in the left shoulder. He reported no numbness or tingling and denied any previous history. Claimant was diagnosed with a shoulder strain.

10. On August 19, 2013, Claimant was evaluated by Gary Zuehlsdorff, D.O/Jimmie Keller, PA-C, at OccMed and reported he had seen Dr. Kleiner, a spine surgeon, for left arm symptoms which were not in the initial report or on the pain

[3] Claimant was also seen for other non-occupational health issues at this appointment.

diagram. Dr. Zuehlsdorff's assessment was sprain/strain of left shoulder and new complaint of left-sided cervical pain. The MRI/arthrogram (8/12/13) showed rotator cuff tendinopathy without full thickness tear and impingement syndrome. Claimant was referred to Rajeesh Bazaz, M.D. for his shoulder.

11. Dr. Kleiner reviewed Claimant's MRI on August 20, 2013 and noted left rotator cuff tendiopthy, without a tear. Foraminal stenosis was noted at C3-4 and C4-5. Dr. Kleiner recommended a subacromial bursa injection and opined if this did not help, the bulk of his problem was related to the foraminal stenosis.

12. Claimant saw Dr. Bazaz on August 30, 2013. In the first office note, Dr. Bazaz said he did not think there was any evidence of significant partial thickness or full thickness rotator cuff pathology. There was some tendinopathy which was age appropriate. No shoulder surgery was indicated. Dr. Bazaz recommended treating the problem as an impingement issue with physical therapy.

13. On September 27, 2013, Claimant returned to Dr. Bazaz, who noted Claimant's main issue was weakness in the left upper extremity. On examination, Claimant had reduced ROM on forward flexion and abduction, as well as "global" rotator cuff weakness. He could not explain the patient's lack of active range of motion or weakness from a rotator cuff standpoint based on the MRI. Dr. Bazaz did not think this was truly a problem inside the shoulder joint, but thought this was more a neurologic irregularity. He noted Claimant was being evaluated by Dr. Kleiner to see what the next step would be from a cervical standpoint. Dr. Bazaz recommended focusing away from the shoulder and evaluating the neurologic irregularity.

14. On October 1, 2013, Respondent filed a General Admission of Liability (medical benefits only).

15. Claimant returned to Dr. Kleiner on November 14, 2013, who noted there was no benefit from the subacromial bursa injection. Dr. Kleiner recommended an endoscopic foraminotomy and Claimant wished to proceed with the surgery.

16. Claimant returned to Dr. Corren on November 1, 2013. Claimant had marked wasting in the biceps, triceps and shoulder girdle. Dr. Corren noted treatment for the shoulder had been transferred to the worker's compensation system. Dr. Corren's impression was left upper extremity weakness and muscle wasting, secondary to radiculopathy from cervical disk disease and foraminal stenoisis. He stated the shoulder had been cleared as a cause of these complaints.

17. A medical record review was done by Lawrence Lesnak, D.O. In his report dated November 20, 2013 on the issue of whether the left-sided C4-5 and C5-6 micro-foraminotomy was reasonable, necessary and related to the 8/5/13 injury. Dr. Lesnak noted Claimant had a significant history of left upper extremity weakness and there was evidence of chronic radiculopathies in the left C5 and C6 distribution. Dr. Lesnak concluded there was no medical evidence to suggest that any of the current left upper extremity symptoms were in any way related to the incident of August 5, 2013.

Although the proposed surgery might be reasonable and clinically indicated, Dr. Lesnak stated none of the cervical treatment was related to the occupational injury.

18. On December 2, 2013, Claimant underwent cervical spine surgery by Dr. Kleiner for C5-C6 denervation and foraminal stenosis. Dr. Kleiner noted Claimant had profound shoulder abductor weakness, with clear evidence of deltoid weakness. Analysis of his rotator cuff was carried out, but it demonstrated no substantial abnormalities. The CT scan and EMG studies confirmed the denervation and foraminal stenosis in Claimant's cervical spine for which surgery was done.

19. In an undated letter bearing a date stamp of January 31, 2014, Dr. Corren noted Claimant had left upper extremity complaints and weakness. Claimant was found to have multilevel spondylitic changes to his cervical spine, which were the most likely cause of the symptoms.

20. On February 4, 2014, Claimant underwent an IME with Timothy O'Brien, M.D. On examination, Dr. O'Brien found marked atrophy of the infra and suprspinatus musculature on the left. Limitations in his ROM were also noted. Dr. O'Brien concluded Claimant had chronic, preexisting degeneration and desiccation of multiple levels of the cervical spine that resulted in nerve root compression causing weakness, dysesthesias, and profound upper extremity atrophy, particularly regarding the left upper extremity shoulder soft tissue envelope. According to Dr. O'Brien, the left upper extremity complaints were caused by cervical spine pathology, not by the incident of August 5, 2013.

21. Dr. Lesnak issued a supplemental report dated February 28, 2014 in which he concluded that any treatment for the cervical spine and left upper extremity complaints were completely unrelated to the incident of August 5, 2013.

22. On April 16, 2014, Dr. O' Brien testified as a medical expert and the transcript of his deposition was admitted. Dr. O'Brien is a board-certified orthopedic surgeon and was Level II accredited pursuant to the W.C.R.P. Dr. O' Brien opined there was no acute injury or pathology shown by the MRI. Claimant had "dessication" changes, which Dr. O'Brien thought were related to his age. Dr. O'Brien noted the EMG revealed a C7 radiculopathy, which showed the problem was from the cervical spine, not the shoulder. Dr. O'Brien described this as a secondary impingement which was neurogenic, as opposed to mechanical. This was causing Claimant's left shoulder symptoms. The rotator cuff had no full thickness tear and was healthy, as seen on the MRI. Dr. O' Brien testified it was reasonable to provide treatment to Claimant for his left shoulder, as well as diagnostic testing. However, Dr. O'Brien did not believe the August 5, 2013 injury caused, aggravated or accelerated Claimant's cervical spine symptoms. Dr. O' Brien thought Claimant probably reached MMI as of September 27, 2013 and sustained no permanent medical impairment.

23. Claimant was examined by Mark Failinger, M.D. on June 9, 2014 to whom he was referred by Dr. Smith for a second opinion. Claimant had significant atrophy around the left shoulder, with external rotation strength 3+/5. Dr. Failinger opined this

was a neurologic problem in origin, not a shoulder problem. Dr. Failinger recommended an evaluation for the nerves and did not believe Claimant could build muscle.

24. Dr. Corren examined Claimant on September 4, 2014. Dr. Corren noted Claimant had experienced weakness in his left upper extremity since mid-2013, secondary to cervical disk disease. He continued to have weakness and muscle wasting, particularly in the biceps of his left arm. Dr. Corren confirmed the weakness and wasting in the biceps muscle on examination. Dr. Corren cleared Claimant for a C4-5 anterior cervical diskectomy and fusion.

25. On September 8, 2014, Claimant underwent a second cervical spine surgery, which was performed by Dr. Kleiner.

26. Greg Smith, D.O examined Claimant on November 13, 2014 and determined Claimant was at MMI. Dr. Smith noted Claimant was previously diagnosed with global atrophy of the shoulder, weakness and had undergone neck surgery. He also noted Dr. Failinger opined this was more of a neurological problem than a shoulder problem. Dr. Smith's assessment was sprain/strain of shoulder; new complaint of left-sided cervical pain consistent with aggravation from his shoulder; left shoulder girdle and arm weakness with global atrophy; cervical disc disease with myelopathy of the left upper extremity; left sided C3-4 and C4-5 foraminotomy at C4-54 and C5-6 with only minimal relief; status post surgical repair of his left shoulder[4].

27. Dr. Smith said he was asked to opine on shoulder range of motion for an impairment rating. Pursuant to the *AMA Guides*, Dr. Smith assigned a 7% upper extremity impairment, which converted to a 3% whole person impairment. In providing this rating, the ALJ infers Dr. Smith believed Claimant sustained a permanent medical impairment as a result of the August 5, 2013 injury. Dr. Smith found Claimant had permanent restrictions (after a functional capacity evaluation) which included: maximum lifting and repetitive carrying-15lbs. and pushing/pulling 20lbs. For maintenance treatment, Claimant could return to Dr. Kleiner three times per year for two years and to Dr. Smith three or four times per year over the next year.

28. Respondent requested a DIME and Thomas Fry, M.D. was selected to perform the examination.

29. On January 14, 2015, Claimant was evaluated by Dr. Kleiner, who noted an increase in the strength of his biceps deltoid and triceps, as well as improvement in Claimant's pain. Dr. Kleiner recommended a referral for a physical medicine consult to assist with rehabilitation and building up the strength of Claimant's biceps, triceps and deltoid. This was done in connection with follow up after the second cervical spine surgery.

30. J. Scott Bainbridge, M.D. examined Claimant on March 4, 2015 upon a referral from Dr. Kleiner. Claimant reported his strength was improving, but he still felt weak. On examination, full ROM was found with arm abduction and on extension; with

[4] This was a typographical error, as there was no evidence of a shoulder surgery in the record.

some limitation on external rotation and flexion. Dr. Bainbridge noted all C5 innervated muscles had 4/5 strength, which was an improvement. Dr. Bainbridge's assessments were: brachial neuritis or radiculitis; degeneration of cervical invertebral disc. Dr. Bainbridge spoke to Dr. Smith, who was going to do the impairment rating.

31. Dr. Fry performed the DIME on April 28, 2015. Dr. Fry signed the Division IME Examiner's Summary Sheet on June 22, 2015. On that document, he confirmed Claimant had reached MMI and listed the date of MMI as 7/1/15. In his report, Dr. Fry, recorded Claimant's complaints as tightness and discomfort in the left shoulder, which increased with ROM testing. Dr. Fry found full ROM of the left shoulder on examination, including flexion, extension, abduction, adduction; internal and external rotation. No crepitus or instability was found. Dr. Fry's assessment was: cervical spondylosis post surgical release (foraminotomies); chronic C6 radiculopathy; left upper extremity atrophy and weakness secondary to #2; left shoulder discomfort without signs of intrinsic pathology, probably neurologic in origin; progressive improvement post surgery. Dr. Fry stated Claimant sustained a 0% medical impairment rating, as he opined Claimant's weakness in his upper extremity was related to the neurologic condition and not an intrinsic shoulder problem. Dr. Fry stated Claimant should be given a six month health club membership at a facility where he could work out and continue his work strengthening exercises.

32. Dr. Smith examined Claimant on May 22, 2015. He noted the chief complaint was left shoulder pain, with muscle wasting and radiculitis in the left upper extremity after the cervical fusion performed by Jeffrey Kleiner, M.D. on December 2, 2013[5]. Dr. Smith diagnoses were: left shoulder sprain/strain; new complaint of left-sided cervical pain consistent with aggravation from his shoulder; left shoulder girdle and arm weakness with atrophy; cervical disc disease with myelopathy of the left upper extremity; left-sided C3-4 and C4-5 foraminotomy by Dr. Kleiner; status post-foraminotomy surgery; status post surgical repair of left shoulder.

33. Dr. Smith observed this was a somewhat complex case involving a two-part impairment. He did not list a date for MMI (other than the 5/22/15 date of the evaluation). On the range of motion worksheet, he noted a loss of shoulder range of motion due to C4-C6 disc. Dr. Smith opined Claimant sustained a 3% impairment, which converted to a 2% whole person impairment. Dr. Smith recommended a health club membership, which he described as the Claimant's only maintenance. The ALJ credited Dr. Smith's opinion that Claimant was at MMI as of 5/22/15 and inferred Dr. Smith was of the opinion that Claimant's shoulder impairment was derived from his cervical spine.

34. Claimant testified he returned to work in August 2015 and was working full-time. He has continuing limitations in his left shoulder, which he described as weakness.

[5] This appears to be a typographical error, since that date refers to the first cervical surgery and the fusion surgery was done on 9/8/14.

35. Claimant testified he wished to continue treating with Dr. Smith, saying he was satisfied with his treatment.

36. Claimant testified he wanted to obtain the gym membership to increase his strength.

37. Based upon the parties' stipulation, Claimant's medical treatment for his cervical spine, including the surgeries, was not related to the August 5, 2013 industrial injury. The ALJ concluded the medical evidence supported the finding that Claimant's cervical spine caused his left upper extremity symptoms, including weakness and tingling. Objective findings were made by Claimant's treating physicians to support, including muscle wasting and radiculopathy.

38. Dr. Fry's evidentiary deposition was taken on September 28, 2015. Dr. Fry was asked about his conclusions regarding MMI. When asked why he selected an MMI date of July 1, 2015, which was after the evaluation. Dr. Fry testified: "I picked that date because he stated he had a follow-up appointment – I believe it was with Dr. Smith on the 22nd – it may have been May – and I didn't know what was going to become of that appointment. So I picked a date after that." [Fry deposition, p. 9:17-21]. Dr. Fry confirmed the medical records, including the MRI and EMG studies ruled out the shoulder as the source of Claimant's symptoms. However, Claimant still underwent a number of evaluations and accordingly Dr. Fry did not feel it was appropriate to put Claimant at MMI until after these evaluations. [Fry deposition, pp. 13:11-14:2]

39. In his deposition, Dr. Fry agreed the shoulder pathology was from cervical radiculopathy and Claimant's treatment (including physical therapy) was to address issues from the cervical spine. Dr. Fry allowed that it was reasonable to state Claimant was at MMI as of September 27, 2013, after Dr. Bazaz evaluated him. Dr. Fry also declined to characterize his testimony as a change of opinion regarding the date of MMI in his deposition, stating: "No, because whether I agree retrospectively with what the doctors were doing and what the origin of his problem was, the patient was, indeed, being treated for his shoulder." [Fry deposition, pp. 16:25-17:8]. Dr. Fry stated whether the treatment was appropriate was a different issue. The ALJ infers Dr. Fry was stating the treatment being provided to Claimant during the aforementioned time period was appropriate. Dr. Fry also testified he was making a determination regarding Claimant's "overall" date for MMI. Dr. Fry testified he believed Claimant was at maximum medical improvement for the shoulder, since he did not find any particular impairment in the shoulder itself. The ALJ was not persuaded by Dr. Fry's testimony regarding various potential dates for MMI.

40. The ALJ found Dr. Fry's conclusion that Claimant was at MMI on July 1, 2015, a date in the future, was an error. Respondents sustained their burden of proof and overcame Dr. Fry's MMI finding by clear and convincing evidence.

41. The ALJ credited Dr. Fry's opinion regarding Claimant's upper extremity impairment. In particular, Dr. Fry opined that the weakness in the upper extremity was related to the neurologic condition and not an intrinsic shoulder problem. This finding

was also made by several of Claimant's treating physicians, including Drs. Bazaz, Corren, Kleiner and Failinger. Therefore, Claimant was not entitled to a work-related rating for his shoulder.

42. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of various health care providers on the question of MMI and Claimant's need for continuing treatment were the preeminent issues.

Overcoming the DIME On the Issue of MMI

Respondent contends Dr. Fry erred in his determination that Claimant would not reach MMI until 7/1/15. In this regard, Respondent argued Dr. Fry findings regarding the date of MMI were conflicting and/or ambiguous. Respondent averred the date of MMI was earlier and pointed to Dr. Fry's deposition testimony, as well as the medical records to support it's contentions.

Claimant asserted Dr. Fry's conclusion regarding MMI was correct and argued Respondent failed to meet its burden of proof to overcome Dr. Fry's opinion by clear and convincing evidence.

The ALJ's analysis of this issue was two-fold, beginning with an evaluation whether Dr. Fry's projection of an MMI date in the future comported with the statute and rules governing MMI. Subsumed within this consideration is the evaluation of the evidence presented by Respondent in support of their claim that Dr. Fry erred. As noted below, the ALJ found Respondent met its burden of proof and determined Dr. Fry's opinion on the date of MMI was erroneous.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties, unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980). A party meets this burden only by demonstrating that the evidence contradicting the DIME's MMI is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002)(citing *DiLeo v. Koltnow, supra*).The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998).

A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the Claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990). In this case, the DIME physician's opinion did not so much concern the need for additional treatment, but projected a future date for MMI after an evaluation by the ATP.

In this case, the controversy centered on Dr. Fry's determination Claimant would be at MMI on July 1, 2015, approximately two months after he examined Claimant. The ALJ found Dr. Fry's conclusion after the DIME did not really confirm Claimant's condition had become "stable and when no further treatment is reasonably expected to improve the condition" [Section 8-40-201(11.5), C.R.S.], in that he referenced a further evaluation by Dr. Smith.

The Act defines MMI as:

> " a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."
> Section 8-40-201(11.5), C.R.S.

By its very language, the statutory definition of MMI excludes a finding like what was made here by Dr. Fry, namely projection to a date in the future. The MMI definition presumes a finding by the physician that when Claimant was evaluated, he or she was medically stable and no further treatment was required. This does not preclude the DIME physician from confirming an MMI date in the past (made by the ATP), however, a projection to some date in the future would not be countenanced under this statutory definition. In the case at bench, Dr. Fry concluded Claimant was at MMI, but on a date in the future. Implicit in this finding was the conclusion that Claimant was not at MMI when Dr. Fry evaluated him on April 28, 2015.

The ALJ found the DIME physician's estimate of the MMI date was erroneous. To the extent Claimant was not at MMI when he was evaluated, Dr. Fry could have concluded this. Indeed, the DIME Examiner's worksheet specifically provides for this possibility. Moreover, both the Act and the W.C.R.P. provide for a follow-up examination by the DIME physician, at which time Dr. Fry could have given a definite MMI date.

In addition, Dr. Fry explained he also made this determination because Claimant had a return appointment with the ATP (Dr. Smith) on May 22, 2015. (Finding of Fact No. 38). Therefore, Dr. Fry's MMI determination was based, at least in part, on an event which had not yet occurred. As found, making this determination dependent upon an event which had not occurred did comport with the statute and was in error.

Under these circumstances, the ALJ found the DIME examiner's opinion on MMI equivocal and somewhat ambiguous. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*, 5 P.3d at 388. When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). An ALJ may consider the DIME physician's deposition testimony as part of his opinion for purposes of determining the DIME physician's opinion. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

The inquiry then turned to what was Dr. Fry's ultimate opinion regarding the date of MMI. In effect, Respondent argued that the DIME report and Dr. Fry's deposition testimony (which was admitted as part of the record) provided clarity as to the date of MMI. The ALJ did not find such clarity in the record, as Dr. Fry's testimony did not dispel the confusion regarding the date of MMI.

When testifying, Dr. Fry offered several explanations as to his thought process when determining the date of MMI. In particular, Dr. Fry disagreed with the suggestion while being questioned that Claimant was at MMI, at least as of November 1, 2013 when Dr. Corren saw him. (Finding of Fact No. 38). Dr. Fry then agreed that June 9, 2014 was a reasonable date for MMI, when he confirmed the orthopedic surgeons had ruled out the left shoulder as the source of his continuing pain. However, Dr. Fry declined to characterize his conclusion as a change of opinion, noting he agreed retrospectively with what the doctors were doing and what the origin of Claimant's pain was. (Finding of Fact No. 39). As found, Dr. Fry's multiple opinions were not clear and led to the ALJ's conclusion his MMI opinion was overcome.

Because Dr. Fry offered different opinion on the date of MMI, the ALJ reached a conclusion based upon the evidence submitted at hearing. Based upon the totality of the medical evidence before the Court, the ALJ concluded Claimant reached MMI when he returned to Dr. Smith on May 22, 2015. (Finding of Fact No. 33).

Change of Physician

Respondent seeks a change of physician from Dr. Smith. Respondent argued Dr. Smith continued to treat Claimant, even after the parties stipulated that the treatment for the neck was not related and the medical evidence showed Claimant's symptoms were from his cervical spine. At the outset, the ALJ notes there is a question whether Respondent is entitled to seek a change of physician under 8-43-404(5)(a)(III), C.R.S. and 8-43-404(5)(a)(VI), C.R.S; which refer to the "employee" and "injured employee", respectively. Even assuming *arguendo,* such a request for change of physician is allowed, Respondent has the burden of proving that it is entitled to a change of physician at this juncture.

Respondent did not adduce sufficient evidence which would support a change of physician. Respondent argued Dr. Smith continued to treat the Claimant, however, the record had only two instances of evaluations by Dr. Smith after May 14, 2014 when the stipulation was approved by ALJ Order.

In addition, Respondent did not offer statutory or other authority which provided a basis for a change of physician. The ALJ has insufficient evidence and no statutory basis to grant Respondent's request for a change of physician at this time. As such, the request for change of physician is denied.

Medical Benefits

As found, Dr. Smith recommended a six month health club membership to help with strengthening. This was the only maintenance treatment recommended by Dr.

Smith. Incidentally, Dr. Fry also concurred in this recommendation. The ALJ credited these opinions. There was no contrary evidence introduced at hearing and the ALJ found Claimant sustained his burden of proof for maintenance medical benefits. Therefore, Respondent shall provide a six month health club membership to Claimant as *Grover* medical benefits.

ORDER

It is therefore ordered that:

1. Claimant was at MMI as of May 22, 2015.

2. Respondent's request for change of physician is DENIED.

3. Respondent shall provide maintenance medical benefits in the form of a six-month health club membership.

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 23, 2016

Digital signature

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

ISSUES

1. Whether the Claimant proved by a preponderance of the evidence that she sustained a worsening of her condition that would entitle her to a reopening of W.C. Case No. 4-903-504 under Section 8-43-303(1), C.R.S.

2. If the Claimant proved that her condition worsened, whether the Claimant proved, by a preponderance of the evidence, that the left knee surgery is reasonably necessary and causally related to the Claimant's November 10, 2013 admitted work injury.

FINDINGS OF FACT

1. The Claimant's date of birth is September 21, 1943 and she is currently 72 years old.

2. The Claimant was employed by Employer as a janitor and she was employed by Employer in this capacity for approximately 3-4 months prior to an incident on November 10, 2013. Prior to that, the Claimant had worked for a different grocery store employer for about 8 ½ years.

3. The Claimant has a long history of rheumatoid arthritis and Dr. Ndudi Oparaeche treated her for rheumatoid arthritis, osteoarthritis, fibromyalgia and low back and joint pain for a number of years. Medical records starting in January of 2010 document the Claimant's treatment (Respondent's Exhibit E). As of July 1, 2013, the Claimant was started on the medication Xeljanz for her inflammatory arthritis and Dr. Oparaeche noted that the Claimant's right knee swelling and other joint swelling was improved as was her pain (Respondent's Exhibit E, pp. E33-E34). On September 4, 2013, Dr. Oparaeche noted the Claimant's rheumatoid arthritis was improved on the Xeljanz although there had been some supply issues (Respondent's Exhibit E, pp. E35-E36).

4. The Claimant sustained an admitted injury on November 10, 2013. The Claimant testified that she was told to go up to the men's bathroom for a water problem. She testified that she brought a mop to pick up liquid on the floor, but realized the mop was not going to do the job sufficiently. The Claimant testified that she then exited the door, coming out adjacent to the stairs and became tangled up in the mop. She tumbled down all 18 steps. During the tumble, the Claimant testified that she first caught her wrist and broke it, then she kept tumbling until reaching the bottom landing on her back and she also hit her knee on concrete.

5. The Employer's First Report of Injury states that the Claimant was injured at 3:45PM on November 10, 2013 when she fell down the stairs attempting to retrieve a mop to clean restrooms. It provides that "the EE broke her wrist. It is unknown what other injuries she sustained. The EE's husband came and picked her up…" (Respondent's Exhibit A, p. A1).

6. At the emergency room at the Medical Center of Aurora, the Claimant was seen on November 10, 2013 due to injuries from a fall that occurred at work. The chief concerns were that the Claimant sustained a blow to the head, without any loss of consciousness and injuries to right wrist. The Claimant was diagnosed with a head injury and a right distal radius fracture and a right distal ulnar fracture. There do not appear to be any references to any knee pain or injury in the medical note documenting this visit (Claimant's Exhibit 3).

7. The Claimant next saw Dr. Matthew Lugliani for an initial evaluation on November 13, 2013. The Claimant's chief complaint was right wrist pain. The Claimant advised Dr. Lugliani that she was experiencing pain in her right wrist, left knee pain and left-sided rib pain. The left knee pain, in particular, was described as "dull and achy in nature, worse with weight bearing or prolonged standing or walking" but with no locking, popping, or giving way (Claimant's Exhibit 5, p. 48; Respondent's Exhibit C, p. C22). At Dr. Lugliani's request, left knee radiographs were performed. The radiologist, Dr. Ellen R. Blatt, noting findings of "an oblique fracture of the lateral aspect of the proximal tibial metaphysic with extends to the articular surface. This is associated with large joint effusion." The impression was, "medial tibial plateau fracture. Follow up CT scan or MRI is recommended" (Respondent's Exhibit D, p. D5). The Claimant also reported the immediate onset of left knee pain to Dr. Kovachevich at Hand Surgery Associates on November 14, 2013 (Claimant's Exhibit 4, p. 27).

8. Dr. Lugliani later diagnosed the Claimant with left knee medial tibial plateau fracture and sprain and noted her history of severe arthritis (Respondent's Exhibit C, p. C20).

9. The Claimant's rheumatoid arthritis treatment provider, Dr. Oparaeche, noted on January 9, 2014 that the Claimant had been in a work injury where she fell down 17 steps at work and had surgery on her wrist (Respondent's Exhibit E, pp. E37-E38).

10. On January 10, 2014, the Claimant underwent a CT scan of the left knee and a hairline, nondisplaced, intra-articular fracture of the medial tibial plateau was found along with a large left knee joint effusion and mild osteopenia (Claimant's Exhibit 6, p. 51).

11. The Claimant saw Dr. Stewart Weinerman on January 20, 2014 for increased knee swelling and pain with activity. Dr. Weinerman assessed the Claimant with a tibial plateau fracture that was new. He recommended an injection and the Claimant's knee was first aspirated and 45 cc's of fluid was obtained and then the

Claimant's knee was injected with Xylocaine and Depmedrol (Claimant's Exhibit 7, pp. 69-72; Respondent's Exhibit G, p. G-1).

12. The Claimant saw Dr. Lugliani on March 20, 2014 and he noted that the Claimant reported "continued left knee pain that she rates at 3/10 in severity, worse with weight bearing or prolonged walking. She denies any locking, popping or giving way." Dr. Lugliani referred the Claimant back to Dr. Weinerman for a possible repeat injection. The Claimant's work status was listed as "working full duty" and she continued to work full duty, tolerating it without any complications per Dr. Lugliani. He noted that the Claimant informed him that she did not want to undergo any surgery (Claimant's Exhibit 5, pp. 44-45; Respondent's Exhibit C, pp. C5-C6).).

13. The Claimant saw Dr. Weinerman again on March 25, 2014 and he noted that the injection performed on January 20, 2014 only lasted a few weeks and the pain and swelling were present after that for two months. Dr. Weinerman characterized the Claimant's knee condition as "deteriorated" and performed a second injection. First the knee was aspirated and this time 65 cc's of fluid was obtained and then she was injected again with Xylocaine and Depomedrol (Claimant's Exhibit 7, pp. 65-68).

14. On April 3, 2014, the Claimant saw Dr. Lugliani again after the repeat injection from Dr. Weinerman. The Claimant reported that she continued to have pain that she rated from 3-5/10 in severity. Dr. Lugliani determined the Claimant was at MMI with no permanent impairment and discharged her from his care but recommended maintenance follow up with Dr. Weinerman, as needed, for mediation adjustments, joint aspiration and joint injections. He returned her to work at full duty with no restrictions (Claimant's Exhibit 5, pp. 42-43; Respondent's Exhibit C2-C3).

15. Also on April 3, 2014, on referral from her PCP Dr. Kevin Scott, the Claimant treated with her rheumatoid arthritis doctor, Dr. Oparaeche. He indicated that the Claimant reported that her left knee swells up and was fractured but healed up on its own. Dr. Oparaeche surmised that the wrist and knee swelling may be from active rheumatoid arthritis and the doctor wanted to have the Claimant consistently treat with Xeljanz to see if there was any improvement. Dr. Oparaeche noted that due to the Claimant's complicated history and by new events and the stopping and starting of medication, it is difficult to determine the cause of the Claimant's various ailments. Dr. Oparaeche did note that the Claimant "never complained of knee effusions in the past," so the doctor wanted to confirm the Claimant's report of a knee fracture that "healed spontaneously and is causing large volume effusions." Dr. Oparaeche noted that as this was through Worker's Compensation, it may be difficult to obtain records on this. (Respondent's Exhibit E, pp. E39-E40).

16. The Respondent filed a Final Admission of Liability on April 24, 2014 in accordance with Dr. Lugliani's April 3, 2014 medical report admitting for no impairment but admitting for post MMI medical treatment that is reasonable and necessary (Respondent's Exhibit A, p. A7). At the hearing, the Claimant testified that she had no attorney and did not object to the Final Admission of Liability.

17. The Claimant saw Dr. Oparaeche again on July 30, 2014. Dr. Oparaeche noted that the Claimant "is hurting everywhere. The neck, fingers, legs, ankles and more. She ran out of her medication as she had to take more." Dr. Oparaeche also noted that the Claimant's "left knee has hurt and swollen more since her fall, she has gotten steroid injections from workers comp with some benefit but is limited to 3 a year." Dr. Oparaeche also noted that the Claimant cannot be started on a biologic therapy or Xeljanz until multiple myeloma is ruled out. An I.M. steroid injection bridge was performed as the Claimant was flaring. Dr. Oparaeche expressed some frustration about what to do about the Claimant's conditions due to poor compliance with medication (Respondent's Exhibit E, pp. E41-E42).

18. The Claimant returned to see Dr. Weinerman on August 22, 2014 for her left knee pain. She reported that there was "increased pain with activities, popping, and grinding." Dr. Weinerman noted that the prior injection gave the Claimant some relief, but her other symptoms have gotten worse. On examination, Dr. Weinerman noted swelling and effusion. Dr. Weinerman aspirated the Claimant's knee, obtaining 30 cc's of fluid. The Claimant was then injected again with Xylocaine and Depomedrol (Claimant's Exhibit 7, pp. 61-64; Respondent's Exhibit G, pp. G4-G7).

19. On September 24, 2014, the Claimant saw Dr. Oparaeche again. Dr. Oparaeche noted the Claimant had her left knee drained again which limited how much she could walk. The Claimant reported that the workers compensation physician offered a surgical procedure but she stated that she didn't want to hear about it. Dr. Oparaeche encouraged the Claimant to inquire about the offered surgical procedure at the next visit. Dr. Oparaeche noted that the Claimant reported the steroid bridge administered at the last visit did not help, but stated that there was obvious improvement in synovitis. Per Dr. Oparaeche, the Claimant remained functional but was restricted at work from the hematologist to no more than four hours per day. Regarding the Claimant's various conditions, Dr. Oparaeche commented as follows:

> Rheumatoid arthritis: the Claimant has the active disease, but there are restrictions to getting more effective biologic treatment due to prior medication non-compliance and a dormant myeloma which required avoiding immune suppression. Cost of medications is also a factor.
>
> Fibromyalgia, unspecified: the Claimant was maintained on hydrocodone due to a claim of morphine intolerance. Dr. Oparaeche recommended switching from short-acting hydrocodone at 6 per day to long-acting generic hydromorpone and also recommended referral to a pain clinic.
>
> Osteoarthritis, unspecified whether generalized: the hand osteoarthritis overlaps the rheumatoid attractors and confuses the diagnosis of the disease. However, since the joint swelling is much improved from the last visit, this confirms rheumatoid activity.

> Unspecified arthopathy involving lower leg: The knee still has residual swelling, arthrocentesis without steroid injection will only last so long. Dr. Oparaeche notes concerns with repeated joint procedures as the Claimant had previous ankle septic arthritis. Dr. Oparaeche encouraged the Claimant to consider the arthroscopic procedure if it is offered.
>
> (Respondent's Exhibit E, pp. E45-E46)

20. When the Claimant saw Dr. Weinerman again on November 4, 2014 he noted that the Claimant reported the last injection given on August 22, 2014 provided only about 3 days of relief and her knee symptoms are the same, including that her knee gives out on her and feels weak. The knee was aspirated again and 65 cc's of bloody fluid was obtained, and then Xylocaine and Depomedrol was injected (Claimant's Exhibit 7, pp. 57-60).

21. The Claimant was seen on January 9, 2015 by Dr. George Schakaraschwili and Nurse Practioner Don Fresqus, on referral from the Claimant's PCP, Dr. Scott for a comprehensive consultation for her chronic pain issues. Dr. Schakaraschwili notes that the Claimant has arthritis all over her body which causes her significant pain. She has a past history of stomach ulcers and bowel obstruction. She had a past injury in 1991 when she fell off a ladder breaking both her tibia-fibula bones. She has a recent history of falling down 18 steps at work on November 10, 2013. She also has a history of 3 back surgeries, a fusion in 1971 with revisions in 1983 and 1984 and cervical fusion. She has a dormant myloma. Dr. Schakaraschwili notes the Claimant has been treated with Norco and is in need of chronic pain management. He noted the Claimant is also on anticoagulation therapy due to her atrial fibrillation and history of deep vein thrombosis (DVT) and pulmonary emboli. Dr. Schakaraschwili assessed the Claimant with "chronic pain due to multiple comorbidities to include rheumatoid arthritis, osteoarthritis, scoliosis, history of cervical and lumbar fusions, history of atrial fibrillation, history of a pulmonary embolus and deep vein thrombosis on anticoagulation therapy." Dr. Schakaraschwili continued the Claimant on Norco and placed her on a Fentanyl patch for better long-term control of her pain (Respondents' Exhibit H, pp. H1-H3). The Claimant saw Dr. Schakaraschwili again on January 23, 2015 and she was tolerating the Fentanyl patch, so Dr. Schakaraschwili increased the dosing and increased the Norco fro breakthrough pain as well (Respondent's Exhibit H, pp. H4-H5).

22. The Claimant saw Dr. Weinerman again on February 3, 2015 and she reported her last injection on November 4, 2014 gave her little to no relief. She reported that her knee had given out on her several times and it pops. Dr. Weinerman noted a knee effusion and assessed the Claimant's condition as deteriorated. He noted grinding and crepitus and medial joint line tenderness along with the swelling and effusion. Dr. Weinerman did not perform an aspiration and injection at this visit, but rather recommended surgery (Claimant's Exhibit 7, pp. 53-56; Respondent's Exhibit G, pp. G8-G11).

23. On February 17, 2015, legal counsel for the Respondent sent correspondence to Dr. Weinerman advising him that Respondent decline to authorize the recommended left total knee arthroplasty (Claimant's Exhibit 8, p. 74).

24. On March 18, 2015, the Claimant saw Dr. Barry Ogin and NP Don Fresques for her chronic pain management. He noted the Claimant was doing well on a Fentanyl patch and was utilizing Norco for breakthrough pain and was compliant with her medicine regimen. The Claimant reported that she continued to work part-time and was doing extremely well. The Fentanyl and Norco was continued and the Claimant was placed on Neurontin at nighttime for sleep disturbance and restless leg syndrome (Respondent's Exhibit H, pp. H6-H7).

25. The Claimant saw Dr. Tim O'Brien for an independent medical examination (IME) and he prepared a written report dated April 3, 2015. Dr. O'Brien took a detailed history of the present illness and it is generally consistent with the medical records contemporaneous with and subsequent to the date of injury. Of note, the Claimant reported to Dr. O'Brien that she reported pain in her left knee immediately, in addition to the significant pain and deformity in her right wrist. She advised Dr. O'Brien that not much attention was directed to the left knee and x-rays were not even taken at the initial medical evaluation, likely due to concerns related to the severe right wrist pain (Respondent's Exhibit B, p. B2). The Claimant reported that she has pain throughout her body and it wears her out and makes her tired, but can also make it difficult to sleep. Her general activities of daily living increase her pain. Her pain and stiffness is worse when she sits and that is why she likes to work and returned to work for Employer (Respondent's Exhibit B, pp. B2-B3). On physical examination, with respect to the left knee, Dr. O'Brien noted that "there was lateral joint line tenderness of the left knee and no medial joint line tenderness. Patellofemoral pain was noted with manipulation" This was noted bilaterally with crepitus bilaterally. Dr. O'Brien noted that "there was mild lateral pseudolaxity with varus stressing of the left knee" which was not noted on the right (Respondent's Exhibit B, p. B5). Dr. O'Brien's review of the medical records only included records from November 10, 2013 through February 3, 2015 that were from the worker's compensation physician and referrals. Other medical records do not appear to have been provided for this IME (Respondent's Exhibit B, pp. B6-B9). Taking into account the above, Dr. O'Brien opined that the November 10, 2013 work incident resulted in (1) a comminuted closed displaced intraarticular distal radius and ulna fracture of the right wrist; and (2) a nondisplaced fracture of the medial tibial plateau of the left knee (Respondent's Exhibit B, pp. B9-B10). Dr. O'Brien opined that treatment up to the date of his report has been reasonable. With respect to the left knee in particular, he noted that this was what he characterized as "a very minor fracture." He questioned how significant the Claimant's left knee osteoarthritis was prior to her work incident. He felt that if the Claimant's prior degeneration were significant enough to qualify her as a candidate for total knee arthroplasty prior to her injury, then a minimally displaced fracture probably had no significant accelerating effect on the Claimant's need for a total knee arthroplasty (Respondent's Exhibit B, p. B10). He indicated that it would be critical to review the medical notes from the Claimant's rheumatologist and any pre-existing radiographic studies of her left knee (Respondent's Exhibit B, pp. B10-B11).

Nevertheless, Dr. O'Brien opined hypothetically that if the Claimant requires a total knee arthroplasty, then "it is medically probable an intraarticular fracture in a knee that had pre-existing arthritic changes, accelerated those pre-existing arthritic changes and thus accelerated the need for a total knee arthroplasty" (Respondent's Exhibit B, p. B11). Although, Dr. O'Brien did indicate that he is not able to ascertain whether the Claimant is a candidate for total knee arthroplasty as he is not in receipt of critical medical records and imaging studies (Respondent's Exhibit B, p. B12).

26. On April 15, 2015, the Claimant saw Dr. Ogin and NP Fresques reporting that her pain level was stable at around a 7 level and her medicine regimen was about 60% effective. She remained functional and continued to work part-time. The medication regimen of Fentanyl and Norco was continued (Respondent's Exhibit H, pp. H8-H9).

27. On September 1, 2015, Dr. O'Brien issued a Supplemental Report upon receipt of additional medical records of the Claimant, including radiology and imaging studies (Respondent's Exhibit B, pp. B13-B19). In light of his review of the additional medical record documentation, Dr. O'Brien stated that his opinions rendered in his April 3, 2015 report have changed. His opinion that the Claimant sustained a nondisplaced fracture of the medial tibial plateau of the left knee remains unchanged. However, Dr. O'Brien now opines that the records demonstrated that the Claimant had significant osteoarthritis of the left knee prior to the work incident and that the long-standing pre-existing condition was intermittently symptomatic prior to the work incident (Respondent's Exhibit B, p. B19). Having reviewed the Claimant's imaging studies, Dr. O'Brien notes that the significant aspect of the Claimant's osteoarthritic process is that it was isolated to the lateral compartment of the Claimant's knee, and, on a lateral view, there is bone on bone contact. The Claimant also has a significant history of rheumatoid arthritis, prior nicotine abuse, and age-related, genetically induced osteopenia. Dr. O'Brien opines that with all of these pre-existing factors, the Claimant had significant softening of the bone, which meant that it took very little trauma to fracture her medial tibial plateau. While Dr. O'Brien acknowledged that the Claimant fell down many stairs and overall experienced a significant trauma, with respect to the fracture of the medial tibial plateau, he opined this was a very low energy injury resulting in a slight fracture that was so insignificant it was not visualized on plain radiographs, only a CT scan. The difficulty in even identifying the fracture at first is the main focus of Dr. O'Brien's change of opinion that the work injury may have aggravated or accelerated her osteoarthritic condition beyond its normal rate of progression. Dr. O'Brien opined that, in light of the new evidence available to him, he now finds that the work injury did not aggravate or accelerate the Claimant's need for a knee replacement. Instead, he opines that the Claimant was a candidate for total knee replacement prior to her accident and the medial tibial plateau fracture did not, in any way, alter that or impact her pre-existing osteoarthritis (Respondent's Exhibit B, pp. 20-21). In addition to the imaging evidence, Dr. O'Brien also found the medical reports of Dr. Oparaeche support his change of opinion. In particular he points to a January 9, 2014 report where there is no mention of left knee pain, an April 3, 2014 report in which the Claimant reported that the left knee injury "healed on its own" and Dr. Oparaeche's comments that swelling in the Claimant's

knee and wrist may be from active rheumatoid arthritis (Respondent's Exhibit B, p. 21). Dr. O'Brien also points out that the Claimant's reports of an increase in symptoms, including locking and popping well after the fracture was felt to have healed. Dr. O'Brien opines that, to the extent the Claimant is experiencing increased knee symptoms, they are unrelated to the knee fracture which healed uneventfully, and are instead causally related to her pre-existing condition and also the result of nonorganic factors and secondary gain issues (Respondent's Exhibit B, p. B22). Dr. O'Brien finally points to the location of the fracture which did not extend into the joint line, but rather into the inter condylar notch. Dr. O'Brien finds that this substantiates his opinion (Respondent's Exhibit B, B23).

28. At the hearing, the Claimant testified that her knee condition has worsened since April of 2014. She testified that it is now to the point that she can't take one step after the other. Rather, she has to go one step at a time. The Claimant testified that when the doctor drained her knee and gave her an injection, it helped somewhat. She testified that she saw blood fill up the whole needle when he drained her knee. She testified that she can't walk "like a normal person" and that she has started to "crack and grind." She testified that her limp is now much more pronounced and her knee goes out on her causing her to fall. This didn't happen before her fall on the stairs. In the last 2 months her knee went out quite a bit, 5 – 6 times more. On cross-examination, the Claimant agreed that although she only works 20 hours per week now, as opposed to the 30-38 hours she used to work, this is due to restrictions from Dr. Faragher, the doctor the Claimant sees for her cancer diagnosis.

29. Subsequent to the hearing, Dr. Timothy O'Brien testified by deposition on November 10, 2015 as an expert witness in the field of orthopedic surgery (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 3). Dr. O'Brien testified regarding his understanding of the Claimant's mechanism of injury of falling down approximately 17 stairs. He noted that the left knee tibial plateau fracture was a low-energy injury that did not result in displacement, did not extend into the weight bearing portion of the knee joint and did not fracture or disrupt any of the cartilage of the knee joint and was not a fracture that is considered significant (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 5-6). In reconciling what would seem to be a high-energy severe mechanism of injury with what Dr. O'Brien characterizes as a low-energy fracture to her tibial plateau, Dr. O'Brien testified that, "there's not always a direct correlation by what seems to be a severe mechanism and the injury it produces" (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 8). In the case of the Claimant, Dr. O'Brien opines that while the Claimant's fall was traumatic, the vast majority of the trauma from the fall was absorbed by her right wrist and that is where the energy from the impact occurred. In comparison to the violent impact of the wrist injury, in comparison the way that the impact occurred for the knee was low energy and the crack in the bone did not displace. Even in spite of the weakened nature of her bone and the loss of calcium, all that occurred was "a tiny, little crack"(Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 8-10). In fact, Dr. O'Brien later elaborates stating that given the condition of the Claimant's bone, a high-energy impact would have shattered it and it would have literally disintegrated, but it did not, which points to an insignificant amount of energy

required to create the tiny crack in her diseased bone (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 27-28). Then the crack healed, as would be expected (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 10). Dr. O'Brien does agree that the Claimant is a candidate for knee replacement surgery. However, after an opportunity to review reports from the Claimant's rheumatologist and the Claimant's imaging reports, he opines that the Claimant had advanced arthritis in her left knee (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 12-17). In addition, upon viewing the January 2014 CAT scan, Dr. O'Brien testified that he was able to determine that the Claimant's fracture didn't involve a weight-bearing surface and it didn't involve a part of the joint that had cartilage on it. Rather, the fracture went from outside the joint to that interchondral notch where ligaments lie, but not any part of the joint that has to do with weight bearing. He testified that the significance of this is that an extra-articular fracture, such as Claimant's, can't accelerate pre-existing arthritis (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 17-19). Although Dr. O'Brien acknowledges that the Claimant has testified that symptomatically she is worse, he opined that her joint was already bone on bone and she can't lose any more cartilage when there is none left to lose. From that standpoint, Dr. O'Brien testified that she was end-state before her injury and she couldn't become any more end-stage. Her symptoms were progressing for years due to her underlying conditions, but the further progression is not due to her injury, but merely because the Claimant has an incurable, relentlessly progressive condition (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 31-32). On cross-examination, the November 13, 2013 radiographs of the Claimant's left knee were referenced, and in particular, the reference to the fracture in the Claimant's left knee identified in the report. Dr. O'Brien agreed that the report of the November 13, 2013 radiograph does reference a fracture although his supplemental written report stated that no fracture was visible on plain radiographs, only on the CT scan (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 33-35; also, see Respondent's Exhibit B, pp. 20-21). Dr. O'Brien also agreed that the fracture was clearly seen on the axial image 35 and 33 of series 2 of the CT scan (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, p. 35). Dr. O'Brien also testified that the surgery recommended by Dr. Weinerman is reasonable although he denied that it was related. With respect to whether or not the surgery is necessary, he testified that this is more of a subjective matter (Depo. Tr. of Timothy O'Brien, MD, November 10, 2015, pp. 35-36).

ULTIMATE FINDINGS OF FACT

30. There was considerable evidence presented of the Claimant's multitude of preexisting conditions. While Dr. O'Brien ultimately concluded that the Claimant's left knee condition did not worsen as a result of her November 13, 2013 work injury, but rather, it worsened as part of the natural progression of her preexisting conditions, notably her osteoarthritis, rheumatoid arthritis and osteopenia, there is also evidence to the contrary in the medical records.

31. First, Dr O'Brien testified that that he erred in his report when he stated that the Claimant's fracture was so insignificant that it was not detected by the initial

radiographs, as the radiology report dated November 13, 2013 clearly references the tibial plateau fracture, which was then also referenced in a follow up CT scan.

32. Additionally, while the Claimant has numerous preexisting conditions, until her work injury of November 10, 2013, the medical reports from Dr. Ndudi Oparaeche, her rheumatoid arthritis specialist, generally noted the Claimant hurt everywhere and was tired, it was not localized to her left knee. In fact, to the extent there was any reference to the Claimant's knees prior to the work injury, there was a reference in a July 1, 2013 medical note to swelling and pain in her right knee which was improved with a trial of the drug Xeljanz. Also, even with her preexisting conditions, the Claimant was able to perform her normal job duties. The Claimant saw Dr. Oparaeche on April 3, 2014, the same day that she was placed at MMI by Dr. Lugliani. At the visit with Dr. Oparaeche comments that the knee swelling may be from active rheumatoid arthritis, which is difficult to determine due to the Claimant's complicated history. However, Dr. Oparaeche also noted that the Claimant had never complained of knee effusions in the past, but since the work injury, something was causing large volume effusions in the left knee. On July 20, 2014, almost 4 months after the Claimant was placed at MMI, Dr. Oparaeche again noted that the Claimant's left knee has hurt more and swollen more since her fall, with some benefit from the steroid injections she received under the worker's compensation physician's care. On September 24, 2014, Dr. Oparaeche noted the Claimant still had residual swelling in the left knee and registered concerns with repeated joint procedures. Overall, in review of Dr. Oparaeche's records, the records from before the work injury and before MMI evidence pain and discomfort everywhere due to the Claimant's multiple conditions. It is only after the injury, that the left knee pain and swelling become more pronounced and documented. If, as Dr. O'Brien has opined, the injury had no impact whatsoever on aggravating or accelerating the condition of the left knee, and that the Claimant's current need for a left total knee replacement is due to the natural progression of her preexisting condition, it would be more likely than not that the need for a TKR would be bilateral and that the Claimant would complain of right knee pain and swelling as much, or more, than the left knee pain and swelling, especially as the right knee was more bothersome before the injury, per the records. However, after the November 10, 2013 work injury, there are multiple references to only left knee swelling and effusions in the medical records of the Claimant's rheumatoid arthritis specialist.

33. As for the left knee effusions, a review of the records provides support that the large volume left knee effusions may have a connection to a traumatic process accelerating the Claimant's preexisting arthritic process, and they are also indicative of a worsening of the Claimant's condition after MMI. Dr. Lugliani referred the Claimant to Dr. Weinerman for treatment directed at the left knee after reviewing a January 10, 2014 CT scan which showed a nondisplaced, intra-articular fracture of the medial tibial plateau along with a large left knee joint effusion. On January 20, 2014, Dr. Weinerman aspirated the left knee and obtained 45 cc's of fluid which evidences a rather large volume effusion. The Claimant then received a steroid injection which provided some initial relief, but it wore off after about 2 weeks. The Claimant saw Dr. Weinerman next on March 25, 2014 and this time, 65 cc's of fluid was obtained upon aspirating the knee

and she received another steroid injection. When the Claimant saw Dr. Lugliani on April 3, 2014, a little over a week after receiving a second steroid injection, Dr. Lugliani placed her at MMI with no permanent impairment and returned her to work full duty with no restrictions. At that April 3, 2014 visit, the Claimant denied any locking, popping or giving way in her knee and her pain was rated between 3-5/10, post procedure from her March 25, 2014 aspiration/injection. Dr. Lugliani did recommend medical maintenance to include follow up with Dr. Weinerman for continued aspiration/injection procedures. Post-MMI, the Claimant next saw Dr. Weinerman on August 22, 2014. The Claimant now reported that she was experiencing increased pain with activities along with popping and grinding. Dr. Weinerman noted swelling and effusion and obtained 30 cc's of fluid upon aspiration of her knee and provided another steroid injection. When the Claimant saw Dr. Weinerman again on November 4, 2014, the Claimant reported that the last injection on August 22, 2014 only provided her with about 3 days relief and she had similar knee symptoms as described in the last visit and now her knee gave out and felt weak. This time when Dr. Weinerman aspirated her knee, he obtained 65 cc's of fluid, more than double from the prior aspiration. In addition, Dr. Weinerman's note indicated that the fluid was bloody, which is also consistent with the Claimant's testimony at hearing that she saw the whole needle fill up with blood when he drained her knee. That the fluid aspirated from her knee was bloody, as opposed to being clear or cloudy, is possibly indicative of a traumatic process as opposed to an arthritic process. Further, the volume of fluid has significantly increased again, which is more likely than not, indicative of a worsening of the Claimant's left knee condition. When Dr. Weinerman saw the Claimant again on February 3, 2015, the Claimant reported that the last injection on November 4, 2014 had given her little to no relief and, although Dr. Weinerman noted a knee effusion, he did not perform an aspiration and injection this time. He also noted grinding and crepitus and medial joint line tenderness along with the swelling and effusion. He assessed the Claimant's condition as deteriorated. At this visit, Dr. Weinerman recommended the Claimant undergo surgery.

34. In looking at Dr. Weinerman's medical notes, in conjunction with the Claimant's reports to her other physicians that her left knee symptoms were increasing, and the Claimant's consistent testimony to that effect, the ALJ finds as fact that the evidence supports that the Claimant's condition has worsened since MMI.

35. Moreover, in viewing the record as a whole, and taking the Claimant's substantial preexisting conditions into account, the ALJ nevertheless finds as fact that the November 10, 2013 work injury played a significant causative role in the Claimant's worsened condition of her left knee and accelerated her need for left total knee arthroplasty. Thus, in weighing all of the evidence presented, the ALJ finds that the recommended surgery is found to be reasonably necessary to cure and relieve the Claimant from the effects of her November 10, 2013 work injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

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

Petition to Reopen

The Claimant filed here Petition to Reopen W.C. 4-934-299 on the ground that her medical condition has worsened. The Claimant initially sustained work injuries on November 10, 2013 when she suffered injuries including injury to her left knee. The

Claimant now seeks medical benefits in the nature of a left knee total arthroscopy and other care for a worsening left knee condition that the Claimant alleges is causally related to her original admitted work injury.

Section 8-43-303(1), C.R.S., provides that an award may be reopened at any time within six years after the date on the ground of a 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. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a threshold matter, the Claimant bears the burden of establishing that change in the Claimant's condition is causally related to the original injury. Section 8-41-301(1)(c), C.R.S.; *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,* 939 P.2d 496 (Colo. App. 1997). 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). 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. Moreover, 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).*

In order to prove a causal relationship, 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).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the 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); *City of Durango v. Dunagan*, *supra*. However, to the extent that the worsening of a condition occurs as the result of an independent intervening cause, then reopening would not be warranted as this is unrelated to the original compensable injury. Whether a particular condition is the result of an independent intervening cause is a question of fact for the ALJ. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002).

The Claimant has established, through her testimony and with the medical evidence, that, subsequent to MMI, the relief from left knee aspirations and injections was wearing off and that the periods of relief following the aspirations/injections were diminishing with the each successive aspiration/injection. Because that treatment was failing, and the Claimant's symptoms were increasing, Dr. Weinerman felt it reasonable and necessary to proceed with a surgical resolution.

Since the Claimant was placed at MMI on April 3, 2014, the Claimant has proved that her left knee condition has deteriorated. The medical records from the Claimant's treating physicians, including those who treat the Claimant for conditions outside of her work related injury, support the Claimant's contention that her condition has worsened and that this worsened condition is causally related to the original injury. The medical records from Dr. Weinerman who provided authorized post-MMI treatment are particularly telling. Prior to being placed at MMI, the Claimant continually denied popping, locking or giving way of the left knee joint in the medical records of Dr. Lugliani, Dr. Weinerman or Dr. Oparaeche. However, after being placed at MMI, the Claimant now reports to Dr. Weinerman that her left knee pops, locks and gives way and Dr. Weinerman has noted grinding and crepitus. In addition, the Claimant continues to have large volume effusions which she had not experienced prior to her work injury, Post-MMI, on November 4, 2014, Dr. Weinerman withdrew 65 cc's of bloody fluid from her left knee, which was more than double the amount extracted at her previous August 22, 2014 visit. In addition, the treatment of providing and aspiration and injection were having a diminished effect and providing less and less relief. These medical records support the Claimant's testimony that the symptoms she was experiencing in her left knee were getting worse and she was now experiencing symptoms that she had not previously experienced. These symptoms were significantly impacting her ability to walk, resulting in a more pronounced limp that favored the left leg and diminished her ability to handle stairs. The Claimant also testified that the knee was weaker and would give out, causing her to fall.

Because the Claimant has proven by a preponderance of the evidence that her condition has changed and she is entitled to benefits, WC Claim No. 4-934-299 is reopened.

Medical Benefits – Reasonably Necessary

Once a claimant establishes the worsened condition is causally related, the claimant must prove the proposed medical treatment is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

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

Here, Claimant established by a preponderance of the evidence that the specific medical treatment consisting of total knee arthroplasty is reasonably necessary to cure and relieve the effects of the November 10, 2013 industrial injury and the worsened

condition from which the Claimant is now suffering. Although Dr. O'Brien disputes that the need for this surgery is related to the work injury, he agreed that the surgery would be reasonable. Having found that the Claimant's condition has worsened since she was placed at MMI on April 3, 2014, and that the more conservative treatment she was receiving is now failing, it is further determined that the Claimant has proven that the surgery recommended by Dr. Weinerman is reasonably necessary to cure and relieve her from the effects of her work injury. The increased symptoms experienced by the Claimant are found to be a foreseeable consequence in this case following the failure of conservative treatment, including aspirations and injections.

The Medical Treatment Guidelines address the work relatedness of aggravated osteoarthritis. The section for aggravated osteoarthritis under "Occupational Relationship" provides:

> The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting.
>
> W.C.R.P. Rule 17 Exhibit 6, p. 47.

The ALJ finds that the Claimant established this through her testimony, the records establishing her traumatic fall down many stairs, and through the medical records of Dr. Weinerman and other providers. Substantial evidence also established that prior to her injury of November 10, 2013, the Claimant had no work limitations with her left knee activities at baseline, and that post-injury and MMI she had significant limitations in all functions.

Section E of the Medical Treatment Guidelines addresses knee arthroplasty where the following surgical indications exist for osteoarthritis:

> [A]ll reasonable conservative measures have been exhausted and other reasonable surgical options have been considered or implemented. Significant changes such as advanced joint line narrowing are expected.
>
> Rule 17, Exhibit 6, p. 127.

As set forth in greater detail in the Findings of Fact, the medical records establish that conservative treatment measures have failed and have been exhausted in this case and Dr. Weinerman now recommends surgery.

While the Claimant has numerous preexisting conditions, until her work injury of November 10, 2013, the medical reports from Dr. Ndudi Oparaeche, her rheumatoid arthritis specialist, generally noted the Claimant hurt everywhere and was tired, it was not localized to her left knee. Dr. Oparaeche also noted that the Claimant had never complained of knee effusions in the past, but since the work injury, something was causing large volume effusions in the left knee. On July 20, 2014, almost 4 months after

the Claimant was placed at MMI, Dr. Oparaeche again noted that the Claimant's left knee has hurt more and swollen more since her fall, with some benefit from the steroid injections she received under the worker's compensation physician's care. On September 24, 2014, Dr. Oparaeche noted the Claimant still had residual swelling in the left knee and registered concerns with repeated joint procedures. Overall, in review of Dr. Oparaeche's records, the records from before the work injury and before MMI evidence pain and discomfort everywhere due to the Claimant's multiple conditions. It is only after the injury, that the left knee pain and swelling become more pronounced and documented. If, as Dr. O'Brien has opined, the injury had no impact whatsoever on aggravating or accelerating the condition of the left knee, and that the Claimant's current need for a left total knee replacement is due to the natural progression of her preexisting condition, it would be more likely than not that the need for a TKR would be bilateral and that the Claimant would complain of right knee pain and swelling as much, or more, than the left knee pain and swelling, especially as the right knee was more bothersome before the injury, per the records. However, after the November 10, 2013 work injury, there are multiple references to only left knee swelling and effusions in the medical records of the Claimant's rheumatoid arthritis specialist.

In addition, the Claimant's testimony that she saw the needles fill up with blood when Dr. Weinerman aspirated the fluid from her knee is consistent with Dr. Weinerman's medical reports, especially the November 4, 2014 report noting that he obtained 65 cc's of bloody fluid, more than double from the prior aspiration. This is further support for the finding that Claimant's worsened left knee condition was related to the work injury and that the work injury and its consequences were an accelerant for the Claimant's need for knee surgery. This is especially telling in Dr. Weinerman's February 3, 2015 medical note when the Claimant reported that the last injection on November 4, 2014 had given her little to no relief and, although Dr. Weinerman noted a knee effusion, he did not perform an aspiration and injection this time. He also noted grinding and crepitus and medial joint line tenderness along with the swelling and effusion. He assessed the Claimant's condition as deteriorated. In viewing the record as a whole, and taking the Claimant's substantial preexisting conditions into account, the ALJ nevertheless found as fact that the November 10, 2013 work injury played a significant causative role in the Claimant's worsened condition of her left knee and accelerated her need for left total knee arthroplasty. Thus, in weighing all of the evidence presented, the ALJ finds that the recommended surgery is found to be reasonably necessary to cure and relieve the Claimant from the effects of her November 10, 2013 work injury.

ORDER

It is therefore ordered that:

1. Workers' Compensation Case No. 4-934-299 is reopened.

2. Insurer is liable for the medical care the Claimant receives that is reasonably necessary to cure and relieve her from the effects of the

compensable injury that occurred on November 10, 2013, as determined by her authorized treating physician and any authorized referrals, including, but not limited to, left knee arthroscopy recommended by Dr. Weinerman, and any reasonably necessary follow up care, per the Act.

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 10, 2016

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

ISSUES

- Is the Claimant's request for additional temporary total disability benefits barred because the authorized treating physician released Claimant to return to work at regular employment and because Claimant did so?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing May 8, 2014?

- If Claimant proved entitlement to temporary total disability benefits did Respondents prove by a preponderance of the evidence that such benefits should be terminated because Claimant was responsible for his termination from employment?

- If Claimant proved entitlement to temporary total disability benefits did Respondents prove by a preponderance of the evidence that they are entitled to an offset based on Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 2 through 6 were received into evidence. At hearing, Respondents' Exhibits A through J were admitted into evidence. After the hearing Respondents submitted what has been marked as Respondents' Exhibit K (report of Dr. Walker). Pursuant to the ALJ's Case Status Order dated November 19, 2015 Claimant was given until November 30, 2015 to register any objection to consideration of Respondents' Exhibit K. No objection was filed and Respondents' Exhibit K is admitted into evidence. The post-hearing depositions of Maureen Kelly and Todd Rand are admitted into evidence.

2. The Employer operates a landscaping and lawn service business. Beginning in 2012 Claimant was intermittently employed as an equipment operator in the Employer's business. This job involved driving a truck and operating machinery such as lawn mowers, tractors and "Bobcats." Claimant was paid $13 per hour and given the use of a company truck.

3. Claimant suffered an admitted injury to his low back on September 10, 2013. Claimant slipped while getting off of a large mower and fell striking his lower back on a steel "wing." Claimant reported the injury to the employer on the same day that it happened but continued to work.

4. On September 30, 2013 Claimant sought treatment for low back pain at the Lutheran Medical Center emergency room (ER). The ER noted a 10-year smoking history. The physical examination (PE) was reportedly normal. Claimant was discharged with a prescription for Percocet and advised to follow-up with a workers' compensation doctor.

5. Claimant's low back problems persisted and the Employer referred him to Midtown Occupational Medicine Services (Midtown) for treatment.

6. On December 4, 2013 Craig Anderson, M.D., examined Claimant at Midtown. Claimant gave a history that on September 10, 2013 he fell off of a mower and struck his right lower back and posterior hip. Claimant advised that after the incident he experienced persistent right lower back and right buttock pain. Claimant reported his symptoms suddenly worsened while he was at work on November 15, 2013. Claimant explained that he began to experience radiating pain down the right leg. On PE Dr. Anderson noted tenderness over the sciatic notch, right buttock and piriformis and right SI joint. Claimant had a positive straight leg test on the right. Dr. Anderson ordered a lumbar MRI, prescribed gabapentin and oxycodone and placed Claimant on "modified duty restrictions." (Medical records review of Dr. Walker, Respondents' Exhibit K p. 5).

7. Claimant credibly testified that on December 4, 2013 Dr. Anderson imposed restrictions of no lifting greater than 5 pounds, no bending over, no excessive walking and no climbing stairs.

8. On December 14, 2013 Claimant underwent an MRI of the lumbar spine. The radiologist reported that at L3-4 there was a small central disc protrusion, at L4-5 there was severe right-sided foraminal stenosis and moderate left-sided foraminal stenosis and at L5-S1 there was severe left-sided foraminal stenosis and mild right-sided foraminal stenosis. (Medical records review of Dr. Walker, Respondents' Exhibit K p. 5).

9. On December 18, 2013 Claimant reported to Dr. Anderson that he was continuing to experience severe pain in the right lower extremity as well as numbness and tingling in the right foot. Claimant exhibited a positive straight leg test on the right. Dr. Anderson referred Claimant to a physiatrist, Dr. Lawrence Lesnak, for the purpose of "ruling out" L5-S1 radiculopathy. Dr. Anderson also prescribed physical therapy (PT). (Medical records review of Dr. Walker, Respondents' Exhibit K pp. 5-6).

10. Dr. Anderson examined Claimant on January 17, 2014. Dr. Anderson noted Claimant was progressively improving but still had "moderate, severe aching discomfort of the right lower lumbosacral area and superior buttock." Claimant exhibited negative straight leg testing bilaterally. Dr. Anderson noted Claimant missed an appointment scheduled with Dr. Lesnak on January 16, 2014. Claimant preferred conservative treatment and did not want "invasive treatment such as an epidural injection." (Medical records review of Dr. Walker, Respondents' Exhibit K p. 6).

11. On January 31, 2014 Dr. Anderson again examined Claimant. Dr. Anderson noted Claimant was working full time with restrictions. Claimant advised that he wanted to postpone any consultation with Dr. Lesnak "with regard to the possibility of injections" because he was "doing well in physical therapy." Dr. Anderson noted Claimant's range of motion (ROM) was "mildly restricted with achy pain" but without radiation. The straight leg raising test was normal and Claimant ambulated without pain behaviors or antalgic gait. (Medical records review of Dr. Walker, Respondents' Exhibit K p. 6-7).

12. On February 28, 2014 the physical therapist noted Claimant was "doing well" and that lumbar spine active ROM was within normal limits and pain free. (Medical records review of Dr. Walker, Respondents' Exhibit K p. 7).

13. Dr. Anderson examined Claimant on March 7, 2014. Claimant advised that "just about all of his lower back pain" had resolved although he reported some intermittent nighttime "discomfort in the right lower back right gluteal area." Dr. Anderson noted the physical therapist reported that Claimant performed "aggressive therapeutic exercise without any exacerbation of pain." On PE Dr. Anderson noted normal active ROM and that palpation was negative. Claimant's lower extremity strength was intact and the straight leg raise maneuver was negative. Dr. Anderson diagnosed the following: (1) Lumbosacral strain, work related, resolving; (2) MRI evidence of degenerative disk disease, severe at L5-S1, facet arhtropathy noted, severe left and mild right foraminal stenosis, and somewhat less severe abnormalities noted at L4-L5 and L3-L4. Probably not work related; (3) Lumbosacral myofascial pain and possible piriformis syndrome, resolving. Dr. Anderson opined that the "more severe MRI findings do not correlate with clinical symptoms and signs of right leg pain" and that the right leg pain was "probably not due to a true radiculopathy." Dr. Anderson placed Claimant at maximum medical improvement (MMI) with no permanent impairment and "no work restrictions required." Dr. Anderson encouraged Claimant to continue with independent exercise and opined that no maintenance care was necessary.

14. Claimant testified at hearing that the pain in his back and the pain radiating into his right lower extremity has never abated. Claimant further testified that after Dr. Anderson released him on March 7, 2014 he returned to work at full duty. Claimant explained that when he first returned to work at full duty he helped a mechanic by getting parts. Later, Claimant was assigned to operate a Bobcat in Boulder. Claimant explained that the Bobcat is a very "rough riding" piece of machinery and there was no seat cushion. Claimant testified he was able to operate the Bobcat for only two weeks because his "pain came back worse than before." Claimant opined that operating the Bobcat caused his pain to get worse.

15. It is difficult to determine the precise course and nature of Claimant's medical treatment immediately after Dr. Anderson's March 7, 2014 examination. Apparently, Claimant went to St. Joseph Hospital on March 12, 2014 where he was examined by Robert Springs, M.D. Dr. Springs saw Claimant as a "new patient" for treatment of a workers' compensation injury and ordered x-rays and laboratory work.

(Medical records review of Dr. Ramos, Claimant's Exhibit 3 p. 27; Medical Records review of Dr. Henke, Claimant's Exhibit 3 p. 35).

16. On March 25, 2014 Respondents filed a Final Admission of Liability (FAL). Respondents admitted for temporary total disability (TTD) benefits from December 4, 2013 through December 19, 2013 and for temporary partial disability (TPD) benefits from December 20, 2013 through March 7, 2014. Based on Dr. Anderson's March 7, 2014 report Respondents admitted Claimant reached MMI on March 7, 2014. Respondents did not admit liability for any permanent disability benefits.

17. Records of St. Joseph Hospital dated April 27, 2014 "refer" to an "epidural steroid injection." (Medical records review of Dr. Walker, Respondents' Exhibit K, p. 7).

18. Claimant apparently returned to Dr. Springs on May 5, 2014. Dr. Springs noted Claimant was having back pain with radiation down the right leg. Dr. Springs recorded Claimant had been seen at two emergency rooms since "mid April" and was treated with Medrol Dosepak without benefit. Dr. Springs recorded Claimant was tender over the lower spine and right SI "joint area" and that straight leg testing was positive on the right. Dr. Spring prescribed Percocet and ordered x-rays of the lumbosacral spine. (Medical records review of Dr. Ramos, Claimant's Exhibit 3 p. 27; Medical Records review of Dr. Henke, Claimant's Exhibit 3 p. 35).

19. On May 6, 2014 lumbar spine x-rays were read by a radiologist to indicate multilevel degenerative disc disease greatest at L5-S1. (Medical records review of Dr. Walker, Respondents' Exhibit K p.7).

20. Claimant's Exhibit 6 is a "Medically Advised Absence" (MAA) form issued by the office of Dr. Springs. This document was not signed by Dr. Springs but was signed "for" him by someone whose signature is illegible. The document is dated May 8, 2014 and states Claimant has been "under our care." The document further states Claimant's absence for the period of May 8, 2014 through May 22, 2014 was "considered important" for his health. The document released Claimant to return to work on May 22, 2014.

21. Claimant testified that on May 8, 2014 he went to see his "own physician" Dr. Springs. Claimant recalled that on May 8 he left Dr. Springs's office with the MAA. Claimant stated he never returned to Dr. Anderson for treatment because Dr. Anderson incorrectly predicted that Claimant could "work out" his residual pain and the pain would eventually "go away."

22. Claimant testified as follows concerning the events of May 8, 2014. He drove from the doctor's office to his apartment that was located immediately adjacent to the Employer's premises. As Claimant was getting out of his truck he was approached by his supervisor, Mr. Todd Rand (Rand). Rand asked Claimant how things went at the doctor and Claimant handed the MAA form to Rand. Rand read the MAA and asked what it meant. Claimant told Rand that Dr. Springs said Claimant shouldn't drive the equipment and should do something else. Rand then asked Claimant to return the keys

to the Employer's premises and the keys to the truck that the Employer allowed Claimant to use. Claimant handed these keys to Rand and went to his apartment. Claimant testified that about 15 minutes later Mr. Steve Butler (Butler), the owner of the Employer, knocked at Claimant's apartment door. Claimant testified that Butler was angry, was yelling and pointed his finger at Claimant. Claimant testified that Butler accused Claimant of being a "leech trying to suck money" and threatened to ruin Claimant's life.

23. Claimant testified that he understood from the events of May 8, 2014 that he had been fired by the Employer. Claimant testified that he then applied for unemployment insurance (UI) benefits.

24. Claimant testified that after the conversation with Butler he received a call from Ms. Maureen Kelly (Kelly), the Employer's "secretary." According to Claimant Kelly directed him to pick up his last check at the Employer's office. In Claimant's mind this call affirmed that he had been discharged from employment. Claimant testified that because he could not climb stairs he sent his brother to the Employer's office to pick up the check.

25. Kelly testified at the hearing on behalf of the Employer. Kelly testified that she is the Employer's office manager and is responsible for accounts payable and receivable and "human resources" issues. Kelly recalled that between March 7, 2014 and "about" May 6, 2014 Claimant never told her that he was unable to perform the duties assigned by the Employer and did not ask to return to Midtown for additional medical treatment. However, Kelly testified that Claimant did request additional hours during this timeframe.

26. Kelly testified that sometime between May 6, 2014 and May 8, 2014 Claimant presented her with a "work release" form. Kelly recalled that the work release contained a "doctor's signature" and was not from Midtown. Kelly testified the "work release" was "vague" and did not give a reason why Claimant was being released from work. Kelly testified that she asked Claimant why he was taken off of work and Claimant stated he was having "kidney problems." Kelly testified that she told Claimant she needed a reason for the release on the "next form" or on a "revised form." Kelly stated that she expected Claimant to bring her a more specific work release sometime prior to May 22, 2014.

27. Kelly testified that she expected Claimant to return to work and come to her office sometime on May 28, 2014, the day after Memorial Day. However, Claimant did not come to her office. Kelly explained that Claimant's personnel file lists him as a "voluntary quit." Kelly explained that it was her impression Claimant quit after he "didn't show up for work after Memorial Day." Kelly testified that Rand never disclosed Claimant's employment "status" to her and that Butler never stated Claimant had been terminated.

28. Kelly "assumed" that in early June 2014 Employer was notified that Claimant had applied for UI benefits. Kelly testified that the UI "paperwork" indicated

Claimant applied for benefits on May 11, 2014. Kelly stated that she thought this was "odd" and it "ticked [her] off."

29. Rand testified at the hearing on behalf of the Employer. Rand is the Employer's "landscape manager" and manages the majority of the Employer's business.

30. Rand testified that he had a conversation with Claimant sometime after Memorial Day. Rand testified that during this conversation Claimant stated he was having back pain and was in too much pain to continue working. Rand explained that in the past Claimant mentioned he had many other health issues including shoulder problems, back problems and kidney problems. Rand testified that he did not terminate Claimant from employment and did not ask Claimant to hand over the Employer's keys. Rand testified that as Claimant was explaining he could no longer work he grabbed the keys out of his pocket and handed them to Rand. Claimant also turned over the Employer's fuel card. Rand stated that he then wished Claimant the best and told Claimant "that he always had a home with us."

31. Rand testified that approximately one hour after he had the conversation with Claimant Kelly came into the office. Rand stated that he turned the keys and fuel card over to Kelly. Rand recalled that Kelly asked if Claimant quit and he replied "yes."

32. On July 9, 2014 Clarence Henke, M.D., performed a Division-sponsored independent medical examination (DIME). Dr. Henke issued a DIME report on July 18, 2014. Dr. Henke noted Claimant's chief complaints were burning and aching in the lower lumbar spine with radiation into the right SI joint, a "pins-and-needles sensation" in the right groin area extending down the right leg to the foot and toe numbness. Dr. Henke noted that by history Claimant had fallen off a mower on to his low back and right hip striking a piece of steel. Dr. Henke recorded that since this incident Claimant "has had persistent right lower back pain extending into the right buttock, with shooting pains down the thigh and leg, which became more pronounced on November 15, 2013 when [Claimant] was working." Dr. Henke's DIME report does not mention any history that Claimant's symptoms became worse after he was released by Dr. Anderson and returned to work on a rough-riding Bobcat. On PE Dr. Henke noted instability of the right leg and "tenderness and moderate paravertebral muscle spasm in the mid-lower lumbar spine, with radiation to the right buttock." Dr. Henke recorded reduced pinwheel "sensation in the right lateral thigh, calf, and foot areas." He also noted positive straight leg raising tests on the right and left sides. Based on the lumbar MRI findings Dr. Henke diagnosed the following: (1) L4-5 severe right foraminal stenosis and moderate left foraminal stenosis; (2) L5-S1 severe left and mild right foraminal stenosis; (3) Mild posterior disc bulging at L3-4 with small central disc protrusion. Dr. Henke also diagnosed clinical examination findings "consistent with right leg radiculopathy from compression of the L4 and L5 nerve roots."

33. Dr. Henke opined Claimant was not at MMI. He recommended that Claimant undergo a bilateral lower extremity EMG examination and be referred for a neurological consultation. Dr. Henke imposed work restrictions of no lifting in excess of

10 pounds and avoidance of bending, lifting, or ladder climbing. Dr. Henke also recommended that Claimant continue his medications.

34. On August 27, 2014 Claimant underwent an independent medical examination (IME) performed by Franklin Shih, M.D. Dr. Shih took a history, reviewed medical records including Dr. Henke's DIME report and performed a PE. The history recorded by Dr. Shih mentions that Claimant reported an increase in low back and right buttock symptoms after he was released by Dr. Anderson, and that the Employer denied Claimant's alleged request to be "reevaluated." The history does not mention any increase in symptoms attributed to operation of a Bobcat. Dr. Shih assessed the following: (1) Status post work related injury 09/11/2013 [sic] with secondary back and lower extremity radicular symptoms; (2) On going back and right lower extremity symptomatology "unclear relationship to #1 above." Dr. Shih opined that "unfortunately" the history given by Claimant differed significantly from the history documented in the medical records. Specifically, Dr. Shih noted that Claimant reported he had "significant limiting pain complaints" when he was discharged by Dr. Anderson on March 7, 2014. However, Dr. Shih observed that Dr. Anderson's reports and the PT reports show that in the weeks preceding March 7 Claimant was able to operate machinery, Claimant's back pain had mostly resolved and Claimant had active ROM within normal limits and without pain. Dr. Shih also noted that Claimant gave a history that Dr. Anderson told him he did not need to see Dr. Lesnak, but Dr. Anderson's report indicated that Claimant wanted to postpone the visit to Dr. Lesnak. Dr. Shih opined that in these circumstances he could not within "medical probability" attribute Claimant's ongoing complaints to the September 2013 industrial injury. Dr. Shih also stated that he disagreed with Dr. Henke's opinion that Claimant was not at MMI since Dr. Shih could not state Claimant's symptoms were related to the industrial injury.

35. On September 22, 2014 Claimant underwent an IME performed by Joseph Ramos, M.D. This IME was conducted at the request of Claimant's former counsel. Dr. Ramos is level II accredited.

36. In connection with the IME Dr. Ramos took a history, reviewed medical records and performed a PE. In the history portion of the report Dr. Ramos noted Claimant sustained an injury on September 10, 2013 when he fell from a mower and struck his right lower back and posterior hip against metal. Dr. Ramos recorded that since the injury Claimant "has had persistent pain in his right lower back with radiation into the right buttock with shooting pain down the thigh and leg." Dr. Dr. Ramos also stated that Claimant's condition has "progressively become more pronounced" and he has not been able to work since November 15, 2013. Ramos also stated that after Dr. Anderson released Claimant to return to work he "had such a pain flare that he could hardly walk." Dr. Ramos's report does not contain any history that Claimant experienced an increase in symptoms attributed to operating a Bobcat. On PE Dr. Ramos noted that ROM was "reduced in all planes, but more with forward flexion" and that forward flexion produce "significant radiculopathic symptoms." There was tenderness to palpation of the right SI joint.

37. Dr. Ramos expressed concern that Claimant was "persistently symptomatic" and wrote that the PE suggested Claimant was "suffering significant spinal pathology, specifically, symptomatic lumbar disc injury." Dr. Ramos agreed with Dr. Henke that Claimant had not reached MMI and concurred with Dr. Henke's recommendations that Claimant should undergo an EMG, a neurosurgical evaluation and continue the pain medications. Dr. Ramos further opined that Claimant "should be "restricted to sedentary duties" until further evaluation and treatment is obtained."

38. On September 16, 2015 Sharon Walker, M.D. performed an IME at Respondents' request. Dr. Walker is board certified in emergency medicine and is Level II accredited. Dr. Walker took a history from Claimant, reviewed medical records and performed a PE. Dr. Walker also reviewed surveillance video of Claimant taken on August 27, 2014.

39. Dr. Walker wrote that Claimant gave a history that in September 2013 he fell from a mower and struck his right buttocks on a steel bar. Claimant reported that he was treated by Dr. Anderson who referred him to PT. However, Claimant stated that the PT "did not help." Claimant also told Dr. Walker that Dr. Anderson "refused to send him to any specialists." Claimant also gave a history that approximately 2 weeks after Dr. Anderson released him to regular employment he was running a Bobcat and "developed the same pain in his right lower back, and states that it was worse." Claimant told Dr. Walker that he smoked cigarettes but "but did not smoke until after this injury."

40. Dr. Walker stated that the video surveillance taken on August 27, 2014 started with Claimant walking towards a car with an "antalgic gait." Claimant then got into the car in a "slow and guarded manner" while holding the door frame for assistance. Claimant then moved each leg into the car "one at a time in a very slow motion." Claimant is then shown to park the car and "appeared to have difficulty getting out of the car" and once again held onto the door frame to "assist in standing up." However, Dr. Walker noted that "about an hour and a half later" the video showed Claimant walking into a building with a normal gait. Claimant was next seen to open his car door and then bend and lean into the car to get cigarettes. Dr. Walker opined that Claimant demonstrated "absolutely no pain behaviors" when he leaned into the car. Dr. Walker also wrote that the video depicts Claimant getting into his car in a "normal fashion without any problems."

41. Dr. Walker assessed Claimant with the following conditions: (1) Lumbosacral strain with radicular symptoms; (2) Lumbar facet pain; (3) Bilateral foraminal stenosis L4-5 and L5-S1; Posterior disc bulging L3-4 with small central disc protrusion; (5) Paresthesias. Dr. Walker opined that the September 2013 industrial injury caused a buttock contusion, a lumbosacral strain and aggravation of the foraminal stenosis. Dr. Walker opined the L3-4 posterior disc bulge was either caused or aggravated by the injury.

42. However, Dr. Walker opined to a reasonable degree of medical probability that on March 7, 2014 Claimant reached MMI for the September 2013 industrial injury

and did not suffer any permanent impairment. Dr. Walker opined that Claimant did not "require any specific work, activity or functional limitations or restrictions" as a result of the September 2013 injury.

43. In support of these conclusions Dr. Walker stated that there are "major discrepancies" between the Claimant's reported history and the medical records. Dr. Walker noted that Claimant reported PT did not help him, but the PT "notes specifically state that he responded well to treatment." Dr. Walker also noted that the PT notes and Dr. Anderson's notes show that prior to being placed at MMI on March 7, 2014 Claimant was "essentially pain-free and had full range of motion of his lumbar spine without any pain." Dr. Walker noted Claimant reported that Dr. Anderson refused to make any referrals to a specialist. However, Dr. Walker noted the medical records show Dr. Anderson referred Claimant to Dr. Lesnak, but Claimant missed the appointment with Dr. Lesnak. Dr. Walker further noted that Dr. Anderson's records reflect that Claimant told Dr. Anderson he did not want to see Dr. Lesnak because he was pleased with his progress and did not expect to need "invasive treatment." Dr. Walker also noted there was a discrepancy between Claimant's statement that he had smoked only since the September 2013 injury and medical records showing "at least a 10 year history of smoking." Dr. Walker wrote that she agreed with Dr. Shih that "the medical record documentation is probably a more accurate depiction of what took place between September 30, 2013 and March 7, 2014.

44. Dr. Walker further opined that the surveillance video caused her concern that Claimant was exhibiting "symptom magnification." Dr. Walker explained that it was her "opinion within a reasonable degree of medical probability that a person with a significant back injury would not display such extremes in pain behavior and function within this short window of time."

45. Claimant failed to prove it is more probably true than not that the industrial injury of September 10, 2013 caused him to suffer any disability commencing May 8, 2014 or thereafter. Rather, the credible and persuasive evidence establishes that Claimant's condition did not worsen after Dr. Anderson released Claimant to regular employment on March 7, 2014. Therefore, Claimant failed to prove that the alleged worsening of his allegedly injury-related condition caused any disability that would warrant an award of TTD benefits.

46. Dr. Walker credibly and persuasively opined that Claimant does not have any functional or work activity limitations that are causally related to the September 10, 2013 industrial injury. Dr. Walker credibly and persuasively explained that Dr. Anderson's medical records and the PT records establish that by the time Dr. Anderson released Claimant to return to regular employment on March 7, 2014 he was "essentially pain-free and had full range of motion" in the lumbar spine. Dr. Walker's opinion that Claimant does not have any limitations causally-related to the September 13, 2013 industrial injury is corroborated by the credible and persuasive opinions expressed by Dr. Shih. Dr. Shih credibly and persuasively that he could not state that Claimant's "ongoing back and right lower extremity symptomatology" is related to the September 2013 industrial injury. Like Dr. Walker, Dr. Shih noted that in the days and

weeks prior to March 7, 2014 the medical records show Claimant was able to operate machinery, that Claimant's back pain had mostly resolved and that Claimant demonstrated normal active ROM without pain.

47. The Claimant's testimony that his injury-related low back and right radicular-type symptoms did not "abate" injury is not credible. Similarly, insofar as Claimant gave a history to doctors Henke and Ramos that his symptoms persisted until he was released on March 7, 2014, that history is found to be inaccurate and misleading. Dr. Walker and Dr. Shih credibly and persuasively opined that the medical and PT records through March 7, 2014 demonstrate Claimant's symptoms significantly improved and almost disappeared. The opinions of Dr. Walker and Dr. Shih are supported the records of Dr. Anderson and the PT records. Specifically, Dr. Anderson's records from January 17, 2014 and January 31, 2014 demonstrate that Claimant declined or postponed a referral to Dr. Lesnak because Claimant reported his symptoms were improving with PT and he did not want "invasive treatment." (Findings of Fact 10 & 11). PE findings improved beginning in January 2014 when Claimant began to exhibit negative rather than positive straight leg raising tests. (Findings of Fact 6, 9-11, 13). The PT records demonstrate that by February 28, 2014 Claimant had full, pain-free ROM in the lumbar spine. (Finding of Fact 12). Dr. Anderson's March 7, 2014 report establishes that Claimant himself stated his pain was almost gone and all that bothered him was some "intermittent" nighttime discomfort. Moreover, Dr. Anderson documented that by March 7 Claimant had undergone "aggressive therapeutic exercise without any exacerbation of pain." (Finding of Fact 13).

48. Claimant's testimony that he experienced a worsening of his allegedly ongoing symptoms after he was released to regular duties and operated the "rough-riding" Bobcat is not credible and persuasive. None of the medical records or reports prior to Dr. Walker's IME report of September 2015 contains any history that Claimant's symptoms worsened after he drove a Bobcat. The ALJ infers that if Claimant's symptoms had actually worsened, and if Claimant attributed the worsening to driving the Bobcat (as he testified), Claimant would have reported this history to one or more of the physicians who treated or examined him between March 7, 2014 and Dr. Walker's examination in September 2015. The ALJ further infers that if Claimant had reported an increase in symptoms after operating the Bobcat the examining or treating physician would have documented this history. Claimant's credibility is also diminished by Dr. Walker's description of the Claimant's activities in the video. If Claimant were truly suffering all of the symptoms and consequent disability that he alleges, he would not have exhibited the rapid variation in functional ability depicted in the video.

49. Insofar as Dr. Henke can be understood to opine that after March 7, 2014 the Claimant's injury-related condition(s) worsened so as to necessitate the re-imposition of restrictions, his opinion is not persuasive. Dr. Henke's opinion appears to be largely based on the belief that after the September 13, 2013 injury Claimant suffered from "persistent" low back pain, buttock pain and shooting pain down the right leg. However, Dr. Henke does not persuasively explain or refute the medical records demonstrating that in the days and weeks prior to March 7 Claimant's symptoms actually improved to the point that he had very little pain and exhibited full ROM.

Further, Dr. Henke's opinion appears to be predicated on Claimant's reported history. However, the ALJ has found the history Claimant provided to Dr. Henke was inaccurate and misleading.

50. Similarly, the opinions and restrictions imposed by Dr. Ramos are not credible and persuasive. The opinions of Dr. Ramos largely depend on the inaccurate history that Claimant had persistent symptoms after the September 2013 injury. Like Dr. Henke, Dr. Ramos does not refute or explain the medical records showing that the in the days and weeks prior to March 7, 2014 Claimant's symptoms actually improved to the point that he had very little pain and exhibited full ROM.

51. Evidence and inferences inconsistent with these findings of fact 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. Generally, a claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

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

CLAIM FOR TTD BENEFITS COMMENCING MAY 8, 2014

Claimant contends that he is entitled to an award of TTD benefits commencing May 8, 2014 when Dr. Springs's office issued the MAA releasing Claimant from work. Respondents contend that by May 8 ATP Anderson had already released Claimant to regular duty and Claimant had returned to regular duty. Consequently, Respondents argue that by May 8 Claimant's right to receive TTD benefits had already been terminated pursuant to § 8-42-105(3)(b), C.R.S. (employee returns to regular

employment), and § 8-42-105(3)(c), C.R.S. (attending physician gives employee written release to return to regular employment). Respondents further contend that even if Claimant is legally entitled to reinstatement of TTD benefits based on proof of a post-release change of condition Claimant failed to prove a change in condition. The ALJ concludes that Claimant failed to prove any post-relief change of condition that warrants reinstatement of TTD benefits commencing May 8, 2014.

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

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

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

Section § 8-42-105(3)(b) provides that TTD benefits are terminated when the "employee returns to regular or modified employment." Section 8-42-105(3)(c) provides that TTD benefits are terminated when the "the attending physician gives the employee a written release to return to regular employment." The Respondents correctly point out that our courts have held that an unequivocal release to regular employment by an attending physician is conclusive and may not be altered by an ALJ absent conflicting opinions from attending physicians. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000); *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

However the ICAO has held in a number of cases that termination of TTD benefits pursuant to § 8-42-105(3)(c) does not establish a *permanent* bar to receipt of TTD benefits. Rather the ICAO has held that where an attending physician has released the claimant to return to regular employment, but the claimant proves a post-release "worsening of condition" causing "additional disability restrictions" the Claimant

is again entitled to TTD benefits. *Aragon v. Western LCM, Inc.,* WC 4-874-169 (ICAO December 13, 2012); *Vigil v. Pioneer Healthcare,* WC 4-779-599 (ICAO March 24, 2010); *Rivera v. Ames Construction,* WC 4-421-438 (ICAO August 25, 2000), *aff'd., St. Paul Fire & Marine Insurance v. Industrial Claim Appeals Office,* (Colo. App. No. 00CA1664, January 18, 2001) (not selected for publication). The ICAO has reasoned that after a release to regular employment a request for TTD benefits based on a subsequent worsened condition does not constitute an impermissible "attack on the attending physician's opinion that the claimant was previously able to perform regular employment." *Vigil v. Pioneer Healthcare, supra.* Similarly, the fact that Claimant has actually returned to regular employment after an injury does not prohibit an award of subsequent TTD benefits where the evidence establishes that the Claimant's condition worsened so as to produce additional disability. *See Hrelja v. Band-It-Index, Inc.,* WC 4-787-143-02 (ICAO February 3, 2014).

Here, Claimant does not dispute that his TTD benefits were properly terminated as of March 7, 2014 when Dr. Anderson released him to regular employment and he returned to regular employment. Rather Claimant contends that his injury-related condition(s) worsened after March 7, 2014 and that the worsening caused him to become temporarily disabled on May 8, 2014. The Respondents' argument notwithstanding, the termination of Claimant's right to TTD benefits pursuant to § 8-42-105(3)(b) and/or § 8-42-105(3)(c) did not permanently foreclose Claimant from proving a right to additional TTD benefits based on a worsened condition subsequent to March 7, 2014.

Having concluded that Claimant's release to regular employment and his return to regular employment do not automatically bar reinstatement of TTD benefits commencing May 8, 2014, the ALJ must determine whether Claimant proved entitlement to these benefits by a preponderance of the evidence. The ALJ concludes Claimant did not.

As determined in Findings of Fact 45 through 50, Claimant failed to prove it is more probably true than not the industrial injury of September 10, 2013 caused any "disability" that would warrant an award of TTD benefits commencing May 8, 2014. Specifically, Claimant failed to prove that he sustained any worsening of his condition after he was released to regular employment on March 7, 2014. Therefore, Claimant necessarily failed to prove that the 2013 industrial injury caused any new or additional restrictions that impaired his temporary wage earning capacity commencing May 8, 2014.

As determined in Findings of Fact 46 through 50, the preponderance of the credible and persuasive evidence supports the conclusion that Claimant's injury-related condition(s) did not "worsen" after March 7, 2014, and did not cause any disability beyond that which was previously admitted. As found, the credible and persuasive opinions of Dr. Walker and Dr. Shih establish that Claimant's condition significantly improved up to March 7, 2014. Dr. Anderson released Claimant to regular employment on March 7, 2014. Dr. Walker and Dr. Shih credibly and persuasively opined that after March 7 Claimant's reported symptoms cannot be attributed to the September 2013

injury. To the extent Dr. Henke and Dr. Ramos opined that Claimant's injury-related symptoms persisted through March 7 and necessitated the re-imposition of restrictions thereafter, the ALJ has rejected their opinions for the reasons stated in Findings of Fact 49 and 50. Claimant's testimony that his injury-related symptoms were "unabated" through March 7, 2014, then worsened so as to disable him on May 8, 2014, is not credible and persuasive for the reasons stated in Findings of Fact 48 and 49. The claim for additional TTD benefits commencing May 8, 2014 must be denied.

In light of these conclusions that ALJ need not address whether or not Claimant was responsible for his termination from employment. Neither does the ALJ need to address whether Respondents would be entitled to an offset for UI benefits Claimant received after May 8, 2014.

ORDER

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

1. Claimant's request for an award of temporary total disability benefits commencing May 8, 2014 and continuing is denied.

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

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

DATED: March 24, 2016

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits.

FINDINGS OF FACT

1. Claimant is a 33 year old male who has worked for Employer since June of 2011 as an electrical lineman.

2. On September 20, 2013 Claimant suffered an admitted injury to his low back when he was laying out utility pipe and attempted to prevent a pipe from rolling into a trench.

3. Prior to the September 20, 2013 work injury, Claimant had no problems with his lower back and no pain in his lower back.

4. Following conservative care for his lower back with Kyle Akers, M.D., Claimant was referred to Paul Stanton, D.O. for lumbar spine surgery and Claimant eventually underwent two lumbar spine surgeries performed by Dr. Stanton.

5. On March 24, 2014 Claimant underwent an L4-S1 decompression. During the surgery, Dr. Stanton also found and repaired a dural leak. Claimant did well post operatively until he suffered a fall down the stairs, which Dr. Stanton believed damaged Claimant's dural leak repair. *See* Exhibit 1.

6. On April 17, 2014 Claimant underwent a second surgery performed by Dr. Stanton to repair the dural leak. *See* Exhibit 1.

7. Overall Claimant has had a good result and outcome from his surgeries. His leg symptoms have largely resolved and his back pain is substantially improved. Although substantially improved, Claimant still experiences back pain that waxes and wanes.

8. On June 19, 2014 Claimant was evaluated by Dr. Stanton. Dr. Stanton noted that Claimant was doing well and that it would be okay for Claimant to go back to work with no restrictions but at a reduced number of hours per day. Dr. Stanton noted Claimant's back was getting stronger and Claimant was able to perform more activities without discomfort. Dr. Stanton noted Claimant was taking Mobic 7.5 MG tablet once per day. *See* Exhibit 1.

9. On July 3, 2014 Claimant was evaluated by Dr. Akers. Dr. Akers noted that Claimant had started working four hours per day for the last two weeks with no medical restrictions and that Claimant could advance to six hours per day at work. Dr. Akers noted that Claimant was using Mobic, doing home exercises, and that Claimant had low back pain that comes and goes. Dr. Akers recommended that Claimant continue home exercises and continue Mobic. *See* Exhibit F.

10. On July 21, 2014 Claimant was evaluated by Dr. Akers. Dr. Akers noted that Claimant was doing well and working without restrictions at six hours per day. Dr. Akers noted that Claimant's low back still got a bit sore/stiff and noted that Claimant was using Mobic. Dr. Akers released Claimant to full duty work with no restrictions and noted that Claimant would transition to over the counter medications. *See* Exhibit F.

11. On August 13, 2014 Claimant was placed at maximum medical improvement (MMI) by Dr. Akers. Dr. Akers provided an 11% whole person impairment rating, noted that Claimant was working full duty with no restrictions, and noted no medical maintenance care. Dr. Akers noted that Claimant still got a bit sore/stiff in his lower back at the end of the day, but that Claimant was able to perform activities of daily living and his required job duties okay. *See* Exhibit F.

12. Claimant continues to work full time with no work restrictions. Claimant continues to experience waxing and waning low back pain with occasional flare-ups. Claimant manages his symptoms by using a prescription anti-inflammatory medication (Mobic) prescribed by Dr. Stanton. Claimant also occasionally uses a prescription muscle relaxer (Flexeril) when he experiences back pain flares that was also prescribed by Dr. Stanton.

13. Claimant has been taking Mobic as needed since his surgeries. Claimant testified credibly that Mobic takes the edge off his pain and doesn't bother his stomach like over the counter medications have. Although in late July 2014 Dr. Akers recommended that Claimant transition to over the counter medications, Claimant has continued to use Mobic as it is more effective than and not as harsh on his stomach as over the counter medications. Claimant currently takes Mobic approximately 6-12 times per month. Claimant also uses Flexeril when his pain is the highest and takes it only at night as it makes him groggy. Claimant currently takes Flexeril approximately 2-6 times per month.

14. On February 19, 2015 Claimant underwent a division independent medical examination (DIME) performed by Lee McFadden, M.D. Dr. McFadden noted that Claimant's chief complaint was low back pain. Claimant reported that all activities tend to worsen his low back pain. Claimant reported pain provocation with prolonged standing and walking, when he coughs and sneezes, and when he has a bad flare. Claimant reported pain at a 2-3/10 with normal activities of daily living. Claimant reported medicating on a daily basis with Mobic and also reported having muscle relaxants on hand that he uses rarely when he has a significant flare. Claimant reported feeling better functionally and from a pain perspective following his surgeries but that he

continued to have lifestyle limiting back pain. Dr. McFadden noted Claimant's current medications included Mobic. Dr. McFadden opined that Claimant sustained an acute low back strain related to the September 20, 2013 work injury. Dr. McFadden opined that Claimant had pre-existing and unrelated degenerative disc disease with foraminal stenosis that was rendered symptomatic by the work injury and opined that the work injury permanently aggravated the degenerative disc disease with foraminal stenosis. Dr. McFadden opined that Claimant was fixed and stable and had reached maximum medical improvement (MMI). Dr. McFadden provided a 13% whole person impairment. Dr. McFadden did not address the need for medical maintenance care or the need for continued prescription medications. *See* Exhibit 2.

15. On April 6, 2015 Dr. McFadden prepared a DIME addendum. In the addendum Dr. McFadden opined that Claimant reached MMI on August 4, 2014 with a 19% whole person impairment. Dr. McFadden again did not address medical maintenance benefits. *See* Exhibit 2.

16. On April 30, 2015 Respondents filed a final admission of liability consistent with Dr. McFadden's opinion on MMI and permanent impairment. Respondents denied liability for medical maintenance care.

17. On June 16, 2015 Claimant was evaluated by Dr. Stanton. Dr. Stanton noted that Claimant was doing well and assessed low back pain, lumbar spondylosis, status post discectomy/decompression, status post lumbar decompression L4 through S1, and status post repair of CSF leak. Dr. Stanton recommended for treatment of his low back pain that Claimant continue the Mobic Tablet, 7.5 MG, 1 tablet daily and that Claimant start Flexeril tablet, 10 MG, 1 tablet as needed for spasms. Dr. Stanton also referred Claimant to physical therapy for the low back pain, lumbar spondylosis, and status post surgery for strengthening and recommended that Claimant go to physical therapy two times per week for six weeks. Dr. Stanton opined that Claimant's back would respond well to a dedicated course of lumbar strengthening. *See* Exhibit 1.

18. On July 2, 2015 Claimant underwent an independent medical evaluation performed by Anjmun Sharma, M.D. Dr. Sharma. Dr. Sharma noted that Claimant's current medications included Mobic. Dr. Sharma reviewed Claimant's reported mechanism of injury, his medical history, and the medical records. Dr. Sharma opined that Claimant had reached MMI on February 19, 2015. Dr. Sharma opined that Claimant had a 15% whole person impairment. Dr. Sharma opined that Claimant did not require any further care, that Claimant had an excellent outcome, and offered no maintenance care. *See* Exhibit R.

19. Respondent's claim representative Stephen Fox testified at hearing that medical maintenance benefits were denied because neither Dr. Akers nor Dr. McFadden had recommended medical maintenance benefits and because Respondent saw no recommendation, they denied maintenance.

20. Claimant did not present evidence of any specific maintenance medical benefit being denied by Respondents, but rather he requests a general award for maintenance.

21. Claimant's testimony at hearing is found credible and persuasive. Claimant requires medication for his low back pain that includes Mobic and Flexeril and Claimant still suffers low back pain and gets flares from time to time. Claimant had no low back pain prior to his work injury and his pre-existing degenerative disc disease was rendered symptomatic by his work injury. Claimant has been prescribed Mobic by his back surgeon Dr. Stanton since June of 2014. Claimant has established, more likely than not, that his need for ongoing prescription medications to manage his residual back pain is related to his work injury. The continued prescription medications are reasonable and necessary treatment for his residual back pain and have been prescribed by Claimant's surgeon.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Medical Maintenance Care

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." *See §* 8-42-101(1)(a), C.R.S. 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 his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In cases where the respondents file an FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Id.* When the respondents challenge the claimant's request for specific post-MMI medical treatment the claimant bears the burden of proof to establish entitlement to the medical benefit. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits. Claimant has presented substantial evidence supporting his need for future medical treatment that is both reasonable and necessary to relieve the effects of his injury. Claimant had no low back pain or symptoms prior to his work injury. Claimant has established that following his work injury, and the two surgeries he underwent, he continues to have low back pain that waxes and wanes. Claimant continues to take medications for his low back pain as needed and he has established that the medications are a reasonable and necessary way to relieve the effects of the residual back pain caused by his work injury. Additionally, although it is argued that Claimant had pre-existing and unrelated degenerative disc disease with foraminal stenosis, the ALJ concludes that the pre-existing condition was asymptomatic at the time of the injury and the pre-existing condition was opined by the DIME physician to have been rendered symptomatic by the work injury and permanently aggravated by the work injury. Claimant has established

that his continued back pain is causally related to his work injury and the substantial evidence shows that future medical treatment would be reasonable and necessary to relieve the continued effects of his work injury. Therefore, Claimant has met his burden and shown an entitlement to a general award of medical maintenance benefits.

ORDER

1. Claimant has established by a preponderance of the evidence that he is entitled to a general award of medical maintenance benefits.

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 29, 2016

/s/ Michelle E. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-585-01

ISSUES

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

- Respondents withdrew the issue of offsets and credits.

FINDINGS OF FACT

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

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

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

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

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

5. On February 28, 2014, Dr. Long imposed work restrictions limiting Claimant to lifting, carrying, pushing/pulling of no more than 5 pounds. He was

restricted from using heavy equipment, ladders, and from bending and twisting at the waist. Claimant agreed these were his work restrictions as of February 28, 2014.

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

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

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

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

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

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

12. Surveillance video shows Claimant violating his October 3, 2014 work restrictions. On October 10, 2014, Claimant was shown setting up a pop-up tent or canopy to be used for a band event at Larry's Guitars. The video shows Claimant

lifting, pushing, and pulling the tent in order to open it and set it up. Claimant testified the tent weighed more than 10 pounds.

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

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

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

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

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

18. On May 20, 2015, Dr. Orent issued a report indicating he had discussed the surveillance video with Claimant. Dr. Orent related a conversation with the Claimant wherein Claimant admitted he performed the activities shown in the video. Significantly, Dr. Orent noted "[t]his does not change of course the fact that he was operating outside his work restrictions and he admitted that this was absolutely true."

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

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

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

CONCLUSIONS OF LAW

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

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

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

Before sanctions under § 8-43-404(3) can be invoked to reduce or suspend benefits, Respondents must show that the treatment at issue is calculated to effect a cure, *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001, 1006 (Colo. App. 2002), or that "such medical or surgical treatment … is reasonably essential to promote recovery." §8-43-404(3), C.R.S.

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

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

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

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

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

Claimant engaged in activities that imperiled and retarded his recovery. His own treating physician (Dr. Orent), Respondents' IME physician (Dr. Lotman), and even the DIME physician (Dr. Henke) all essentially opined that the purpose of imposing work restrictions in a workers' compensation claim is to treat pain, to allow tissue damage to heal, and to limit any further damage. Dr. Orent was particularly disturbed that Claimant

exceeded his work restrictions without disclosing that information to him during the course of treatment. Dr. Lotman testified that in his expert opinion, Claimant's activities not only violated the work restrictions that were essential to promoting recovery, but did in fact imperil and retard recovery.

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

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

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

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

- Claimant failed to provide Dr. Orent with essential information that was needed in order for treatment.
- Claimant failed to disclose to Dr. Orent or Dr. Long that he was receiving treatment for his lumbar spine from Dr. Cahn up until a month prior to the work injury.
- He also failed to disclose this relevant information to Respondents in sworn discovery responses.
- Claimant posted on Facebook that he was employed by Insurer.
- Claimant failed to disclose to Dr. Long or Dr. Orent that he played in a band.
- He told Dr. Lotman that he was no longer able to walk his dog, ski, or perform work in his garden—giving the wrong impression as to his daily activities.

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

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

ORDER

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

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

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

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

4. Any issue not resolved herein is reserved for future determination.

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

DATED: February 29, 2016

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

ISSUES

- Did Claimant prove by a preponderance of the evidence he was in the quasi-course and scope of his employment when he was involved in an automobile accident on June 9, 2014.
- Did Respondents prove Claimant's motor vehicle accident constituted an intervening event, severing Respondents' liability for TTD benefits?
- Was the Petition to Modify, Terminate, or Suspend Compensation improvidently granted?
- Is Claimant entitled to Temporary Total Disability benefits from October 1, 2014 and continuing?

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on December 19, 2013 while working for Employer. Claimant was living in Fairplay, Colorado at the time.

2. Claimant worked on the floor crew and was injured while stripping wax off a floor. Claimant testified that his feet went out from under him, which caused him to hit his head and shoulder. He suffered a severe concussion, which affected his cognitive abilities.

3. Claimant testified Thomas White, M.D. was his primary authorized treating physician.

4. On or about May 22, 2014, Dr. White referred Claimant to Marc Wasserman, M.D.[1] Dr. Wasserman's office was located at 499 E. Hampden Ave, Englewood, CO. This was a neurosurgery referral for Claimant's C6 radiculopathy. Dr. White's narrative report stated Claimant had decreased flexion and extension, as well as reduced range of notion. C6 radiculopathy was confirmed by EMG. Dr. White noted Claimant was unable to work for six (6) weeks.

5. Respondents did not dispute that Dr. Wasserman was an ATP by virtue of the referral from Dr. White. Claimant's appointment with Dr. Wasserman was scheduled for June 9, 2014.

6. Claimant's medical history was significant in that he previously suffered seizures related to alcohol withdrawal. At the hearing, Claimant admitted he was an

[1] Exhibit A.

alcoholic and had received medical treatment for alcohol-related issues. Medical records from St. Anthony Summit Medical Center, dated August 10, 2012, were admitted at hearing. On that day, Claimant was admitted for seizures related to alcohol withdrawal. By history, Claimant had two (2) previous seizures. In the discharge note, Claimant was advised to quit drinking and he may require professional help. A Dr. Gervais also noted Claimant was at risk for seizures or other complications if he quit abruptly.

7. Claimant testified when he had seizures in the past after he stopped drinking, he would experience flu-like symptoms, including nausea and vomiting. He couldn't hold anything down (including water). Claimant testified he would get sick and the seizures would usually come the day after he quit drinking.

8. Claimant testified he decided to stop drinking the Friday[2] before his appointment with Dr. Wasserman. This was after an argument with his wife. Claimant testified that he had no alcohol after that Friday night. The ALJ found Claimant to be a credible witness, both in regard to his history of alcoholism, but also concerning what prompted the decision to stop drinking.

9. On June 9, 2014 (Monday), Claimant drove from his home in Fairplay, Colorado to Englewood, where Dr. Wasserman's office was located. The appointment with Dr. Wasserman was scheduled for 3:00 p.m. Claimant testified he had never travelled to Dr. Wasserman's office before. Claimant said left early (between approximately 10:00 a.m. and 10:30 a.m.) because he didn't know if there would be obstacles such as accidents or road construction which could delay him. He described Highway 285, as "not an easy road or highway to travel" and said it was hard to predict how long the trip would take. Claimant testified he did not know exactly where Dr. Wasserman's office was located. He had never been there before.

10. Claimant did not have any of the symptoms of a seizure on the morning of 6/9/14, including nausea. He had no forewarning he was going to have a seizure that day. The ALJ concluded that Claimant did not have any prior knowledge or indication he was going to suffer a seizure on 6/9/14.

11. Claimant testified he did not drink alcohol that morning, nor did he go to a liquor store. He denied any knowledge of the fireball bottle in his vehicle. Claimant said his drink of choice was beer or vodka, not whiskey.

12. Claimant testified he took Highway 285 from Fairplay to Englewood and turned on a street (north) that he thought was near the doctor's office. Claimant did not recall the name of that street and he stated he was not familiar with the area. The ALJ found Claimant credible, since he had not been to Dr. Wasserman's office before and had never driven in the area.

13. Claimant testified that his plan was to find the doctor's office, as he had the address and then get a bite to eat.

[2] The ALJ takes administrative notice that June 6, 2014 was a Friday.

14. Claimant testified he saw the hospital and thought he had gone too far. He couldn't turn right as this was where the hospital was, so he turned left. Claimant did not know the name of the street. He was going to make a loop around in order to get to where he thought the doctor's office was[3]. The last thing he could remember was the left turn. Claimant thought the accident occurred about 1 block from where he believed the doctor's office was located, but was not sure. The next thing he remembered was waking up in the hospital. The ALJ found Claimant's testimony credible concerning what happened immediately before the motor vehicle accident.

15. An accident report was prepared by the City of Englewood Police Department. In that report, it was noted that Claimant was driving a 1991 Ford Tempo westbound in the 300 block of east Floyd Av. when he went off the right side of the road and struck a utility pole. The witness indicated Claimant was seizing immediately before he hit the utility pole. In Section R–Most Apparent Human Contributing Factor- "illness/medical" was listed. There was no reference to alcohol in this accident report. Claimant was not cited for DUI/DWAI, nor for an open container of alcohol.

16. The EMS report noted Claimant was awake, but actively seizing when they arrived. The witness to the accident said Claimant was shaking before hitting the pole. Medication could not initially be administered because Claimant was shaking so violently. In the report, Claimant's symptoms included "altered mentation, unconsciousness, neurological deficit". The report also noted alcohol was found in the vehicle and Claimant had "smell of alcohol on breath" [sic]. Claimant was transported to Swedish Hospital.

17. The Emergency Department note for 6/9/14 at 16:51 did not record any finding regarding intoxication. There was also no notation in the ED records concerning the smell of alcohol. Claimant's lab tests at Swedish hospital were negative for alcohol. The ALJ infers there would have been reference to the odor of alcohol or intoxication if such an observation was made by health care personnel in the ED. The ALJ was unable to conclude whether the time which elapsed from the accident to when the blood test was performed was long enough for alcohol to be out of Claimant's system or whether would have been a trace amount present. No evidence was presented on that subject.

18. Claimant testified that he had no recollection of the first three (3) days in the hospital. He did not recall anyone questioning him as to what occurred in the accident. Claimant denied he was travelling to a liquor store at the time of the accident. The ALJ credited Claimant's testimony that he did not drink that day and had not gone to the liquor store. The ALJ notes that this conclusion was also supported by the inference drawn from the evidence that Claimant probably would not have had a seizure related to alcohol withdrawal, if he had been drinking that morning.

[3] Respondents' Position Statement incorrectly states Claimant had already found the doctor's office, which was located at the hospital. There was nothing in the record which supported such a finding.

19. There was a June 11, 2014 Swedish Medical Center note which referenced a discussion concerning Claimant during rounds. The note said: "Pt has a PMH of ETOH, Seizure, HTN. Per report pt had a seizure whole (sic) driving and hit a telephone pole. Pt was restrained. Per Trauma pt was trying to stop drinking was going into withdraw (sic) and drove to the liquor store and had an accident". The ALJ finds this note was based upon an unidentified report and unidentified statement or report from "Trauma". Thus, because of the error regarding Claimant's destination and the lack of clarity regarding the source of the information, the ALJ was not persuaded this note accurately reflected Claimant's activities before the MVA.

20. On June 26, 2014, the adjuster for Insurer sent a letter to Dr. White posing questions related to the motor vehicle accident. Dr. White responded with aletter (undated), which was faxed on 8/25/14. Dr. White noted Claimant had sustained a number of injuries, but was still being treated for radiculopathy when he was involved in the motor vehicle accident ("MVA").

21. A Trauma Progress Note dated July 7, 2014, from Denetta Sue Slone, M.D., noted under Chief Complaint that Claimant had a seizure driving home from a liquor store and hit a tree. Under the diagnosis of seizure, a comment was made of "alcohol withdrawal most likely." Under the Assessment/Plan for alcohol abuse/withdrawal/seizure, Dr. Slone noted, "Patient was apparently trying to stop alcohol use, was driving and had an alcohol withdrawal related seizure." The ALJ finds Dr. Slone incorrectly stated Claimant was travelling home and did not indicate the source of her information. The ALJ concluded Dr. Slone's description of Claimant's destination was inaccurate.

22. Respondents filed a Petition to Modify, Terminate or Suspend Compensation on September 30, 2014. The Petition to Modify, Terminate or Suspend Compensation did not have page 2 of 2 of the Division of Worker's Compensation ("DOWC") prescribed form, which is the Objection to Petition to Modify, Terminate or Suspend Compensation. A copy of Dr. White's response letter was attached to the Petition to Modify, Terminate or Suspend Compensation.

23. The fact the Objection form was not attached to the Petition to Modify, Terminate or Suspend Compensation was confirmed by Claimant's testimony and the certified copy of the DOWC file, which was admitted as Exhibit 21. The failure to attach the Objection form to the Petition to Modify, Terminate or Suspend Compensation made the Petition deficient under the W.C.R.P.

24. Dr. White noted as of the 6/9/14 MVA, Claimant was experiencing a "significant amount of pain and weakness and discomfort" from C6 radiculopathy. Dr. White opined Claimant was unable to return to his maintenance position as of 6/914. Dr. White said the MVA was not related to the worker's compensation injury or the cervical radiculopathy. Dr. White also stated that, as of his last visit with Claimant on May 22, 2014, his pain was improving and Dr. White thought Claimant would probably be able to resume work in some capacity within a month or less. The ALJ notes the

record was bereft of any evidence that an offer of modified duty was tendered to Claimant before the subject accident.

25. Claimant testified when he received the Petition to Modify, Terminate or Suspend Compensation, he did not know what to do. No Objection to the Petition to Modify, Terminate or Suspend Compensation was filed.

26. The DOWC issued a letter, dated October 24, 2014, which noted the Petition to Modify, Terminate or Suspend Compensation was filed and any response was reviewed. The Petition to Modify, Terminate or Suspend Compensation was approved. The DOWC letter stated Respondents were allowed to suspend compensation as of the date of the Petition.

27. On or about November 6, 2014, Respondents filed an Amended General Admission of Liability ("GAL"), which referenced the Petition to Modify, Terminate or Suspend Compensation, as well as the letter from Dr. White. Claimant's TTD benefits were terminated as of September 30, 2014. No Objection was filed to the Amended GAL. Claimant has not received TTD benefits since that time.

28. The ALJ concludes the MVA occurred while Claimant was trying to find Dr. Wasserman's office.

29. The ALJ concludes Claimant did not deviate on his trip from Fairplay to Englewood for the appointment with Dr. Wasserman. Claimant was still in the process of trying to find Dr. Wasserman's office and the ALJ credited Claimant's testimony that he turned near the hospital. Claimant was still en route to the medical appointment when the MVA occurred, as he had not confirmed where the doctor's office was located.

30. The ALJ concludes the MVA accident occurred while Claimant was in the quasi-course of his employment and therefore his injuries were compensable.

31. No ATP has determined Claimant reached MMI.

32. Claimant has not returned to work since 6/9/14. There was no offer of modified employment tendered to Claimant in the record.

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

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the

rights of Respondents. Section 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). Claimant's credibility was one of the primary issues in this case, as his testimony had to be considered on its face, as well as when compared with the medical records admitted at hearing.

Quasi-Course of Employment

Claimant argued the injuries he sustained in the 6/9/14 accident were compensable, as he was in the quasi-course of employment when the MVA occurred. Claimant disputed he deviated on his trip to Dr. Wasserman's office and pointed to the location of the accident in support. Claimant also denied he imbibed alcohol prior to the MVA.

Respondents put forward two arguments on this issue; first, even if Claimant was in the quasi-course of employment, he deviated on his trip to the doctor's office. As part of this assertion, Respondents averred the MVA was an intervening event, which served to terminate their liability. Second, Respondents contended compensability under the quasi-course doctrine was defeated by employee misconduct such as a deliberate act in violation of express medical orders or an implied prohibition. The test of implied prohibition required a showing the employer would have forbidden the act, if it had had an opportunity to express itself on the subject and the employee knew or should have known of this fact. Respondents cited *Larson's Workers' Compensation Law*, § 10.05 to support this latter argument.

As a starting point, the ALJ considered whether Claimant was in the quasi-course of employment when the MVA occurred. Claimant had the burden of proof on this issue. As found, Claimant met his burden and established he was in the quasi-course of employment when the MVA occurred.

In Colorado, the quasi-course of employment doctrine has been applied to certain activities of Claimant following a compensable injury. *Employers Fire Insurance Co. v. Lumbermens Mutual Casualty Co.*, 964 P. 2d 591 (Colo. App. 1998). This doctrine has been the basis for expanding what is considered compensable, beyond what would ordinarily be the time and space limits of employment, when it occurs after an industrial injury. The rationale articulated by Colorado courts is that but for the compensable injury, Clamant would not have undertaken those activities. The trip to the physician's office became part of the employment contract. *Excel Corp. v. Indus. Claim Appeals Office,* 860 P.2d 1393, 1394 (Colo. App. 1993). Since the employer is required to provide medical treatment after an industrial injury, liability for injuries sustained while travelling to an appointment to treat for the injuries is compensable because these activities would not have been undertaken but for the compensable injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936, 938 (Colo. App. 2003).

Accordingly, the quasi-course of employment doctrine has been extended to injuries sustained by Claimants while traveling to and from treatment provided by an authorized provider under various factual scenarios. *Excel Corp. v. Indus. Claim Appeals Office, supra,* 860 P.2d at 1394-1395. [Claimant's slip and fall while leaving physical therapy was deemed compensable as part of the quasi-course of employment doctrine. The activity of going to the medical appointment was considered "an implied part of the employment contract", since Claimant would not have been going to the doctor but for the compensable injury.]*; Price Mine Service, Inc. v. Industrial Claim Appeals Office*, *supra* 64 P.3d at 938. [The injuries sustained by Claimant in an MVA after authorized medical treatment was compensable as part of the original injury and the insurer on the risk was liable under quasi-course of employment doctrine. The Court specifically held under this doctrine "the second injury was not an intervening event which would relieve the employer of liability".]; *Turner v. Industrial Claims Appeals Office*, 111 P.3d 534 (Colo. App. 2004) [Claimant's injuries from MVA after a vocational evaluation appointment were found compensable, despite the fact Claimant had stopped for lunch after the appointment].

Therefore, as a general proposition, Claimant's injuries in the 6/9/14 MVA would be compensable under the quasi-course of employment doctrine, if it was shown he was going to a medical appointment when he was injured. As found, Claimant satisfied his burden of proof that he was traveling to an authorized medical appointment when the accident occurred. (Findings of Fact Nos. 9, 12, 28 and 30)

The next issue presented in this case was whether there was a deviation which took Claimant out of the quasi-course of employment. Respondents had the burden of proving Claimant made a substantial deviation, which took him out of the quasi-course of employment. Alternatively, Respondents had the burden of proving that the accident occurred under such circumstances that it would constitute an intervening event.

In this regard, the Colorado Court of Appeals decisions in *Turner v. Industrial Claims Appeals Office*, *supra*, and *Kelly v. Industrial Claim Appeals Office*, 214 P.3d

516, 518 (Colo. App. 2009) were considered by the ALJ. In *Turner,* the ALJ found that neither Claimant's stop at the restaurant after the vocational evaluation, nor the wrong turn constituted a deviation. *Turner v. Industrial Claims Appeals Office*, *supra*, 111 P.3d at 535. However, the ALJ concluded because the Employer did not have a contractual obligation to provide vocational rehabilitation, Claimant was not in the quasi-course of employment. *Id.* The ALJ's decision was affirmed on appeal by the Industrial Claim Appeals Office.

The Court of Appeals found Claimant's travel for the vocational evaluation was directly related to and proximately caused by a compensable prior injury, despite the fact Employer was not required to provide vocational rehabilitation benefits. *Turner v. Industrial Claims Appeals Office*, *supra*, 111 P.3d at 538. The Court reasoned this fit squarely within the quasi-course of employment doctrine. *Id.* The Court of Appeals reversed and remanded the case.

In *Kelly*, Claimant suffered a compensable injury for which he required knee surgery. Authorization for the surgery was initially denied and the surgeon's office sought to re-schedule the surgery due to a cancellation. The surgeon's office contacted Claimant to set a pre-operative appointment. At the time, Claimant was on vacation travelling from Colorado to California and had arrived in Reno, Nevada. Claimant started the return trip to Colorado and was injured in a MVA, approximately 300 miles from Reno. Claimant testified he intended to travel directly from Reno to Denver for the medical appointment because he did not have time to return home. However, Claimant also testified the route he was taking was longer, which took him past his home in Gypsum.

The ALJ concluded Claimant failed to prove he was within the quasi-course of his employment because he did not prove he was en route to a medical appointment at the time of the MVA. The ALJ found the accident occurred after Claimant's vacation in Nevada. The ALJ reasoned the length and duration of Claimant's trip exceeded the reasonable range of consequences contemplated by the employment contract. The ALJ also found Claimant failed to prove the pre-surgical appointment was authorized.

The ICAO affirmed the ALJ's decision on appeal, as did the Colorado Court of Appeals; neither court reaching the authorization issue. When considering the question of whether Claimant deviated from the route of travel so as to take him/her out of the quasi-course of employment, the Court of Appeals noted this issue was highly fact specific. *Kelly v. Industrial Claim Appeals Office*, *supra*, 214 P.3d at 518. The Court held the test was whether the deviation was substantial and adopted the test used in cases where the employee goes on a personal errand during a business trip. *Kelly v. Industrial Claim Appeals Office*, *supra*, 214 P.3d at 519. When a personal deviation was asserted, the issue was whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Id.*

The Court adopted the aforementioned test for deviations from route of travel and applied it to the quasi-course of employment doctrine when Claimant was seeking medical treatment. In *Kelly,* implicit in the ALJ's finding was that Claimant was travelling home and not to the medical appointment. Therefore, the Court of Appeals affirmed the ALJ's finding that Claimant had substantially deviated from the route of travel. *Id.*

The ALJ notes there are significant factual distinctions between *Kelly* and the case at bar. In *Kelly*, Claimant was injured while traveling back to Colorado after being on vacation. The ALJ determined Claimant was returning to his home, as opposed to being en route to a medical appointment. Under those facts, the ALJ found the travel from Reno to Denver attenuated the causal connection with the injury. In addition, the authorization for the surgery did not occur until after the accident and thus, Claimant was not travelling to an appointment with an authorized physician.

Those facts were not present in this case where Claimant travelled directly from home to Dr. Wasserman's office in Englewood. But for the appointment with Dr. Wasserman (an ATP), Claimant would not have travelled from Fairplay to Englewood. At the time the accident occurred, Claimant was engaged in the act of trying to locate Dr. Wasserman's office. (Findings of Fact Nos. 12 and 14). In fact, by all accounts, the accident occurred a short time after Claimant arrived in Englewood and very close to where the doctor's office was located. Under these facts, this was not sufficiently attenuated from the trip to the medical appointment and was not a substantial deviation. (Finding of Fact No. 29).

In this regard, the fact that Claimant was significantly early for the appointment was not dispositive and did not take the MVA out of the quasi-course of employment. As found, the ALJ credited Claimant's explanation that he was concerned about how long it would take him, possible detours and was unfamiliar with the area where the doctor's office was located. Furthermore, it was significant to the ALJ that the evidence showed Claimant had not yet found the doctor's office and planned to go around the block. As such, Claimant was still en route to the appointment.

In addition, the ALJ did not credit the evidence which Respondents alleged showed Claimant had stopped at a liquor store or was travelling to liquor store. Said evidence was unsubstantiated and based on unknown sources, which raised questions about its accuracy. The ALJ had no way of determining the validity of these reports based upon the evidence in the record. (Findings of Fact Nos. 19 and 21). The ALJ also had no way of determining the credibility of the authors of these notes.

Likewise, the evidence concerning the presence of alcohol was disputed, with evidence both in support of and directly contrary to Respondents' assertions. Respondents had the burden of proving the accident was an intervening event and failed to adduce a sufficient quantum of evidence to carry this burden. As such, the ALJ determined the MVA was not an intervening event and Claimant's injuries were compensable as part of the original claim.

The ALJ also considered the argument that Claimant was engaged in misconduct when the accident occurred (i.e. going to the liquor store or drinking alcohol) which took him out of the quasi-course of employment. As found, the evidence was equivocal (at best) as to whether Claimant was going to the liquor store or had drunk any alcohol. While the paramedic report noted a container of alcohol, the police report did not and Claimant was not cited for DUI/DWAI or for an open container. (Findings of Fact Nos. 15 and 16). While there were hospital notes Claimant was going home from the liquor store, no evidence established this fact. Also, Claimant's blood test had no evidence of alcohol and the ED report contained no reference to alcohol. (Finding of Fact No. 17).

In this regard, there was no evidence in the record regarding Employer's policies on this subject. Although the ALJ could intuitively conclude that the Employer would prohibit drinking alcohol while on the job, even assuming Claimant was traveling to or from a liquor store, there was insufficient evidence to conclude that conduct would have been prohibited. Therefore, the evidence in the record was insufficient to establish the first prong of this defense, that Claimant was engaged in a deliberate prohibited act.

Finally, Respondents argued Claimant's act of driving for 2 ½ hours after he had stopped drinking, when he had a known history of seizures and was previously advised by his physicians not to stop drinking without medical advice, broke the chain of causation. However, the ALJ found Claimant did not know he was going to have a seizure that day. He had no indication before the accident occurred, including any of the symptoms he previously experienced. (Finding of Fact No. 10). Based upon the evidence presented at hearing, there were insufficient facts to establish Claimant's conduct was deliberate or that he engaged in conduct that he knew or should have known was in direct contravention of the prior medical advice concerning seizures.

Considering the totality of the evidence admitted at hearing, the ALJ found Claimant was in the quasi-course of employment when he was injured in the MVA on 6/9/14. He was trying to locate the doctor's office and had not substantially deviated from his route of travel. The MVA was not an intervening event under the facts of this case.

Petition to Modify, Terminate or Suspend Compensation

Claimant also contended the Petition to Modify, Terminate or Suspend Compensation was insufficient and did not provide the basis to terminate his TTD benefits. Respondents argued the termination of Claimant's TTD was proper, as it was approved by the DOWC and there was no Objection filed.

As found**,** Respondents filed a Petition to Modify, Terminate or Suspend Compensation on September 30, 2014. In this filing, Respondents stated Claimant had a MVA on 6/9/14 and was still in rehab. Respondents alleged Claimant would have returned to modified duty, if not for the intervening event and relied upon Dr. White's letter. Claimant did not respond to the Petition to Modify, Terminate or Suspend Compensation and the DOWC issued a letter which approved the termination of benefits.

The issue of whether Claimant's TTD benefits were properly suspended is subsumed in the question of whether proper notice was given by the Petition to Modify, Terminate or Suspend Compensation. W.C.R.P Rule 6-4 (B) governs the Petition and provides in pertinent part:

> "A copy of a response form prescribed by the Division **shall** be mailed with a copy of the petition to the claimant and claimant's attorney and the Division. Certification of this mailing shall be filed with the petition." [Emphasis added].

The ALJ found the attachment of the Objection form to the Petition to Modify, Terminate or Suspend Compensation was required. The Objection form was not attached to the Petition to Modify, Terminate or Suspend Compensation. The use of the word "shall" in the aforementioned rule leads to this conclusion: the failure to attach this document made the filing deficient. This would be a sufficient basis to find that the Petition to Modify, Terminate or Suspend Compensation was improvidently granted.

However, Respondents correctly pointed out this issue is before the Court and could be determined by an ALJ, after a hearing in which the circumstances related to the termination of TTD was considered and evidence presented. W.C.R.P. 6-8(A) specifically provides:

> "Temporary disability benefits may not be suspended, modified or terminated except pursuant to the provisions of this rule or pursuant to an order from the Director under 6-4(C), or an order of the Office of Administrative Courts following a hearing."

Therefore, the more important consideration to be adjudicated at hearing was whether, under these circumstances, Respondents were entitled to terminate Claimants' TTD benefits. In this regard, Respondents filed their Petition to Modify, Terminate or Suspend Compensation, based on the MVA (which they characterized as an intervening event) as grounds for the termination of benefits.

As found, Claimant was in the quasi-course of employment when the accident occurred. Furthermore, the ALJ determined Respondents failed to meet their burden of proof that the MVA was an intervening event. Thus, there was no legal basis to modify, terminate or suspend Claimant's TTD benefits. Since none of the statutory grounds under 8-42-105(3), C.R.S. for termination of indemnity benefits existed, Claimant is entitled to receive TTD from October 1, 2014 (the date his benefits were terminated) until terminated by law. Respondents are required to pay those benefits.

ORDER

It is therefore ordered that:

1. Claimant's injuries sustained in the September 6, 2014 MVA are compensable as these occurred in the quasi-course of his employment.

2. The September 6, 2014 MVA did not constitute an intervening event, which severed Respondents' liability for payment of benefits under the Colorado Workers' Compensation Act.

3. Claimant is entitled to TTD from October 1, 2014 and continuing until terminated by law.

4. Respondents shall pay Claimant temporary total disability benefits from September 30, 2014 and continuing until terminated by law.

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

6. All 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 11, 2016

Digital signature

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

ISSUES

The issues before the ALJ for determination were:

1. Conversion of the permanent partial disability scheduled impairment to a whole person rating; and,

2. Disfigurement.

FINDINGS OF FACT

1. The claimant began working for the respondent-employer in May 2001.

2. The claimant's position requires him to travel to colleges and promote employment opportunities with the respondent-employer.

3. While attending a campus event in Arlington, Texas on October 15, 2013 the claimant was involved in a work related motor vehicle accident (MVA), wherein his Mazda CX-7 was struck in the rear by a Jeep Cherokee. This MVA occurred approximately 7:15 pm under dark and rainy conditions.

4. The claimant was treated for injuries he sustained at an emergency room and released.

5. The claimant sustained serious injuries to his left shoulder and was assigned to an authorized treating physician, Dr. Karen Davis.

6. Ultimately, the claimant required surgery on his left shoulder.

7. The claimant underwent surgery on January 9, 2014 that was conducted by Dr. Phillip Stull.

8. The claimant's surgical procedures included left shoulder arthroscopy with debridement; mini-open acromioplasty and release of CA ligament; and, a distal clavicle excision.

9. Subsequent to the surgery the claimant underwent a course of physical therapy from January 16, 2014 through May 22, 2014 and he was provided an exercise regimen to continue post-PT.

10. The claimant was found to be at maximum medical improvement by Dr. David Zieg as of September 2, 2014. Due to the claimant's travel obligations he did not receive an impairment rating until February 10, 2015.

11. The claimant was given a left upper extremity scheduled rating of 13%, which converts to an 8% whole person impairment. There were no permanent restrictions and no maintenance medical care recommended.

12. The respondent-insurer filed a final admission of liability (FAL) on March 6, 2015 admitting for the scheduled impairment rating of 13%.

13. The claimant objected to the ATP's findings as admitted to in the FAL and subsequently underwent a division independent medical examination (DIME) conducted by Dr. Frank Polanco on July 1, 2015.

14. Dr. Polanco found the claimant to be at MMI as of September 2, 2014 with a scheduled impairment rating of 11% for the left upper extremity that converts to a 7% whole person impairment.

15. The claimant then objected to the FAL filed on August 17, 2015, which admitted for the 11% scheduled impairment as found by Dr. Polanco, and filed an Application for Hearing and Notice to Set on September 16, 2015, requesting a hearing in pertinent part on disfigurement and conversion of the scheduled rating to a whole person rating.

16. As a result of the surgery the claimant continues to have a loss of sleep. Additionally, he hears a recurrent popping sound in the shoulder joint. The residual effects of the surgery have impacted the claimant's lifestyle.

17. The claimant previously engaged in martial arts, weight lifting, golf, and basketball.

18. The claimant has had to minimize or eliminate some of his previous activities. He has had to stop his jiu jitsu activities for fear of landing on his shoulder. Additionally, he has stopped playing basketball due to the physical contact nature of the sport.

19. When undertaking driving activities the claimant can feel strain through his clavicle.

20. Although the claimant agrees he is at MMI, he believes this is so because his job is not a physical job and he can function in his job without a problem.

21. The claimant has, however, lost strength and power. He used to be able to lift heavy weights and now lifting weights greater than 50 pounds will cause considerable pain to the collarbone.

22. The claimant agrees that no doctor has limited his activities; however, during PT he had to reduce activities at times due to clavicular pain.

23. The greatest impact is to the claimant's personal life. He has had to undergo a change in lifestyle and reduce certain activities.

24. The ALJ finds the claimant to be credible.

25. The ALJ finds that the claimant has established that it is more likely than not that he sustained a functional loss that extends beyond the shoulder based upon limitations in activities resulting from pain that is generated beyond the shoulder, specifically in the clavicle area.

26. The ALJ finds that the claimant has established that it is more likely than not that he sustained a 7% whole person impairment.

DISFIGUREMENT

27. The ALJ finds that as a result of his October 15, 2013 work injury, the claimant has a visible disfigurement to the body consisting of two arthroscopic surgery scars on the left shoulder with each being approximately three-quarters of an inch in length and one-eighth of an inch in width. Additionally, there is a main surgical scar on the left shoulder that is approximately three inches in length and three-quarters of an inch wide at its widest. All of the scars are discolored when compared to the surrounding tissue.

28. The ALJ finds the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation in the amount of $1,200.00. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

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

2. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

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

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

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

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

7. The "loss of an arm at the shoulder" is on the schedule of injuries listed under Section 8-42-107 (2)(a), C.R.S. Depending on the particular facts of the claim, damage to the structures of the arm at the shoulder may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107 (2), C.R.S.

8. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment of structures beyond the "arm at the shoulder" is probative evidence of whole person impairment.

9. As found above, the ALJ concludes that the claimant's testimony was credible and is supported by the medical record.

10. The ALJ concludes as found above, that as a result of his work-related injury the claimant has functional impairment of the arm at the shoulder, and the claimant has functional impairment in areas beyond the arm at the shoulder, to include his clavicle area. As a result of his work-related injury, the claimant has functional impairment that is located beyond the arm at the shoulder; it is located in the clavicle area and in the entire body as it relates to the claimant's ability engage in personal pursuits. As a result of his work-related injuries the claimant's functional impairment is not limited to the arm at the shoulder.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that his upper extremity impairment rating should be converted to a whole person impairment rating.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant suffered 7% permanent impairment of the whole person.

13. The ALJ concludes, as found above, that the claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation in the amount of $1,200.00. Section 8-42-108 (1), C.R.S.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon a 7% whole person impairment rating.

2. The respondent-insurer shall pay the claimant $1,200.00 for disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

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

DATE: March 25, 2016

/s/ original signed by:

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-944-056-01

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No further hearings have been held in the above-captioned matter. On March 29, 2016, thwe Claimant filed a "Motion for Clarification of Order Dated 03/21/2016," which the ALJ will construe as a timely motion for a corrected order. The Claimant was appropriately confused by paragraph B of the Order portion of the decision, which is, in fact, inconsistent with the overall decision. Consequently, the Full Findings of Fact, Conclusions of Law are adopted in full with the exception of the herein below modification of the Order portion. Adoption of the Final Admission **is not appropriate** under the circumstances.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/23/16, Courtroom 1, beginning at 1:30 PM, and ending at 4:15 PM).

This matter involves the Respondents' request to overcome the Division Independent Medical Examination (DIME) opinion of David Yamamoto, M.D. , an occupational medical physician to the effect that the Claimant had not reached maximum medical improvement (MMI) because the Claimant needed more psychiatric/psychological evaluations and/or treatment. The Respondents assert that the medical report provided by Gary S.Gutterman, M.D., a board certified psychiatrist indicates that the Claimant had achieved MMI on January 25, 2016; and, Dr. Gutterman's psychiatric opinion establishes by clear and convincing evidence that the DIME opinion of Dr. Yamamoto, with respect to psychiatric MMI has been overcome.

Respondent's Exhibits A through M were admitted into evidence, without objection. Claimant's Exhibits 1 through 15 were admitted into evidence, without objection.

ISSUE

The issue to be determined by this decision concerns whether the psychiatric conclusion made by Dr Gutterman that the Claimant reached MMI on January 25, 2016 establishes clear and convincing evidence to overcome the determination made by DIME Dr. Yamamoto, issued on September 23, 2015, that the Claimant had not achieved MMI regarding psychiatric health associated with the initial injury.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was injured on February 22, 2014 when he fell from a ladder during a firefighting training exercise for the Employer fire department. The Claimant fell approximately 14 feet and fractured his right ankle and foot.

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated July 10, 2015, based on the opinion of authorized treating physician (ATP) Dean Plok, M.D., admitting for medical benefits; an average weekly wage (AWW) of $1,500; temporary total disability (TTD) benefits of $437.71 per week (reduced 50%, based on an alleged safety violation) from February 23, 2014 through March 17, 2014; and, scheduled permanent partial disability (PPD) of 21% of the right lower extremity (RLE). There was a timely objection and request for a DIME. Dr. Yamamoto was appointed as the DIME Examiner.

3. On February 24, 2014, Dr. Prok examined the Claimant and concluded that the Claimant had a pain rating of 8/10 in the foot and ankle and Dr. Prok referred the Claimant to Gregg A. Koldenhoven, M.D., of the Front Range Orthopedics and Spine Clinic.

4. Dr. Koldenhoven examined the Claimant on February 24, 2014 and confirmed that the Claimant had foot fractures. Dr. Koldenhoven performed surgery on the Claimant's right foot on March 4, 2014.

5. The Claimant underwent physical therapy and had his pain monitored by Drs. Koldenhoven, Olsen, Aspergren, and Prok between March 2014 and May 2015.

6. Dr. Prok placed the Claimant at MMI on July 1, 2015.

Division Independent Medical Examination (DIME) of David Yamamoto, M.D.

7. Dr. Yamamoto is fully Level 2 Accredited by the Division of Workers' Compensation (DOWC). On September 23, 2015, Dr. Yamamoto performed the DIME and subsequently issued a report. He recommended consideration of a trial of injection therapy for lumbar discomfort. He further found that the Claimant was not at MMI because he was experiencing anxiety, panic attacks, depression, and symptoms of Post Traumatic Stress Disorder (PTDS), all psychiatric/psychological conditions. Dr. Yamamoto recommended that the Claimant undergo a psychological evaluation, counseling, and a referral to a psychiatrist for treatment of anxiety, PTSD, and depression. The Claimant was referred to Dr. Gutterman. The ALJ infers and finds that DIME Dr. Yamamoto considered the Claimant at MMI for all purposes other than psychiatric MMI.

8. On December 17, 2015, Dr. Koldenhoven conducted a physical examination and stated, "Consider MMI at present with potential for further intervention later in life."

9. Dr. Prok issued a report on January 4, 2016, indicating that the Claimant wanted to undergo medial branch block for the bilateral L4-5 and L5-S1 facets to provide short term relief.

10. On January 25, 2016, the Claimant underwent the psychiatric evaluation conducted by Dr. Gutterman, as recommended by DIME Dr. Yamamoto. Dr. Gutterman concluded after 45 minutes of psychiatric consultation that the Claimant had reached MMI from a psychiatric perspective. The ALJ finds that Dr. Gutterman's opinion concerning psychiatric MMI makes it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant is **not** at MMI is in error.

Ultimate Findings

11. Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and, Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion, which creates an inference that Dr. Yamamoto would defer to Dr. Gutterman on psychiatric matters..

12. Based on substantial evidence, the ALJ makes a rational choice, between conflicting medical opinions, to accept Dr. Gutterman's opinion and to reject Dr. Yamamoto's opinion with respect to psychiatric MMI.

13. The Respondents have proven, by clear and convincing evidence that Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error. Therefore, the Respondents have overcome DIME Dr. Yamamoto's opinion in this regard by clear and convincing evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Gutterman's (a board certified psychiatrist) opinion that the Claimant reached MMI on January 25, 2016 is highly persuasive and more credible than DIME Dr. Yamamoto's, (an occupational medicine physician) opinion that the Claimant was not at psychiatric MMI. Indeed, Dr. Gutterman's opinion renders it highly probable, unmistakable and free from serious and substantial doubt that Dr. Yamamoto's opinion regarding psychiatric MMI is in error. Dr. Gutterman has more specific psychiatric expertise than Dr. Yamamoto and Dr. Yamamoto, in fact, referred the Claimant to Dr. Gutterman for a psychiatric opinion.

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 two conflicting medical opinions, the ALJ made a rational choice to accept the opinion of Dr. Gutterman on MMI and to reject the DIME opinion of Dr. Yamamoto in this regard..

Burden of Proof

c. Under Colorado law, a party disputing a DIME physician's opinion must meet the burden of proof by a showing of clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 38 (Colo. App. 2000). "The finding regarding MMI and permanent medical impairment of an DIME examiner in a dispute arising under subparagraph (II) of paragraph (b) may be overcome only by clear and convincing evidence. § 8-42-107(8)(III), C.R.S..

d. Clear and convincing evidence is defined as, "[T]hat evidence which is stronger than a 'preponderance of the evidence,' and which is unmistakable and free from serious or substantial doubt." *People v. Lane*, 581 P.2d 719, 722 (Colo. 1978); *Metro Moving and Storage Co. v. Gussert, supra*; *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). 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). As found, it has been established that it is highly probable, unmistakable and rfree from serious and substantial doubt that DIME Dr. Yamamoto's opinion that the Claimant has not reached psychiatric MMI is in error.

e. There is no dispute that the Claimant reached MMI on all non-mental health injuries, however, there is but one MMI date for all injuries resulting from a specific compensable event, and psychiatric MMI is a component thereof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant reached maximum medical improvement on January 26, 2016 on all issues as a result of the opinion of Division Independent Medical Examination David Yamamoto, M.D. having been overcome by clear and convincing evidence, by virtue of the opinion of psychiatrist, Gary S. Gutterman, M.D.

B. Any and all issues, including the issues of permanent impairment and safety violation, are reserved for a future hearing.

DATED this _____ day of March 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

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

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

Wc.cord

ISSUES

The issue for determination involves Claimant's entitlement to additional medical treatment. The question to be answered is:

I. Whether Claimant established, by a preponderance of the evidence, that the cervical decompression and lumbar kyphoplasty procedures recommended and performed by Dr. Rauzzino on July 23, 2015, were reasonable, necessary, and related to her admitted February 28, 2014 industrial injury.

FINDINGS OF FACT

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

1. Claimant sustained an injury while working as a customer service representative for Employer on February 28, 2014. She was walking in the company's cafeteria when she slipped on water and twisted her ankle. She then fell to the floor landing on her knees and outstretched hands, injuring her neck in the process.

2. Claimant reported an inability to complete her work shift. Consequently, she was sent to Concentra Medical Centers where she was evaluated by Physician Assistant Kristina Sanfilippo. At that time, PA Sanfilippo documented the following history of injury from Claimant: ". . . she states she slipped and fell on some liquid in the cafeteria at work. She states she did not hit her head and states no LOC (loss of consciousness). . . . She states mild HA (head ache) and believes this is due to the jolt she experienced when trying to catch herself as the muscles on the right side of her neck are starting to become tight. Although she was not formally diagnosed with a neck sprain, PA Sanfilippo noted that Claimant head ache was "most likely" related to a neck strain. Claimant was instructed to follow up (F/U) if her condition "[worsened] or [did] not improve."

3. Liability for Claimant's injuries has been admitted.[1]

4. Claimant's neck pain and headaches persisted and she was seen by Dr. Daniel Peterson at Concentra Medical Centers on May 15, 2014. During this encounter, Claimant reported ongoing and increasingly worsening headaches since her neck

[1] A General Admission of Liability (GAL) is contained in Respondents' Exhibit Packet at Tab A. It reflects that copies of the GAL were mailed to Employer, the Division of Workers Compensation and Claimant on February 21, 2014. The content of the GAL persuades the ALJ that the reference to the GAL being mailed on February 21, 2014 is, more probably than not, a typographical error as it predates the injury by seven (7) days.

strain. At the time of her evaluation, Claimant was sitting in a dark exam room secondary to a reported "migraine head ache." Dr. Peterson noted "restricted and painful" rotation of the cervical spine directionally to the right and left. He also noted a positive Spurling's maneuver. Hoffman's testing was not completed. Dr. Peterson ordered x-rays of the neck, which demonstrated "marked DJD C spine" (marked degenerative joint disease of the cervical spine).

5. Claimant was referred for an MRI of the cervical spine, additional physical therapy (PT) and further evaluation by a physical medicine and rehabilitation expert (PM&R), specifically Dr. John Bissell.

6. Claimant underwent MRI of the cervical spine on May 22, 2014, which demonstrated circumferential disc protrusions at C3-4, C4-5, C5-6, C6-7 and C7-T1. The changes at the C5-6 level were noted to be causing mild spinal cord compression.

7. Claimant was evaluated by Dr. Bissell on May 28, 2014. Dr. Bissell documented the following history of injury: "While walking by the salad bar, she slipped and fell on ice and water- she recalls that her right ankle bent underneath her (years ago she tore 5 ligaments in her right ankle and it has been weak ever since). She fell onto her left knee and then onto her right shoulder. . . . In addition she sprained her neck." Dr. Bissell documented 5/5 motor strength in the upper and lower extremities, no atrophy and/or fasciculations were present and Spurling's testing revealed negative results bilaterally. Additionally, Dr. Bissell specifically noted that Hoffman's testing of the bilateral upper limbs was noted to be negative. Dr. Bissell made no comment regarding Claimant's gait pattern; however, expressly noted that there was "no evidence of cervical myelopathy or radiculopathy.

8. Palpation of the cervical spine during Claimant's May 28, 2014 appointment yielded what Dr. Bissell documented as "Tenderness noted over right cervical and thoracic paraspinal muscle regions with trigger points noted." Cervical spine flexion/extension was documented to be 80% of normal and cervical rotation was 50% of normal according to Dr. Bissell. Dr. Bissell prescribed tizanidine (Flexeril) for "spasm" and reassured Claimant that she should "improve with her current treatment."

9. Claimant returned to Dr. Peterson's attention on June 20, 2014 with complaints of neck pain, headache and with specific report that the tizanidine she was prescribed was causing her "vertigo." While Dr. Peterson noted that cervical axial loading and Spurling's testing was negative, he made no comments about Claimant's station and gait or the results of any Hoffman's testing.

10. On July 31, 2014, Dr. Peterson referred Claimant to Dr. Albert Hattem for delayed recovery. The physical examination from this date of service is similar in characteristic to Dr. Peterson's June 20, 2014 exam in that axial loading and Spurling's testing revealed negative findings. Again the record from this encounter date is devoid of reference to Claimant's station and gait and/or the results from Hoffman's testing.

11. Based upon the content of the June 20, 2014 and July 31, 2014 notes, the ALJ

finds it probable that Dr. Peterson did not perform any Hoffman's testing protocol and did not assess Claimant's gait pattern. Nonetheless, he provided a diagnosis for "cervical spondylosis without myelopathy" for what he described was a "whiplash type injury."

12. On September 4, 2014, Claimant was evaluated by physician assistant Jocelyn Cavender. The note concerning this date of service is devoid of any special testing regarding the cervical spine or Claimant's neurological status, including Hoffman's testing; although she noted Claimant's gait to be "normal."

13. Claimant returned to Dr. Bissell on September 8, 2014 with continued complaints of neck pain. She reported having stopped taking her tizanidine secondary to vertigo type symptoms. Nonetheless, Claimant reported persistent vertigo while denying "progressive neurologic deficit, motor paralysis, and bowel and bladder incontinence." Dr. Bissell noted that Claimant station and gait were "Normal, nonanatalgic." He also noted that while Claimant had "mild cord compression at the C5-6 level" per MRI, she had "normal spinal cord signal." He did not feel that there was medical evidence to support a conclusion that Claimant had "myelopathy or radiculopathy." Dr. Bissell administered trigger point injections to the cervical spine.

14. On September 30, 2014, Claimant was evaluated by Dr. Albert Hattem. Dr. Hattem documented that Claimant reported a history of twisting her right ankle, falling onto her left knee and as she fell she "smacked" her neck. Physical examination revealed 0 to 1+ symmetrical deep tendon reflexes bilaterally at the triceps, biceps, knee and ankle, normal muscle strength in the arm and legs bilaterally, no clonus and a negative Hoffman's sign.

15. On November 20, 2014, Dr. Hattem referred Claimant to Dr. Brain Polvi's office for chiropractic care for her persistent cervical spine complaints.

16. Claimant was evaluated by Dr. Woodrow Hill, a chiropractor in Dr. Polvi's office on December 11, 2014. At this appointment, Dr. Hill documented the following history of injury provided by Claimant: "She stated she stepped into a puddle of water by the salad bar with (sic) caused her to slip and fall. She stated 'she twisted her right ankle and fell forward onto her left knee which also caused her neck to jerk forward then snap back." Dr. Hill assessed cervical spine facet syndrome, specifically at the C5-6 joints on the right as well as cervical myofascial pain syndrome involving the right suboccipital, cervical paravertebral and upper trapezius musculature.

17. Despite PT, acupuncture and chiropractic treatment, Claimant cervical spine pain persisted and worsened over time. On February 12, 2015, Claimant reported 6-7/10 pain to Dr. Hattem during a follow-up visit. Consequently, Dr. Hattem referred Claimant to Dr. Michael Rauzzino for neurosurgical evaluation. Dr. Hattem's physical examination demonstrated a "normal" gait and "no focal neurological deficits in the upper or lower extremities.

18. Claimant was evaluated in the offices of Front Range Spine and Neurosurgery, Dr. Rauzzino's clinic, on March 17, 2015. She was evaluated at that time by Physician Assistant Derrick Winckler. PA Winckler noted that Claimant reported getting "dizzy when standing too quickly or when getting into bed or changing activities", which by Claimant's report would then "slowly resolve." According to PA Winckler, Claimant also reported "twitching" in her left eye and migraine headaches. A complete neurological exam was preformed which resulted in negative for Hoffman's sign bilaterally, although Claimant was unable to tandem walk. PA Winckler ordered updated imaging studies, including repeat MRI and flexion/extension views of the cervical spine. Claimant was scheduled to a follow-up visit with Dr. Rauzzino.

19. Repeat cervical spine MRI was performed on March 18, 2015. The images from this study were compared to the previous film taken August 22, 2014. After comparison it was felt by the interpreting radiologist that the findings on the March 18, 2015 MRI had not appreciably changed beyond what had been noted on the August 22, 2014 study.

20. Claimant was evaluated by Dr. Rauzzino on March 31, 2015. During this appointment, Claimant reported continued pain with range of motion of the neck. Dr. Rauzzino noted that the imaging studies (MRIs) had been compared and were "essentially" unchanged. Physical examination revealed a positive Spurling's maneuver and a "trace" Hoffman's sign on the left, but negative on the right. Dr. Rauzzino noted that Claimant had significant difficulty with tandem gait and that she referred to her balance difficulty as "vertigo." Dr. Rauzzino noted that Claimant's imbalance was "likely myelopathy related to the spinal cord" and not positional vertigo. Noting that Claimant had severe stenosis at C4-5 and C5-6, Dr. Rauzzino opined that Claimant's future treatment could involve a surgical decompression due to the "myelopathy related to her gait." He also felt that Claimant's ongoing cervical spine pain could be addressed further with epidural steroid and/or facet injections. He referred Claimant to Dr. Shimon Blau

21. On April 9, 2015, Claimant returned to Dr. Hattem for follow-up. During this encounter, Claimant reported persistent 2-5/10 neck pain and "balance issues that seemed to be worsening during the past year." Directed physical examination revealed a "normal" gait overall, but a mildly abnormal tandem gait pattern. Nonetheless, Claimant's deep tendon reflexes at the biceps, triceps, knee and ankle were 1+ and symmetrical bilaterally. There were no focal neurological deficits of the arm/legs and no clonus elicited on examination and a negative Hoffman's sign. Dr. Hattem noted Dr. Rauzzino's treatment suggestions and rescheduled Claimant for a recheck following her appointment with Dr. Blau.

22. Claimant was evaluated by Dr. Blau on April 20, 2015. She reported continued cervical pain, headaches and restricted cervical range of motion. Following a physical examination which revealed normal and symmetric reflexes bilaterally and a normal gait pattern, Dr. Blau opined that Claimant's ongoing pain may be "stemming from facet joint pathology versus radiculopathy, or . . . both." However, given Claimant's findings on physical examination, Dr. Blau felt that Claimant's facets joints were the most likely

source of her pain. Consequently, Dr. Blau recommended and after consent performed fluoroscopic guided, bilateral facet injections at C4-5, C5-6 and C6-7.

23. Claimant returned to Dr. Rauzzino's offices on May 12, 2015 reporting "increased difficulty with her balance and . . . a recent fall secondary to this." She also reported "residual dizziness after having injections" and "non-positional headaches" occurring every couple of days and which were worse when "leaning forward." According to the office note from this encounter, Claimant's March 17, 2015 MRI demonstrated "significant spinal stenosis at C5-C6 secondary to a broad-based disc osteophyte complex that produces moderate to severe stenosis." Claimant demonstrated a trace positive Hoffman's sign on the right and continued to demonstrate difficulty with tandem gait. She was assessed with "cervical stenosis and myelopathy at C4-C5 and C5-C6." Given Claimant's returning pain, increased difficulty with ambulation coupled with recent falling episodes, Dr. Rauzzino recommended surgical decompression.

24. Claimant lost her balance and fell backwards onto some steps on or about May 16, 2015, injuring her low back. She was taken to the hospital immediately after this fall.[2]

25. On May 21, 2015, Claimant returned to Dr. Rauzzino's offices for follow-up. During this encounter, Claimant reported that she had fallen a couple of times, relating the most recent fall wherein she landed on her back resulting in severe pain. Physical examination was directed to both the cervical and lumbar spines and demonstrated continued trace positive Hoffman's sign on the right and pain with range of motion of the lumbar spine. Additionally, Claimant demonstrated dysdiadochokinesia of the right hand and difficulty with tandem gait. Her gait was also significantly antalgic. MRI of the lumbar spine was recommended to assess whether the L1 compression fracture visualized on CT scan was acute.

26. Based upon the content of the May 21, 2015 report and the testimony presented at hearing, the ALJ finds that Claimant demonstrated both signs of ataxia, i.e. in coordination of the upper/lower extremities consistent with myelopathy as well as findings consistent with a painful gait (antalgic gait), likely as a consequence of her lumbar spine injury after her May 16, 2015 fall.

27. MRI of the lumbar spine was performed on June 23, 2015. The imaging study revealed an "[a]cute compression fracture of the superior endplate of L1 and about 10% reduction of height and mild posterior superior endplate retropulsion and mild stenosis T12-L1."

28. During a follow-up visit at Dr. Rauzzino's office on July 7, 2015, Claimant's gait remained antalgic and she was unable to perform tandem gait testing. Dr. Rauzzino continued to recommend decompressive surgery for the cervical spine and also noted

[2] A report from Dr. Rauzzino's office Dated May 21, 2015 references that a CT scan of the lumbar spine was performed on May 16, 2015 which demonstrated a mild compression fracture at L1 with no retropulsion.

that a kyphoplasty could be preformed for her acute compression fracture at L1. Claimant consented and insisted that both procedures be performed at the same time to avoid additional surgery at a later date. Consequently, Dr. Rauzzino preformed an anterior cervical discectomy and fusion (ACDF) at C4-5 and C5-6 along with a L1 kyphoplasty on July 23, 2015. The procedures generated two separate reports, both of which reference that surgery was necessitated by injuries sustained in a "motor vehicle accident" (MVA). The ALJ finds the reference to the need for surgery being related to a MVA a mistake in documentation of the part of Dr. Rauzzino as the balance of his records documents the details of Claimant's work related injuries culminating in the need to proceed to surgery.

29. During the ACDF procedure, Dr. Rauzzino found and removed "some disc material posterior to the PLL", which he noted suggested a "more acute herniation . . ."

30. On October 21, 2015 Respondents filed an Application for Hearing requesting determination of the reasonableness, necessity and relatedness of Claimant's ACDF and kyphoplasty procedures to her admitted February 28, 2014 industrial injury.

31. On November 16, Dr. John Douthit evaluated Claimant at Respondents' request. As part of his independent medical examination (IME), Dr. Douthit obtained a history concerning Claimant's injuries. According to Dr. Douthit's IME report, Claimant reported that she had just "finished breakfast and was on her way to the cashier. When passing by the salad bar, Claimant believes there was melted ice on the floor causing her ankle to twist and fall. She fell forward onto her knees, twisting her right ankle sustaining injury. She states she went down first left and then right and felt her neck snap."

32. Dr. Douthit also obtained a history of progressive gait instability and subsequent falls. Claimant reported her balance problem as "vertigo" which waxed and waned for which she required the security/stability of a cane to walk. Dr. Douthit's physical examination failed to reveal ataxia. According to Dr. Douthit, Claimant had a "narrow based coordinated gait with the cane and was able to use her hands very well. Tandem gait testing revealed an unsteady pattern, but Claimant did not lose her balance per Dr. Douthit's IME report. Hoffman sign was normal. Dr. Douthit found "no objective physical signs of myelopathy"; however, noted that he was missing records which he wished to review. Nonetheless, Dr. Douthit opined that Claimant did not develop a myelopathy secondary to her fall in the cafeteria. Rather he opined that the results of Claimant's physical examination (failure of long track signs such as clonus, lack of hyperreflexia, no parenchymal signal, normal Hoffman's and lack of ataxic gait) coupled with her persistent post surgery "imbalance" did not support a conclusion that Claimant had myelopathy. To the contrary, Dr. Douthit opined that Claimant's imbalance was consistent with vertigo which he opined should have been "investigated" through consultation by internal medicine before Dr. Rauzzino took her to surgery. Because Dr. Douthit felt that Claimant did not develop a myelopathy as a consequence of her February 28, 2014 slip and fall, he opined that her ACDF procedure was unrelated to that fall. Moreover, because Claimant did not have a myelopathy, her subsequent fall on May 16, 2015 was unrelated to her February 28, 2014 slip and fall. Consequently,

Claimant's kyphoplasty was also unrelated to the February 28, 2014 slip and fall.

33. Additional medical records were sent to Dr. Douthit per his request. Dr. Douthit reviewed those records and prepared a supplemental IME report dated January 5, 2016. In this report, Dr. Douthit draws particular attention to the August 31, 2015 PT report of Jonathan Brown. According to this note, Claimant reported to PT Brown that she had vertigo, which he felt sounds "consistent with crystal . . . lying down nearly always causes vertigo and she covers her eyes while she waits for it to subside. Dr. Douthit reiterated his previous opinions concerning the myelopathy, noting that "[i]t is evident from Mister Brown's report . . . as well as my exam and review of her records that this is unrelated to her fall at work." Based upon the content of the report, the ALJ finds that reference to the phrase "this is unrelated to her fall", likely means Claimant's balance problems.

34. Dr. Rauzzino testified by deposition on January 26, 2016.

35. Dr. Rauzzino testified that he is a board certified neurosurgeon. After graduating from medical school he did an 8 year residency in neurosurgery. He has been board certified in neurosurgery for about 11 years and has taught surgical techniques to other neurosurgeons. He is an actively practicing neurosurgery and the chief of Neurosurgery at Sky Ridge Hospital in addition to acting Chief of the Neurology Department.

36. Dr. Rauzzino testified that Claimants second fall in May, 2015 was caused by myelopathy or spinal cord dysfunction, which manifested itself with gait instability when she walked. Dr. Douthit felt the second fall in May, 2015, was caused by vertigo and unsteadiness of uncertain origin possibly related to hypertension medication, vestibular or vascular problems.

37. Regarding Dr. Douthit's opinion, Dr. Rauzzino distinguished between vertigo and imbalance caused by myelopathy. According to Dr. Rauzzino, position vertigo is separate from myelopathy and occurs when, for example, when you are sitting in a chair and the room starts spinning around you; where as myelopathy manifests in a balance disturbance because of spinal cord dysfunction. (Id.) According to Dr. Rauzzino, a person can have positional vertigo and myelopathy concurrently.[3] Dr. Douthit agreed that it is possible to have both vertigo and myelopathy at the same time.

38. In response to Dr. Douthit's opinion that Claimant did not have myelopathy because she had no evidence of injury to her spinal cord, i.e. no "parenchymal spasm, Dr. Rauzzino testified that "parenchymal spasm" is an irreversible event that evidences injury to the spinal cord and that patients can have a myelopathy without a parenchymal

[3] Dr. Rauzzino also addressed the differences between position vertigo and imbalance caused by myelopathy when addressing PT Brown's August 31, 2015 note, testifying that vertigo is "something that happens kind of at rest, when you change position, when you go from a seated to a laying position, or vice versa, or something like that. Walking is something entirely different. So, she could have vertigo from something else, but the - - the trouble with her balance and - - falling - - is related to the myelopathy."

spasm. He disagreed with Dr. Douthit on this point testifying that the point of treating people with myelopathy is to help them before a parenchymal spasm occurs, causing irreversible spinal cord damage.

39. Dr. Rauzzino opined that Claimant developed a cervical myelopathy when she fell on February 28, 2014, and that when she fell hurting her lower back in May, 2015 that was a result of the myelopathy caused by the original fall.

40. As noted above, Dr. Douthit opined that he saw no signs of myelopathy. Dr. Rauzzino testified that there were likely no signs of myelopathy apparent to Dr. Douthit because Claimant had a good result to surgery. The record evidence indicates that the surgery performed by Dr. Rauzzino was done 4 months before Dr. Douthit's report of November 16, 2015.

41. Regarding the relatedness of Claimant's need for ACDF procedure, Dr. Rauzzino testified that as a Level II accredited physician, he did a causation analysis which lead him to conclude that the need for the procedure was related to Claimant's February 28, 2014 slip and fall of the following reasons:

- Claimant did not have a history of neck symptoms prior to the February 28, 2014 slip and fall. (Dr. Douthit agreed there were no references to Claimant having an unsteady gait prior to Claimant's slip and fall on February 28, 2014);

- Claimant had an acute injury with immediate complaint of symptoms;

- Claimant had signs and symptoms of an acute problem with the spinal cord; she had surgery for this; at the time of surgery, an acute disc herniation was found, in addition to the superimposed chronic changes (noted on MRI); and,

- Claimant got better after the surgery.

42. During cross examination, Dr. Rauzzino testified that a chiropractic examination is not likely to be as detailed and adept in discerning the subtle findings regarding the presence or non-presence of a cervical spine condition as would be that of a neurosurgeon like him. Further the fact that a chiropractic examination found Claimant's neck pain free did not mean that Claimant didn't have a myelopathy since the spinal cord does not sense pain.

43. As to the discrepancy between the results of two Hoffman's tests, one on March 17, 2015 with a negative Hoffman test and one on March 31, 2015 with a positive result, Dr. Rauzzino states the first exam was done by his P.A. and the second by himself. Dr. Rauzzino states his exam may be slightly different and elicit different findings because he is the neurosurgeon. Dr. Rauzzino states the positive Hoffman test was subtle but was there and the PA with less training, likely didn't appreciate it.

44. Dr. Rauzzino testified the lumbar strain is related to the work injury because Claimant fell due to myelopathy from the cervical stenosis.

45. Dr. Douthit testified at hearing. Dr. Douthit testified to that "the story that the injured person gives to the first examiner is the candid one, the truth. Thereafter, things get vague and things change." Dr. Douthit testified he believes the story Claimant gave on her date of injury was truly what happened. Dr. Douthit testified Claimant changed her story as time went by to fit her circumstances. Based upon the evidence presented, the ALJ finds subtle differences in the histories given to the various providers who have treated/evaluated Claimant during the pendency of the case. While there are minor inconsistencies in the histories as documented, the ALJ finds those inconsistencies immaterial and likely errors due to poor/incomplete documentation by the provider. The ALJ finds that Claimant has been consistent regarding the material aspect of the mechanism of injury (MOI) from the first her first treatment appointment with PA Sanfilippo, namely that she slipped, fell and jolted/snapped her neck. Indeed, Dr. Peterson concluded that Claimant sustained a whiplash type injury based upon the history provided.

46. Dr. Douthit testified that he performed tests for myelopathy. Dr. Douthit testified consistently with his report opining that a patient must have long tract signs for a diagnosis of myelopathy, and that Claimant had no long tract signs. Dr. Douthit relied on medical research finding patients with myelopathy had four long tract signs, and almost all (90%) of them had an ataxic gait. According to Dr. Douthit, Claimant had no long tract signs and no ataxic gait during his examination.

47. Dr. Douthit disagreed with Dr. Rauzzino's diagnosis of myelopathy and while it was possible to have both vertigo and myelopathy causing imbalance, Dr. Douthit testified exactly opposite of Dr. Rauzzino, specifically that Claimant's imbalance was caused by vertigo, not myelopathy.

48. Dr. Douthit testified that if Claimant had a myelopathy the results from Hoffman's testing would have been consistently positive on all testing with every provider who tested her. Dr. Douthit testified that Claimant's Hoffman's test results were at worst a trace positive, and negative most of the time, which is "lame evidence of a long tract sign for myelopathy." Nonetheless, Dr. Douthit testified that whether findings on Hoffman's testing are documented as positive or negative is dependent on the observations of the examiner. Simply put, the test is subjective. Consequently, Dr. Douthit testified that Hoffman's testing is known to produce false positive results. Since Claimant only had a few positive tests, Dr. Douthit testified Claimant's testing results were a very unreliable sign of myelopathy.

49. While the ALJ finds Hoffman's testing subjective and dependent on the observations of the testing provider, the ALJ notes that the provider who documented the presence of findings consistent with myelopathy is a highly trained, board certified neurosurgeon with years of experience in evaluating patients with cervical spine pathology. Consequently, the ALJ finds that Dr. Rauzzino possesses the expertise to discern subtle physical signs consistent with spinal cord compression, i.e. myelopathy. Based upon the evidence presented, the ALJ credits the testimony of Dr. Rauzzino to

find that Claimant likely developed a myelopathy following her February 28, 2014 slip and fall and this progressing myelopathy caused a subsequent fall on May 16, 2015 resulting in injury to Claimant's lumbar spine.

50. While Dr. Douthit likely possesses the ability to discern the difference between vertigo and myelopathy based upon his experience and training, the ALJ finds the testimony of Dr. Rauzzino more persuasive concerning the question of whether Claimant had a myelopathy for the following reasons:

- Claimant had a positive Hoffman's sign on a number of occasions;
- the imaging of Claimant's neck revealed moderate spinal stenosis causing spinal cord compression;
- Claimant's balance problems worsened with the passage of time suggesting progressing neurological deficits secondary to persistent spinal cord compression;
- Claimant's gait became increasingly ataxic as evidenced by her inability to perform tandem gait testing prior to surgery;
- Claimant's neurologic findings on examination included the presence of ataxia (dysdiadochokinesia) in her right hand by May 21, 2015; and
- Surgery revealed the presence of disc material not appreciated on MRI which likely contributed to further spinal stenosis and spinal cord compression

51. Dr. Douthit disagreed with Dr. Rauzzino's explanation of vertigo occurring primarily when sitting or standing, as compared to imbalance from myelopathy occurring mainly when walking, testifying that a person can also have difficulties walking with vertigo.

52. Claimant continues to experience dizziness and imbalance after her surgery. Claimant still walks with a cane and used the cane on the date of Hearing. Based upon the evidence presented, including the August 31, 2015 report of PT Brown, the ALJ finds that in addition to having a myelopathy that was addressed by Dr. Rauzzino's July 23, 2015 surgery, Claimant likely suffers from positional vertigo which causes symptoms when changing positions, including the position of her head affecting her gait.

53. Dr. Douthit a projected image of Claimant's March 18, 2015 x-ray film, testifying that the segmental level fused by Dr. Rauzzino had no motion prior to that surgery. Specifically, Dr. Douthit testified Dr. Rauzzino "fused these already stable vertebrae. There's no evidence of instability. There's nothing going on here." The ALJ infers from this testimony that Dr. Douthit believes the ACDF procedure was neither reasonable nor necessary.

54. Dr. Douthit also explained how measurements are taken for diagnosing cervical spine stenosis. He testified that a measurement of at least 8mm was discernible on Claimant's MRI image of the cervical spine. A measurement of 6mm or less is consistent with severe stenosis whereas 8mm represents moderate stenosis. According to Dr. Douthit, he measured the most affected spinal segment at 8.7mm. Dr. Douthit testified that based on his measurements and his reading of the MRI, Claimant had moderate spinal stenosis. Dr. Douthit called the radiologist who wrote the March 18, 2015 MRI report to confirm his findings, and there was concurrence between the radiologist's findings and Dr. Douthit's findings of moderate spinal stenosis.

55. Dr. Douthit testified a cervical decompression and fusion would not be appropriate treatment for a patient with only moderate cervical stenosis. Dr. Douthit testified there were not significant indications for a cervical decompression and fusion surgery, reiterating his opinion that the ACDF procedure was not necessary.

56. In addressing Dr. Rauzzino's discovery of disc material in the spinal canal during surgery, which Dr. Rauzzino felt constituted evidence of acute injury and which he testified also "compromised the space for the spinal cord, causing myelopathy, Dr. Douthit testified the discovery did not mean an acute injury happened on February 28, 2014. Rather, Dr. Douthit testified that the disc herniation "could have happened at any time in her lifetime." Dr. Douthit found it "absurd" to try to associate the disc matter found during the surgery to an event occurring 17 months prior. Regardless, the ALJ finds Dr. Douthit's opinion regarding the timing of when the herniation may have occurred unresponsive to the question of whether the herniated disc material was contributing to signs/symptoms consistent with myelopathy.

57. Based upon the totality of evidence presented, the ALJ finds a temporal relationship between the February 28, 2014 event and the development of signs/symptoms consistent with a myelopathy. The evidence presented persuades the ALJ that Claimant's slip and fall, more probably than not, aggravated her previously asymptomatic degenerative disc disease and caused a traumatic disc herniation, which was undetectable on MRI and which caused additional spinal stenosis leading to the development of a myelopathy over time. The ALJ further finds that Claimant's myelopathy precipitated Claimant's uncoordinated gait causing her to fall on or about May 16, 2015 resulting in a compression fracture at L1. Dr. Douthit's contrary opinions are not convincing based upon the totality of the record evidence presented.

58. By the time Dr. Rauzzino preformed surgery, Claimant had been complaining of neck pain for approximately 17 months. She had also been complaining of increasing difficulty with her balance over the preceding year and specifically leading to falls for approximately 2 months prior to surgery. Conservative treatment failed to ameliorate these symptoms leading to the recommendation for surgery. Based upon the evidence presented, the ALJ credits the testimony of Dr. Rauzzino to find that the ACDF procedure was reasonable and necessary to alleviate Claimant's persistent symptoms associated with the myelopathy caused by her February 28, 2014 slip and fall.

59. Dr. Douthit testified he would not recommend performing a kyphoplasty procedure for a compression fracture; that it is a discredited procedure and that there were no objective physical findings indicating the presence of a compression fracture in Claimant's lumbar spine. As noted above, the June 23, 2015 MRI of Claimant's lumbar spine revealed the presence of an "acute" compression fracture at L1.

60. Based upon the evidence presented, the ALJ finds Dr. Douthit's opinions regarding the reasonableness and necessity of the kyphoplasty procedure unconvincing. Imaging revealed the presence of a compression fracture contrary to Dr. Douthit's testimony. The evidence presented persuades the ALJ that it was necessary to address Claimant's severe low back pain caused by this fracture and that kyphoplasty was a reasonable medical procedure to cure and otherwise alleviate that pain.

61. Taken as a whole, the ALJ finds that the record evidence supports a finding that Claimant's need for the ACDF and kyphoplasty procedures performed by Dr. Rauzzino on July 23, 2015 arose as a direct consequence of her February 28, 2014 work related injury. Moreover, the evidence presented persuades the ALJ that these procedures were reasonably necessary to cure and relieve Claimant from the ongoing effects of her myelopathy and compression fracture directly traceable to that work related injury. Claimant has carried her burden of proof to establish that the surgery performed by Dr. Rauzzino on July 23, 2015 were reasonable, necessary and causally related to her February 28, 2014 slip and fall. Consequently, Respondents are obligated to pay for this care.

CONCLUSIONS OF LAW

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

General Legal Principals

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

leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding her ongoing symptoms and the need for treatment has been consistent and is generally supported by the content of the medical records submitted at hearing. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. Where a party presents expert opinion on the issue of causation, the weight and credibility of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). As found, the opinions of Dr. Rauzzino are credible and more persuasive that the contrary opinions of Dr. Douthit.

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

Medical Benefits

E. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

F. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of*

Aurora, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

G. 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). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). The medical reports submitted in this case along with Claimant's testimony and the testimony of Dr. Rauzzino outline persistent pain and functional decline as a consequence of a probable myelopathy caused by Claimant's slip and fall on February 28, 2014. Here, conservative care failed to yield long-term results leading Dr. Rauzzino to recommend surgical intervention to decompress the cervical spine. Before that surgery could be performed Claimant fell and injured her low back as a direct consequence of her myelopathy. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the need for the surgical procedures performed by Dr. Rauzzino was related to Claimant's February 28, 2014 slip and fall. Moreover, the evidence presented persuades the ALJ that the procedures were reasonable and necessary given Claimant's continued pain and functional decline in the face of failed conservative care. Consequently, Respondents are liable for the costs of the care associated with Dr. Rauzzino's ACDF and kyphoplasty procedures.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her neck and low back injuries, but not limited to the ACDF and kyphoplasty procedures performed by Dr. Rauzzino on July 23, 2015.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2016

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence, that his 8% scheduled left shoulder impairment rating should be converted to 5% whole person impairment.

FINDINGS OF FACT

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

1. On March 14, 2014, Claimant was working in his usual capacity as a lead foreman for Employer when he injured his right knee and left shoulder. Claimant's work crew was setting gables on a pole barn and he was using a 2 x 4 to pry a section of the building over to straighten the frame and set a gable when the 2 x 4 suddenly and unexpectedly snapped. Claimant pitched forward and fell onto his left arm/shoulder injuring it.

2. Claimant reported his injury, liability was admitted and he was referred to Emergicare where he was evaluated/treated by Douglas Bradley, M.D. Conservative care, including physical therapy failed to result in lasting symptom improvement. Consequently, Claimant was referred to Pueblo Imaging Center where an MRI of the left shoulder was performed on June 14, 2014. MRI revealed a "[l]arge full thickness retracted rotator cuff tear with subacromial and subdeltoid bursitis and glenohumeral joint effusion."

3. Claimant underwent left rotator cuff repair surgery on July 17, 2014, performed by Dr. Michael Simpson. Claimant returned to post surgical physical therapy (PT) at Arkansas Valley Regional Medical Centers (AVRMC) where he participated in therapeutic exercise. With additional PT, Claimant demonstrated sufficient improvement to warrant a return to modified work duty.

4. Physical therapy records from AVRMC from January 8, 13 and 15, 2015 indicate that Claimant complained of difficulty reaching behind his back and with overhead activities, including overhead use of tools. His pectoralis, teres, rhomboids and latissimus dorsi muscles were tight and tender.

5. As part of his treatment, Claimant participated in a Functional Capacity Evaluation (FCE) on January 14, 2015. During the FCE, Claimant demonstrated the ability to perform lifting from floor to knuckle and knuckle to shoulder in the medium duty

category.[1] Claimant also demonstrated the ability to carry 50 pounds with the left arm, placing him in the medium duty category. Pushing and pulling was graded at very heavy (over 100 pounds) and medium (50 pounds) respectively. High lift, meaning from shoulder and above was graded at light as Claimant demonstrated a maximum tolerable limit of 20 pounds.

6. Claimant was placed at maximum medical improvement (MMI) with permanent impairment by Dr. Bradley on February 1, 2015.

7. Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Bradley concerning MMI and permanent impairment on February 17, 2015.

8. Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME). Dr. William Watson performed the requested DIME on July 14, 2015. In a report dated August 31, 2015, Dr. Watson opined that Claimant had reached MMI on February 1, 2015 with 8% scheduled left upper extremity impairment.

9. On September 18, 2015, Respondents filed a FAL consistent with Dr. Watson's opinion regarding MMI and permanent impairment.

10. Claimant objected to the FAL and filed an Application for Hearing seeking additional Permanent Partial Disability (PPD) on the grounds that his 8% scheduled permanent impairment should be converted to 5% whole person as his injury has resulted in functional impairment of the left upper extremity extending beyond the arm at the shoulder.

11. Regarding the current condition of his left shoulder, Claimant testified it is "no where it was" prior to his March 14, 2014, injury. According to Claimant, he continues to have impaired strength and limited range of motion in the left shoulder. He testified that cannot push (lift) objects overhead like he used to and cannot reach his left hand behind his back in order to scratch it.

12. Claimant testified that after a heavy day of work he experiences tightness and aching pain in his chest, upper back and shoulder which his wife "rubs out." Nonetheless, Claimant has not sought additional formal treatment for his left shoulder since being placed at MMI and released from care. He does utilize chiropractic on his own, but agreed during cross examination that this care was not associated with his workers' compensation injury.

13. As noted above, Claimant was returned to light duty work following his injury. He made the transition to full duty work approximately January 20, 2015 and worked full duty for Employer until June 2015, when he quit to accept a position as a laborer for K.R. Swerdfeger. Based upon the evidence presented, the ALJ finds that Claimant

[1] Maximum tolerable lifting from floor to knuckle was 50# whereas maximum tolerable lifting from knuckle to shoulder was 40#.

worked in a full duty capacity for Employer for approximately 5 months before he quit to start work for K.R. Swerdfeger.

14. As noted, Claimant was working in his capacity as a lead foreman for Employer at the time of his injury. As a lead foreman, Claimant participated in the assembly of pole barns constructed from dimensional lumbar and 2 x 6 posts (columns) set in the ground. His duties required him to dig/shovel dirt, handle/manipulate building materials and climb ladders and/or girts, hand over hand, with a 20# tool belt to access the buildings trusses to nail purlins into place.

15. Claimant's immediate supervisor at the time of his injury confirmed the accuracy of Claimant's testimony concerning his work duties, noting further that the buildings Employer's crews constructed ranged from small 24 x 24 (foot) garages to large "ag" buildings with dimensions of 60 x 120 feet or larger.

16. Based upon the evidence presented, the ALJ finds Claimant's work for Employer was physically demanding and required substantial use of the upper extremities, including the shoulders.

17. During the approximate 5 months he worked full duty for Employer before quitting to start work for K.F. Swerdfeger, Claimant performed the full range of his job duties without assistance. He did not ask for assistance and never complained that he was unable to meet the physical demands of his job.

18. Nick Herron testified that the nature of the job Claimant performed probably made him sore at the end of the day; however, he noted that everyone was sore and that to his knowledge Claimant experienced "nothing out of the ordinary."

19. Claimant presently works as a laborer for K.F. Swerdfeger installing underground utility infrastructure, including gas and sewer lines. Claimant participated on a job in Estes Park installing heavy sewer pipe 6-8 inches in diameter and up to 20 feet long. Most recently, Claimant has been working to install gas lines in Pueblo West.

20. Claimant's work duties include digging, shoveling, and operating equipment. He uses various hand tools, i.e. nail guns, demo saws, ram guns, sledge hammers and spud bars to complete his job duties and he must be able to lift, push and pull up to 100 pounds. Claimant testified that while he is the oldest member of his work crew and cannot swing a sledge hammer and work a spud bar like the younger members of the crew, he has had no problems completing any of his assigned job tasks and is working full duty without assistance. Claimant also testified that his operators are very good, which precludes heavy shoveling and digging, but if necessary Claimant testified he could engage in such digging/shoveling, including digging the 2 x 2 x2 foot holes necessary for the current projects field work. Based upon the evidence presented, the ALJ finds Claimant's work with K. F. Swerdfeger physically demanding.

21. Claimant did not report that he had physical limitations to his current employer at

the time he was hired. Claimant has also never reported any pain/limitations regarding his shoulder or neck while working for K.F. Swerdfeger. According to Claimant, his current employer has no knowledge of his left shoulder condition.

22. Based upon the evidence presented, the ALJ finds Claimant's current left shoulder range of motion and strength deficits similar to those he reported in January 2015 during PT sessions at AVRMC. Despite his claimed limitations, the ALJ finds that Claimant has been able to work two physically demanding jobs one involving the construction of pole barns and the other installing gas and sewer lines, each requiring heavy use of the upper extremities. By his admission, Claimant preformed these jobs without limitation and/or complaint. Indeed, Claimant is currently working as a laborer digging/shoveling and using hand tools to install gas lines for K.F. Swerdfeger.

23. Claimant did not allege he preformed his work duties using his right arm only. Rather, he claimed entitlement to whole person impairment secondary to referred pain and tightness into body parts beyond the shoulder, i.e. the torso, neck and upper back. Consequently, the ALJ finds that in the past several months, Claimant, more probably than not, has used his left arm/shoulder to assist with or carry out activities such as lifting, digging, shoveling, climbing ladders/girts, and using hand tools.

24. The ALJ accepts as fact that Claimant's left shoulder, chest and upper back/neck may be tight and sore, especially at the end of a heavy work day. Nonetheless, the totality of the evidence presented, including Claimant's own testimony, persuades the ALJ that these conditions are not functionally impairing. Accordingly, Claimant has failed to establish that he has a "functional impairment" beyond the schedule which would entitle him to "conversion" of his scheduled impairment to impairment of the whole person.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. When determining credibility, the fact finder should consider, among other things,

the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the totality of the evidence presented, that while Claimant sustained a serious injury to his left shoulder, his testimony fails to establish that that he has suffered any decreased capacity to meet his personal, social or occupational demands. Consequently, his assertion that he is entitled to conversion of his scheduled upper extremity impairment to whole person impairment is unpersuasive.

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Conversion

D. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder.

E. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or functional impairment, pertains to a person's ability to meet personal, social, or

occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Accordingly, "referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005).* Nonetheless, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996)

F. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet his burden to establish that he has sustained functional impairment beyond the arm at the shoulder warranting conversion of his scheduled impairment to impairment of the whole person. At hearing, Claimant testified that since his admitted shoulder injury he has experienced neck/upper back pain, pectoralis tightness/pain, difficulty reaching behind his back and using his left shoulder to lift objects overhead. Accordingly, Claimant asserts that he has functional limitations beyond the arm at the shoulder entitling him to an award of whole person impairment. The ALJ is not persuaded for the following reason: While Claimant may have pain and tightness beyond the shoulder into the neck, upper back and chest, these symptoms have not caused "functional impairment" or disability. Indeed, Claimant has worked two physically demanding jobs in the recent months which require substantial use of the upper extremities. While Claimant testified that his crew "looks out" for him when it comes to performing some duties, the ALJ concludes that any suggestion that he was incapable of carrying out some works tasks, based upon this testimony is substantially overstated given Claimant's testimony that he was and is working full duty without limitation and can perform all digging/shoveling tasks as necessary. As found, Claimant did not allege he

preformed his work duties using his right arm only. Rather, he claimed entitlement to whole person impairment secondary to referred pain and tightness into body parts beyond the shoulder, i.e. the torso, neck and upper back. Consequently, the ALJ finds that in the past several months, Claimant, more probably than not, has used his left arm/shoulder to assist with or carry out activities such as lifting, digging, shoveling, climbing ladders/girts, and using hand tools.

G. Claimant's functional capacity, as demonstrated, substantially erodes his claims that he has functional impairment beyond the arm at the shoulder. While Claimant's left shoulder injury may cause referred pain to other body parts, such as his neck, upper back and chest while and after he engages in work activities, the injury has not resulted in any decreased capacity to meet his personal, social or occupational demands. Based upon a totality of the evidence presented, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder. Consequently, the ALJ concludes that Claimant does not have functional loss that would support an award of permanent disability benefits as a whole person.

ORDER

It is therefore ordered that:

1. Claimant's request for conversion of her scheduled upper extremity impairment to impairment of the whole person is denied and dismissed.

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

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

DATED: March 16, 2016

/s/ Richard M. Lamphere

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

ISSUES

1. Whether the claimant has established by clear and convincing evidence that she is not at maximum medical improvement (MMI) for her April 11, 2014 compensable injury;

2. If the claimant is at MMI, whether the claimant has overcome the impairment rating by the Division IME, Dr. Higginbotham, by clear and convincing evidence; and,

3. Whether the claimant has established by a preponderance of the evidence that she is entitled to additional reasonable, necessary, and related medical treatment.

FINDINGS OF FACT

1. On April 11, 2014, the claimant suffered a compensable industrial injury while working for the respondent-employer school district.

2. On that day, the claimant was standing outside, functioning as a monitor in a playground. A basketball struck the claimant in the right temple and apex of the skull. The claimant was knocked backwards and was caught by a nearby teacher. It was unknown whether or not the claimant suffered a loss of consciousness.

3. Approximately forty-five minutes after the injury occurred, the claimant reported to Premier Urgent Care. She was examined by Dr. Anjmun Sharma. The claimant reported symptoms of dizziness and right head symptoms-aching and burning. The claimant was diagnosed with a concussion and was referred for a CT scan. Dr. Sharma temporarily took the claimant off work until April 14, 2014.

4. The claimant returned to Premier Urgent Care on April 14, 2014. She reported nausea, vomiting, lightheadedness, difficulty sleeping, and headaches. Dr. Sharma referred the claimant for physical therapy and continued the claimant's release from work restrictions.

5. On April 16, 2014, the claimant returned to Dr. Sharma at Premier Urgent Care. The claimant reported symptoms of aching pain in her head, lightheadedness,

headache, front of face ache, nausea, difficulty focusing, trouble with balance, and trouble remembering things.

6. On April 21, 2014, the claimant returned to Dr. Sharma again reporting symptoms of difficulty focusing, nausea, headache, light headedness, dizziness, and pressure in her head. Dr. Sharma referred the claimant to vestibular rehabilitation at Balance Point. The claimant remained off work.

7. The claimant returned to Dr. Sharma on April 23, 2014, reporting similar symptoms as her previous visit of difficulty focusing, nausea, vomiting, headache, difficulty with balance, dizziness, and pain behind her eyes. Dr. Sharma noted that the claimant was improving despite her continuation of symptoms.

8. On May 1, 2014, Dr. Sharma noted that the claimant continued to have sensitivity to light, nausea, headache, and trouble with balance. The claimant reported that she vomited after dinner the night before. The claimant also noted that she was still experiencing headaches, dizziness, nausea, confusion, and when she tried to focus it triggers a headache, and ongoing trouble with balance. Dr. Sharma noted: “Anticipate a targeted return to work date on Monday May 12, 2014. Patient continues to make improvements. Speech improved less complaints of headache and dizziness. Must continue with vestibular rehab.” Dr. Sharma noted the claimant was improving despite the claimant’s continuation of symptoms.

9. On May 7, 2014, the claimant returned to Dr. Sharma reporting she was having a bad headache, dizziness, pressure in her head, having a hard time focusing, and feeling off balance. Dr. Sharma continued the claimant’s “off work” work restrictions.

10. On May 9, 2014, the claimant returned to Dr. Sharma reporting headaches, dizziness, difficulty with balance, and difficult time focusing. Dr. Sharma released the claimant to return to work without restrictions.

11. The claimant returned on May 12, 2014 to Dr. Sharma. The claimant was taken off work again through May 21, 2014. Dr. Sharma noted “attempted return to work today 05/12//2014 but she was unable to tolerate extrasensory noise level.”

12. On May 21, 2014, the claimant returned to Dr. Sharma. The claimant reported symptoms of headaches, dizziness, difficulty with balancing, difficult time focusing, nausea, pain in her eyes, sensitivity to light, and feeling of light headedness. Dr. Sharma continued the claimant’s “off work” restrictions and referred the claimant to “Gleneagle Vision Center PC for Prism lenses to stabilize vestibular system.”

13. On May 28, 2014, the claimant reported symptoms of ichiness from medications, trouble sleeping, headaches, light headedness, restlessness, and pressure in her head.

14. On May 29, 2014, Dr. Sharma noted that the claimant was "[u]nable to return to work as balance is still an issue. Making good improvements."

15. On June 13, 2014, the claimant returned to Dr. Sharma. The claimant reported on the pain diagram that she was experiencing headache's hasn't broken yet 2-5, pressure in head, light headedness, dizziness, balance motion, confusion, clumsiness, eyes hurt. The claimant also reported "Problems with memory, remembering past/present important information that I should know. Loss of time/loss of days. Seems or feels like first week of April. Several different times, I've woken up and not recognized my bedroom or where I was." Dr. Sharma noted that the claimant was "improving with time" despite the claimant's report of ongoing symptoms and reports of lost time.

16. On June 13, 2014, Dr. Sharma referred the claimant to neurology associates.

17. On June 20, 2014 the claimant again saw Dr. Sharma and reported headaches, lightheadedness, temporary darkness, dizziness, balance issues, sensory issues, and memory issues.

18. On June 21, 2014 the claimant reported she continued to experience a steady headache, nausea 3-4 times daily, lightheadedness with feelings of passing out daily, weakness, fatigue, dizziness, confusion, and spasms behind the eyes. Dr. Sharma then referred the claimant to Dr. David Reinhard at Colorado Rehabilitation and Occupational Medicine.

19. On June 30, 2014 the claimant met with Dr. Reinhard who recommended the claimant continue with physical therapy and referred her to Dr. Alan Lipkin of ENT for evaluation and treatment of dizziness "secondary to probable inner ear trauma."

20. On July 3, 2014 the claimant met with Dr. Lipkin for initial ENT evaluation.

21. On July 10, 2014 the claimant again visited with Dr. Sharma. She described symptoms of escalating headaches, lightheadedness, a feeling of off balance, dizziness, spinning, stumbling, confusion, issues remembering, and problems sleeping. Dr. Sharma continued the claimants "off work" restrictions until August 5, 2014.

22. A VGN examination with Dr. Lara Strotheide, audiologist, occurred on July 15, 2014 and indicated that the claimant had a vestibular stability pattern.

23. On July 18, 2014 the claimant had a follow-up with Dr. Lipkin regarding the testing with Dr. Strotheide.

24. On July 29, 2014 the claimant had a follow-up appointment with Dr. Reinhard.

25. The claimant attempted to work for about two weeks, however, her symptoms worsened and she could not return to work.

26. On August 29, 2014 the claimant again saw Dr. Sharma and reported symptoms of headaches, dizziness, eye spasms, "stabbing dull ache in head," nausea, lightheadedness, spinning, fatigue, lack of focus, confusion, and pressure in head. Dr. Sharma placed "off work" restrictions until September 8, 2014 after visit.

27. On September 2, 2014 the claimant had a follow-up visit with Dr. Reinhard.

28. On September 8, 2014 the claimant reported to Dr. Sharma symptoms of headaches, nausea, vomiting, lightheadedness, off balance resulting in a fall, light and noise sensitivity, and lack of focus. Dr. Sharma put the claimant on temporary restrictions until September 15, 2014.

29. On September 15, 2014 the claimant continued to report similar symptoms to Dr. Sharma. The claimant was still on temporary restrictions with Dr. Sharma stating she could return to work 3 hours per day for two days each week.

30. On September 25, 2014 the claimant had a follow-up appointment with Dr. Reinhard. Dr. Reinhard noted in his report that if the claimant's symptoms continued that they "may want to do a formal neuropsychological testing."

31. On October 8, 2014 the claimant again met with Dr. Sharma. She reported a steady ongoing headache since August 18th, which easily escalates, lightheadedness, and pain behind the eyes. Dr. Sharma continued work restrictions increasing to 5 hours of work two days per week.

32. On October 16, 2014 the claimant met again with Dr. Reinhard.

33. On October 31, 2014 the claimant continued to report similar symptoms to Dr. Sharma. Work restrictions remain unchanged with modified duty extended until November 7, 2014.

34. On November 5, 2014 the claimant had her initial consultation with neurologist Dr. Adams. Dr. Adams diagnosed the claimant with post concussive syndrome and occipital neuralgia. He recommended occipital nerve injections on the right, medications to include possible stimulants, vestibular therapy, cognitive behavioral therapy/psychotherapy/neuropsychology evaluation.

35. The next day, on November 6, 2014, the claimant reported to Dr. Sharma the following symptoms: steady headaches, eye spasms behind eyes, shooting pain in head (including stabbing, piercing, and dull all over, but especially the right side), nausea and vomiting, memory issues, slow responses, lightheadedness, dizziness, spinning, sensitivity to light/noise/darkness, fatigue, sleeping problems, and balance issues. Dr. Sharma then referred the claimant to an ENT and optometrist, as well as for an MRI Brain and cervical spine evaluation.

36. On November 15, 2014 MRIs of the claimant were conducted by PenRad Imaging.

37. On November 26, 2014 the claimant met with Dr. Reinhard for a follow-up, where the claimant reported ongoing cognitive challenges. Dr. Reinhard again mentioned in his report that the claimant "may need to undergo formal neuropsyological testing."

38. On December 10, 2014 the claimant continued to report similar symptoms as before to Dr. Sharma, including falling down twice since last visit. She also reported ringing in ears, that "brain is going blank," having trouble making choices and problem solving. She reported that her perception of surroundings, people, and time was off. Two days after that visit, Dr. Sharma concluded in his December 12, 2014 report that the claimant had reached MMI with no permanent impairment even though she had met with Dr. Reinhard merely weeks before and had appointment to see Dr. Saxerud for an eye examination.

39. On December 16, 2014 the claimant went for an appointment at Evenstar Internal Medicine. The progress note stated she had mild traumatic brain injury and "needs to get further testing including neurooptem."

40. The claimant underwent an eye examination on December 29, 2014 with Dr. Saxerud who reported the claimant's persistent convergence insufficiency. He found

"corpus labyrinthine movement with induce dizziness, undershoot on saccadic eye movements, and a moderately reduced near-point of convergence." He provided prismatic lenses to the claimant.

41. On February 27, 2015 Dr. Trudy Wong submitted a Leave Request Form on behalf of the claimant and provided a detailed list of the claimants ongoing symptoms, including: memory problems, balance problems, steady headaches, difficulty understanding, confusion, slow response. Dr. Wong noted that the claimant had "decreased detailed work, decreased concentration."

42. On March 3rd, 17th, and 24th, 2015 the claimant underwent a neuropsychological evaluation with Dr. Victor Neufeld. He provided a description of "multiple persistent postconcussive symptoms which have not resolved." The claimant scored in the 8th percentile which may show a "decline from premorbid ability levels. These declines have most likely occurred in the areas of attention and processing speed." Dr. Neufeld also opined that the claimant's deficits would "make it difficult for her to work in a competitive employment situation due to significant reduction in her efficiency in processing information."

43. The claimant underwent a division independent medical examination (DIME) on April 8, 2015 with Dr. Thomas Higginbotham. Dr. Higginbotham noted in his evaluation that the claimant was "unsure with her gait and stance," had "difficulty with interpreting right-to-left," and had "difficulties with balance." Dr. Higginbotham could not make a determination of MMI at his time due to need for further medical records.

44. On June 5, 2015 Dr. Laurence J. Adams with CSNA neurosurgery & neurology opined that the claimant "demonstrates fairly marked amounts of inattention, mild anxiety without abnormalities on [scales] of malingering" This suggested that the claimant had a "concussion, traumatic brain injury, and post concussive syndrome with marked amounts on inattention." He had previously recommended that the claimant have psychiatry consult with Dr. House, a psychology evaluation with Dr. Neufeld, cognitive rehabilitations, and continue work with Dr. Saxerud.

45. On July 7, 2015, the claimant saw PA-C Elizabeth Harmon at Colorado Springs Neurology Associates. PA-C Harmon noted that "[the claimant] continues to function quite slow from a cognitive perspective, which makes social interactions difficult. She has slurring and disfluency of speech. She has had several episodes of suddenly not knowing where she was or what she was doing although these have resolved fairly quickly. At this point she is unable to work." PA-C Harmon felt that the

claimant would benefit significantly from cognitive rehabilitation because the claimant was most bothered by cognitive and speech problems.

46. On July 28, 2015 Dr. Higginbotham continued his DIME evaluation, assigning an MMI of the initial DIME evaluation date, April 8, 2015, after having requested additional medical records and noting that Dr. Sharma may be unaware of the claimant's "recent specialty evaluations that appear to support mild traumatic brain injury sequela." Dr. Higginbotham then provided "no mental/behavioral impairment" and gave an impairment rating of 10% of the whole person for complex integrative cerebral function disturbance.

47. The claimant underwent additional eye exams on June 10, 2015, July 9, 2015, and August 27, 2015.

48. On August 20, 2015 Dr. Wong again recommended that the claimant have a temporary leave of absence from work as there was no significant improvement regarding her mild traumatic brain injury.

49. On September 21, 2015, the claimant underwent a Brain SPECT and Assessment at CereScan. The claimant presented with the following reported symptoms:

> Balance problems, blurred vision, cognitive decline or changes, cognitive function problems, confusion, decreased judgement, difficulty following instructions, difficulty integrating information, difficulty learning new things, difficulty performing familiar tasks, difficulty with concentration, disorganization, disorientation to time and/or place, distractability, fatigue, frequent dizziness, frequent headaches, grief, involuntary tics and tremors, irritability, long-term memory problems, losing things, loss of appetite, loss of interest in things, loss of motivation, nausea, performance anxiety, personality changes, problems paying attention, problems with abstract thinking, problems with language/word finding, ringing in ears, sensitivity to light, sensitivity to sound, short-term memory problems.

50. The Brain SPECT scan was interpreted by Dr. Gregory Hipskind, MD, PhD. Dr. Hipskind's impressions were that this was an abnormal SPECT study which demonstrated focal areas of abnormal cortical hypoperfusion in the frontal, temporal, occipital and cerebellar lobes. Dr. Hipskind noted that the frontal/occipital findings are suggestive of a coup/counter coup mechanism of injury. Dr. Hipskind noted that there was also focal areas of abnormal subcortical hypoperfusion in the anterior brainstem

and basal ganglia areas. There was also paradoxical cortical deactivation when performing concentration task.

51. Dr. Hipskind opined that:

> the nature, location, and pattern of these abnormalities is primarily consistent with the scientific literature pertaining to traumatic brain injury (TBI) and the patient's clinical history, as obtained, which was received after the blind review. Alternative considerations for these findings, such as neurodegenerative, neurovascular and tocis/hypoxic process were considered, but were considered to be less likely given the patient's age and clinical history, which was obtained after the blind review. Close correlation with the patient's entire medical history is advised.

52. The claimant began rehabilitative services with Memorial Hospital on September 30, 2015. The speech and language pathologist, Jacy Doumas, reported in the progress notes that the claimant's "speed of processing is delayed and pt is unable to repeat a phrase accurately."

53. The claimant had an IME performed by Dr. Bennett Machanic on December 23, 2015. Dr. Machanic notes in his report that the claimant had "a lot of problems answering questions…There are great delays in her responses, and when she responds, it appears apparent that she really does not understand what was asked or what is expected." Dr. Machanic also noted that the claimant's tandem gait is unsteady. Dr. Machanic assessed that the claimant has "mild posttraumatic encephalopathy residua" and at this time "may indeed be incapable of working due to her posttraumatic issues." Dr. Machanic stated that he was "not convinced that [the claimant was] truly at maximum medical improvement" and if she was then she would be eligible for a permanent partial impairment rating of 24% for the whole person. Dr. Machanic recommended that the claimant be given a trial of a "memory enhancing agent" and continue with ongoing speech therapy to "enhance coping skills."

54. Dr. Machanic testified at hearing that the SPECT scan confirms what he saw during the claimant's examination. He testified that the SPECT scan is used as a correlative device. "The correlation is very sound, in terms of that both [the SPECT scan and the clinical exam] show the evolution of eventual stabilization of a – a previous traumatic brain injury." Dr. Machanic testified that the results of the SPECT scan are absolutely consistent with the claimant's reported symptoms.

55. On cross examination Dr. Machanic conceded that the claimant is most likely at MMI and that his treatment recommendations would be maintenance treatment.

56. At hearing, the claimant testified that she requires help with her activities of daily living. She testified that she requires help with cooking because she has burned herself in the past. She testified that she is not able to drive. She testified that she has difficulty gripping and grasping and that she often drops objects. She testified that she has trouble writing and typing. She testified that she has trouble navigating the grocery store and often runs into the shelves. She testified that she requires assistance with running errands. The claimant testified that she needs help styling her hair. The claimant also testified that she has trouble with memory and understanding things. She testified that she has trouble with her speech.

57. At hearing, the claimant's husband, Jack, testified about the trouble that the claimant has performing her activities of daily living. He testified that the claimant is unable to drive per the doctor's orders. He testified that the claimant has trouble riding in the car for long trips. The claimant often lays down in the back seat when riding in the car. He testified that the claimant has trouble with cooking and has burned herself in the past. He testified that a big problem is that the claimant has difficulty with sleeping. He testified that the claimant has trouble walking and will often touch the wall while walking down the hallways.

58. At hearing, Dr. Mechanic was accepted as an expert in the field of neurology. Dr. Machanic testified that he has been practicing in the field of neurology since 1976. Dr. Machanic also testified that he is Level II Accredited.

59. Dr. Machanic testified that the SPECT scan confirms the symptoms that the claimant is experiencing. Dr. Machanic testified that the claimant would benefit from cognitive behavioral therapy, speech therapy, and treatment with medications. He testified that these treatments might improve her function and activities of daily living. He testified that these treatments are not going to cure the claimant.

60. Dr. Machanic testified that the claimant's permanent impairment is a 24% whole person. Dr. Machanic testified that he arrived at this impairment rating by looking at page 109 of the AMA Guides. He testified that based off his examination and review of the medical records he categorized several subcategories. He assessed a 5% impairment for language. He categorized a 10% for emotional dysfunction. A 10% impairment for headaches. A 10% impairment for sleep disturbances. Dr. Machanic testified that the most significant category was the complex integrated cerebral function. Dr. Machanic testified that a 10% impairment (which is what Dr. Higginbotham assessed) would be for a person who does not require any supervision. Dr. Machanic testified that even requiring minimal supervision would equate to a 20% impairment. Dr. Machanic testified that the claimant has a 20% impairment that category.

61. Dr. Machanic went on to testify that the claimant also has vestibular dysfunction, which is poor coordination and balance dysfunction. He referred to Table 1 on page 178. Dr. Machanic testified that the claimant had a class 2 on this table. Dr. Machanic testified that these impairments combined equate to a 24% whole person impairment.

62. Dr. Machanic testified that vestibular dysfunction means problems with balance. The claimant consistently reported problems with balance to every physician that has examined and treatment her.

63. Dr. Machanic testified that he disagrees with Dr. Higginbotham's impairment rating because "the claimant's integrated cerebral function negates the fact that she historically --- and, by the way, this is also documented – needs some degree of supervision. That changes the category right there. It goes directly from ten percent directly to 20 percent. And because that concept is in the guides, that is indicative of a more severe chronic problem. So, that – that's the rationale for going from ten to twenty." Dr. Machanic went on to testify that Dr. Higginbotham is also missing the impairment rating for balance, coordination, vestibular dysfunction. He testified that these problems are very real and were given a lot of attention throughout the entire course of her treatment. He noted that the claimant was evaluated by an ear, nose, throat doctor and underwent neurological and audiological testing.

64. Under the AMA Guides Appendix A, activities of daily living include self care (urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating); communication (writing, typing, seeing, hearing, speaking); normal living postures (sitting, lying down, standing); ambulation (walking, climbing stairs); travel (driving, riding, flying); nonspecialized hand activities (grasping, lifting, tactile discrimination); sexual function (having normal sexual function and participating in usual sexual activity); sleep (restful nocturnal sleep pattern); social and recreational activities (ability to participate in group activities).

65. Under the AMA Guides, a permanent impairment rating ranging between 20%-45% should be assessed if a person possesses complex regional cerebral function disturbances and needs supervision with activities of daily living.

66. The ALJ finds the claimant to be credible.

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

impairment rating arises to a greater degree than a difference of opinion between he and Dr. Higginbotham and reveals that Dr. Higginbotham's rating is clearly erroneous.

68. The ALJ finds that the claimant has failed to establish that Dr. Higginbotham was clearly wrong in determining that the claimant reached MMI on April 8, 2015.

69. The ALJ finds that the claimant has established that Dr. Higginbotham was clearly wrong in assigning only a 10% whole person impairment rating.

70. The ALJ finds that the claimant has established that the correct impairment rating for the claimant is that found by Dr. Machanic; that is, 24% whole person.

71. The ALJ finds that the claimant has established that it is more likely than not that the claimant is in need of post-MMI medical maintenance treatment as recommended by Dr. Machanic.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in § 8-40-101, et. seq. C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. § 8-40-102(1), C.R.S. 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. § 8-43-201, C.R.S. 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).

2. 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)

3. 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). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools*, W.C. 4-782-625 (ICAO May 24, 2010).

4. 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).

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

6. 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).

7. Dr. Sharma credibly testified claimant was at MMI as of December 2014 due to her exhaustive and detailed treatment. Dr. Higginbotham thereafter found claimant to be at MMI after even more "extensive diagnostic and consultative evaluations post-MMI decisioning of Dr. Sharma of 12/12/2014." Although Dr. Machanic originally testified he did not believe claimant was at MMI, on cross-examination he admitted she was at MMI, and he could not say Dr. Higginbotham erred.

8. As found, the ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the DIME physician, Dr. Higginbotham, was clearly wrong when he assessed the claimant to be at MMI as of April 8, 2015.

9. The ALJ concludes as found above that Dr. Higginbotham was clearly

wrong when he assessed that the claimant suffered a 10% combined impairment rating for her industrial injury of April 11, 2014.

10. Dr. Machanic's finding that the claimant required supervision to conduct her activities is credible and persuasive. Dr. Machanic's analyses and application of the AMA Guides is credible and persuasive.

11. As found, the ALJ concludes that the claimant has established by clear and convincing evidence that Dr. Higginbotham clearly erred in assessing the impairment rating of the claimant.

12. As found, the ALJ concludes that the claimant has established by a preponderance of the evidence that Dr. Machanic's impairment rating of a combined 24% is the correct rating.

13. The claimant requested authorization of medical treatment recommended by Dr. Machanic; specifically cognitive/behavioral therapy administered by a speech therapist, as well as being prescribed a memory enhancing drug or alerting agent. Dr. Machanic's ultimate testimony that the claimant was at MMI, and the ALJ's finding regarding same, renders such a request for post-MMI medical treatment.

14. The claimant must establish by a preponderance of the evidence that post-MMI medical treatment is reasonable and necessary to relieve the effects of the injury or prevent further deterioration. Dr. Machanic's analyses and opinions establish that the recommended treatments would assist the claimant in maintaining her level of function.

15. The ALJ concludes that the claimant has established by a preponderance of the evidence that the treatment recommended by Dr. Machanic is reasonable, necessary, and related post-MMI medical care.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request to overcome the DIME opinion as to MMI is denied and dismissed.

2. The respondents shall pay the claimant permanent partial disability payments based upon her impairment rating of 24% whole person.

3. The respondents shall pay for the claimant's post-MMI medical care as recommended by Dr. Machanic.

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 17, 2016

/s/ original signed by:

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

ISSUES

1. Whether the claimant proved by a preponderance of the evidence that the right hip arthroscopy recommended by Michael R. Schuck, M.D. and Miguel Castrejon, M.D. is causally related and reasonably necessary to cure and relieve the claimant from the effects of her February 21, 2014 injury.

2. Originally, the claimant asserted the issue of whether the respondents were liable for penalties for unreasonably delaying and denying medical care pursuant to C.R.S. § 8-43-203. Subsequent to the hearing the claimant withdrew this issue.

FINDINGS OF FACT

1. The claimant was involved in a work-related motor vehicle collision on February 21, 2014 in El Paso County. The car in which the claimant was riding was T-boned on the driver's side.

2. The claimant immediately complained of right hip pain after the collision to paramedics and to emergency room physicians at Penrose St. Francis Hospital. In the motor vehicle collision, the claimant also injured her neck, back, and head.

3. Prior to the motor vehicle collision, the claimant had no significant hip issues. The claimant credibly testified at the hearing that prior to the motor vehicle crash, she has not sought any sort of medical treatment for right hip pain.

4. This is an admitted claim and the claimant received conservative treatment for her claimed injuries, including physical therapy and chiropractic care.

5. The claimant credibly testified that she has consistently complained of pain in her right hip that radiates into her right buttock and right groin area. The claimant's medical records confirm that the claimant has made consistent pain complaints about her right hip.

6. On July 30, 2015, the claimant was placed at MMI by her then ATP, Edwin Baca, M.D. with a 0% impairment rating.

7. On October 27, 2014, the claimant underwent a Division independent medical examination (DIME) with Timothy Hall, M.D. Dr. Hall assigned the claimant with a 17% whole person impairment rating and determined that the claimant was not at MMI. Dr. Hall found that a lot of the claimant's pain symptoms were focused with the hip and recommended that the claimant consult with an orthopedic surgeon for a possible labral tear.

8. When the claimant returned to Dr. Baca for more treatment on December 15, 2014, Dr. Baca opined that he had exhausted all interventional and conservative measures and could not help the claimant any further. Dr. Baca recommended that the claimant's care be transferred to another ATP and specialist.

9. Pursuant to Dr. Baca, request, the claimant transferred her care to Dr. Castrejon. Also, the claimant began to treat with Dr. Schuck, an orthopedic surgeon. On February 19, 2015, the claimant received a corticosteroid injection in her right hip. The injection provided mild improvement and some relief, but did not result in any lasting relief.

10. To rule out the claimant's back as a pain generator, the claimant underwent a lumbar corticosteroid injection.

11. Due to the results of the lumbar injection and a review of the claimant's hip MRI, Dr. Schuck determined that the claimant's pain symptoms were coming from the joint in her hip. Dr. Schuck suspected that the claimant had a more significant labral tear in her right hip than her MRI indicated. Consequently, Dr. Schuck recommended that the claimant undergo a right hip arthroscopy.

12. The claimant underwent hip surgery on May 20, 2015. As originally suspected, Dr. Schuck confirmed during the surgery that the claimant had a labral tear.

13. After the surgery, the claimant continued to complain of significant pain in her right hip. Consequently, Dr. Schuck recommended a second MRI of the claimant's right hip.

14. The MRI revealed objectively that the claimant had a recurrent tearing of her labrum. Dr. Schuck determined that the recurrent tear was consistent with the claimant's pain complaints and recommended a repeat arthroscopic procedure on the right hip.

15. Dr. Schuck made the request for the repeat arthroscopic procedure on October 6, 2015. The respondent-insurer denied the surgery and filed an application for hearing on the issue of whether or not the surgery was reasonable and necessary.

16. Dr. Castrejon, the claimant's ATP, believes there is sufficient documentation of medical necessity to support the treatment plan that is being recommended by both Dr. Schuck and Dr. Castrejon and should be covered under workers' compensation.

17. Dr. Failinger conducted an independent medical examination of the claimant on November 2, 2015. The claimant reported to Dr. Failinger, as she testified at the hearing, that the injections to her hip never provided relief, the surgery did not help with her hip pain, and her pain was diffused throughout her hip with no specific focal discomfort.

18. Dr. Failinger found that the repeat hip arthroscopy is not appropriate. He noted that: (1) the claimant symptoms have never been well defined to the hip and that her pain has always been diffused and nonspecific; (2) no injections to her hip, including diagnostic portion, have provided even temporary relief of her hip pain; and (3) while there apparently is some labral pathology, the surgery on May 20, 2015 did not provide any relief and she is worse off after the surgery. Based upon his findings, Dr. Failinger believed that the repeat surgery has a very low medical probability of helping the claimant's symptomatology.

19. The ALJ finds the analyses and opinions of both Dr. Schuck and Dr. Castrejon to be credible and more persuasive than medical analyses and opinions to the contrary.

20. The ALJ finds the claimant has established that it is more likely than not that the treatment recommended by Dr. Schuck is reasonable, necessary, and related to the claimant's industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-

40-102(1), C.R.S.

2. Pursuant to C.R.S. Section 8-42-101(1)(a), the Respondents are liable for medical treatment which is reasonable and necessary to cure or relieve the effects of an industrial injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d, 1337 (Colo. App. 1997). The question of whether a proposed treatment is reasonable and necessary is generally one of fact for determination by ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d, 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d, 251 (Colo. App. 1999).

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. Here, the claimant's surgeon, Dr. Schuck, and the claimant's ATP, Dr. Castrejon, have determined that the right hip surgery is reasonable and necessary to relieve the effects of the claimant's industrial injury.

5. The ALJ concludes that the analyses and opinions of both Dr. Schuck and Dr. Castrejon are credible and more persuasive than medical analyses and opinions to the contrary.

6. The ALJ concludes that the claimant has established by a preponderance of the evidence that the treatment recommended by Dr. Schuck is reasonable, necessary, and related to the claimant's industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall authorize and pay for the surgery as recommended by Dr. Schuck.

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

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

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

DATE: March 3, 2016

/s/ original signed by:

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the 6-8 acupuncture treatments recommended by Authorized Treating Physician (ATP) Kristen D. Mason, M.D. are reasonable, necessary and causally related to her May 1, 2014 industrial injuries.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover penalties pursuant to §8-43-304(1), C.R.S because Claimant violated §8-43-503(3), C.R.S. by directing Mark H. Zacharewicz, Ph.D. to engage in a specific course of medical treatment.

FINDINGS OF FACT

1. Claimant worked for Employer in food delivery. On May 1, 2014 Claimant was making a delivery on her bicycle when she collided with another bicyclist on a bike path. She visited Concentra Medical Centers and was diagnosed with a concussion, a mild, traumatic brain injury and abrasions to her knee and hip.

2. On June 24, 2014 Claimant underwent neuropsychological treatment with Kevin J. Reilly, Psy.D. Dr. Reilly obtained a medical history from Claimant and administered psychological testing. He determined that Claimant possessed average to above average neuropsychological capabilities. However, Dr. Reilly concluded that the tests revealed significant non-organic factors for Claimant's symptoms.

3. On July 18, 2014 Claimant returned to Dr. Reilly for an examination. She apprised Dr. Reilly that she did not have a good relationship with counselor Joel L. Cohen, Ph.D. Claimant requested treatment through a prior female counselor. She also informed Dr. Reilly that she did not agree with her neuropsychological testing results. Dr. Reilly thus discharged Claimant from care through his practice.

4. After receiving treatment from additional providers, Kristin D. Mason, M.D. became Claimant's Authorized Treating Physician (ATP) in February 2015. She referred Claimant to various providers for additional treatment.

5. On May 29, 2015 Claimant underwent an independent neuropsychological examination with David W. Zierk, Psy.D. Dr. Zierk determined that Claimant suffered a mild traumatic brain injury as a result of her May 1, 2014 bicycle accident. He would have expected Claimant to have completely recovered within 90 days, but after one year she was still experiencing considerable and variable cognitive difficulties. Dr. Zierk attributed Claimant's continued psychological difficulties to factors that were not related

to her May 1, 2014 accident that included lack of robust psychological functioning, inadequate coping skills, passive orientation and a high intolerance for distress.

6. On July 31, 2015 Dr. Zierk drafted an addendum to his May 29, 2015 report. After reviewing surveillance video and additional documentation, Dr. Zierk determined that Claimant was capable of functioning at a higher level than she had portrayed to medical providers.

7. On September 2, 2015 Dr. Mason prescribed 6-8 acupuncture visits for Claimant.

8. On September 21, 2015 J. Trevor McNutt, M.D. performed a records review of Claimant's condition. He determined that she had suffered a very mild traumatic brain injury, abrasions to her knee and hip and posttraumatic headaches. Dr. McNutt concluded that Claimant no longer required chiropractic treatment and her current symptoms were not related to the May 1, 2014 bicycle accident. Because her current symptoms were caused by pre-existing psychological issues, Dr. McNutt reasoned that additional medical treatment was not necessary.

9. On October 12, 2015 Insurer received a letter from Patient Coordinator Gracie Patrick requesting prior authorization for a follow-up appointment with Mark Zacharewicz, Ph.D. Ms. Patrick specifically noted that Claimant was requesting a two-hour appointment with Dr. Zacharewicz in order to review Dr. Zierk's report and discuss the contents. The cost for the appointment would be $620.00. Insurer denied the prior authorization request.

10. On October 28, 2015 Claimant's counsel drafted a letter to Dr. Mason inquiring about medical treatment and physician referrals. Dr. Mason affirmed that Claimant required acupuncture to relieve her symptoms. She specified that acupuncture constituted reasonable and necessary medical treatment for Claimant's May 1, 2014 industrial injuries. Finally, Dr. Mason acknowledged that she had referred Claimant to Dr. Zacharewicz for reasonable, necessary and related treatment.

11. On December 16, 2015 Claimant underwent an independent medical examination with Dr. McNutt. After reviewing Claimant's medical records and conducting a physical examination, Dr. McNutt determined that Claimant had suffered a mild traumatic brain injury, abrasions to her knee and hip and posttraumatic headaches as a result of her May 1, 2014 bicycle accident. He noted that Claimant's symptoms had resolved and she did not require any additional medical treatment for her industrial injuries. Dr. McNutt concluded that Claimant likely reached Maximum Medical Improvement (MMI) around November 1, 2014 and does not have any functional limitations.

12. On January 7, 2016 Dr. Mason noted that she had ordered acupuncture treatment for Claimant but it had not yet been authorized.

13. Claimant testified at the hearing in this matter. She explained that she had previously undergone acupuncture treatment for her May 1, 2014 industrial injuries.

The treatment decreased her work-related symptoms and improved her functional abilities. Claimant thus seeks to undergo the additional 6-8 acupuncture treatments recommended by Dr. Mason.

14. Dr. McNutt testified at the hearing in this matter. He explained that Claimant's symptoms from the May 1, 2014 mild traumatic brain injury should have improved over time but have not. Relying on Dr. Zierk's reports, he noted that Claimant has had an atypical recovery. Dr. McNutt determined that Claimant's chiropractic treatment was not necessary or appropriate. Moreover, additional acupuncture treatment is not reasonable, necessary or related to Claimant's May 1, 2014 bicycle accident. Dr. McNutt explained that Dr. Mason did not consider Dr. Zierk's findings regarding Claimant's symptom magnification in determining Claimant's treatment. He summarized that Dr. Mason's continuing recommendations for Claimant's treatment are not reasonably, necessary or related to her May 1, 2014 industrial injuries.

15. Claimant has demonstrated that it is more probably true than not that the 6-8 acupuncture treatments recommended by ATP Dr. Mason are reasonable, necessary and causally related to her May 1, 2014 industrial injuries. On September 2, 2015 Dr. Mason prescribed 6-8 acupuncture visits for Claimant. Dr. Mason affirmed that Claimant required acupuncture to relieve her symptoms. She specified that acupuncture constituted reasonable and necessary medical treatment for Claimant's May 1, 2014 industrial injuries. Moreover, Claimant explained that previous acupuncture treatment decreased her work-related symptoms and improved her functional abilities. She thus seeks to undergo the additional 6-8 acupuncture treatments recommended by Dr. Mason.

16. In contrast, Dr. McNutt explained that Claimant's symptoms had resolved and she did not require any additional medical treatment for her industrial injuries. Dr. McNutt concluded that Claimant likely reached MMI around November 1, 2014 and does not have any functional limitations. He remarked that Dr. Mason failed to consider Dr. Zierk's findings regarding Claimant's symptom magnification in determining appropriate treatment. Dr. Zierk had attributed Claimant's continued cognitive difficulties to factors that were not related to her May 1, 2014 accident. Dr. McNutt summarized that Dr. Mason's continuing recommendation for Claimant's acupuncture treatment is not reasonably, necessary or related to her May 1, 2014 industrial injuries. However, Dr. Mason treated Claimant over a significant period of time and thoroughly evaluated her condition. Acupuncture treatment had alleviated some of Claimant's prior work-related symptoms and improved her functional abilities. Although Claimant may have exhibited psychological concerns unrelated to her industrial accident as detailed by Dr. Zierk, additional acupuncture treatment constitutes reasonable and necessary medical care related to Claimant's October 1, 2014 bicycle accident.

17. Respondents have failed to prove that it is more probably true than not that they are entitled to recover penalties pursuant to §8-43-304(1), C.R.S because Claimant violated §8-43-503(3), C.R.S. by directing Dr. Zacharewicz to engage in a specific course of medical treatment. On October 12, 2015 Insurer received a letter from Patient Coordinator Gracie Patrick requesting prior authorization for a follow-up

appointment with Dr. Zacharewicz. Ms. Patrick specifically noted that Claimant was requesting a two-hour appointment with Dr. Zacharewicz in order to review Dr. Zierk's report and discuss the contents. The cost for the appointment would be $620.00. An October 28, 2014 letter reflects that Dr. Mason acknowledged she had referred Claimant to Dr. Zacharewicz for reasonable, necessary and related treatment. The record simply reveals that Claimant sought a two-hour consultation with Dr. Zacharewicz to review and discuss Dr. Zierk's report. The request does not reflect that Claimant directed the type or duration of treatment or her degree of physical impairment. Accordingly, Respondents' request for penalties is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual

determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that the 6-8 acupuncture treatments recommended by ATP Dr. Mason are reasonable, necessary and causally related to her May 1, 2014 industrial injuries. On September 2, 2015 Dr. Mason prescribed 6-8 acupuncture visits for Claimant. Dr. Mason affirmed that Claimant required acupuncture to relieve her symptoms. She specified that acupuncture constituted reasonable and necessary medical treatment for Claimant's May 1, 2014 industrial injuries. Moreover, Claimant explained that previous acupuncture treatment decreased her work-related symptoms and improved her functional abilities. She thus seeks to undergo the additional 6-8 acupuncture treatments recommended by Dr. Mason.

6. As found, in contrast, Dr. McNutt explained that Claimant's symptoms had resolved and she did not require any additional medical treatment for her industrial injuries. Dr. McNutt concluded that Claimant likely reached MMI around November 1, 2014 and does not have any functional limitations. He remarked that Dr. Mason failed to consider Dr. Zierk's findings regarding Claimant's symptom magnification in determining appropriate treatment. Dr. Zierk had attributed Claimant's continued cognitive difficulties to factors that were not related to her May 1, 2014 accident. Dr. McNutt summarized that Dr. Mason's continuing recommendation for Claimant's acupuncture treatment is not reasonably, necessary or related to her May 1, 2014 industrial injuries. However, Dr. Mason treated Claimant over a significant period of time and thoroughly evaluated her condition. Acupuncture treatment had alleviated some of Claimant's prior work-related symptoms and improved her functional abilities. Although Claimant may have exhibited psychological concerns unrelated to her industrial accident as detailed by Dr. Zierk, additional acupuncture treatment constitutes reasonable and necessary medical care related to Claimant's October 1, 2014 bicycle accident.

Penalties

7. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $1000 per day where a party violates a statute, rule, or lawful order of an ALJ. *See Holliday v. Bestop, Inc.,* 23 P.3d 700, 705 (Colo. 2001). The term "order" as used in §8-43-304 includes a rule or regulation promulgated by the Director of the Division of Worker's Compensation. §8-40-201(15), C.R.S.; *see Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176, 177 (Colo. App. 2002). Section 8-43-304(1), C.R.S. also requires that the fine imposed is to be apportioned, in whole or in part, by the ALJ between the aggrieved party and the workers' compensation cash fund created in C.R.S §8-44-112(7)(a), C.R.S. except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.

8. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP, Nov. 17, 2004). The

ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998). Factors considered in assessing the amount of the penalties are willful and wanton conduct, repeated failure to pay indemnity and medical bills, a systemic failure to provide written explanation for the non-payment, hardship on Claimant and punishment to deter future misconduct. See *Associated Business Products v. ICAO*, 126 P.3d 323 (Colo.App. 2005).

9. Respondents specifically request penalties pursuant to §8-43-503(3), C.R.S. because Claimant dictated medical care by directing Dr. Zacharewicz to engage in a specific course of medical treatment. Section 8-43-503(3), C.R.S. provides in pertinent part, that [e]mployers insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment."

10. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled to recover penalties pursuant to §8-43-304(1), C.R.S because Claimant violated §8-43-503(3), C.R.S. by directing Dr. Zacharewicz to engage in a specific course of medical treatment. On October 12, 2015 Insurer received a letter from Patient Coordinator Gracie Patrick requesting prior authorization for a follow-up appointment with Dr. Zacharewicz. Ms. Patrick specifically noted that Claimant was requesting a two-hour appointment with Dr. Zacharewicz in order to review Dr. Zierk's report and discuss the contents. The cost for the appointment would be $620.00. An October 28, 2014 letter reflects that Dr. Mason acknowledged she had referred Claimant to Dr. Zacharewicz for reasonable, necessary and related treatment. The record simply reveals that Claimant sought a two-hour consultation with Dr. Zacharewicz to review and discuss Dr. Zierk's report. The request does not reflect that Claimant directed the type or duration of treatment or her degree of physical impairment. Accordingly, Respondents' request for penalties is denied and dismissed.

ORDER

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

1. Claimant's request for 6-8 acupuncture treatments as recommended by ATP Dr. Mason is granted.

2. Respondents' request for penalties because Claimant dictated medical care in violation of 8-43-503(3), C.R.S. is denied and dismissed.

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

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

DATED: March 9, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable right shoulder injury on March 15, 2014 during the course and scope of her employment with Labor Finders.

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. . Whether Claimant has proven by a preponderance of the evidence that the right shoulder surgery recommended by Nirav Shah, M.D. is reasonable, necessary and related to her March 15, 2014 right shoulder injury.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Labor Finders is a temporary employment agency that contracted with Huron Produce to provide temporary employees. Claimant worked for Labor Finders at the Huron Produce facility as a Cleaner. Her job duties involved cleaning bathrooms, offices and the dining area. Claimant's specific duties included keeping the floor clean of debris in the tomato-packing area, sweeping, mopping and ensuring boxes were properly stacked. Claimant also removed produce from plastic boxes.

2. Claimant stated that she earned $9.75 per hour while working for Labor Finders. She also received time and a half pay for working overtime in excess of 40 hours each week. Claimant noted that she earned a $50.00 annual bonus. Claimant's wage records reflect that she earned $6,638.88 for the 10 weeks preceding March 15, 2014. Including her annual bonus, Claimant earned an Average Weekly Wage (AWW) of $664.84. An AWW of $664.84 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant testified that in early March 2014 she was lifting two boxes of tomatoes weighing approximately 30 pounds when she experienced a "pop" in her right shoulder. She did not seek any medical treatment or miss any time from work as a result of the incident.

4. Claimant explained that on Saturday, March 15, 2014 she was cleaning a microwave oven in the kitchen with co-worker Maricela Morales near the end of her shift. While they were lifting the microwave oven, Claimant experienced pain and a "pop" in her right shoulder.

5. Claimant reported the microwave incident to Huron Produce Supervisor Francisco Carbajal aka "Kiko." She did not directly report her injury to Labor Finders. However, Huron Produce Manager Nathan Sheets relayed the incident to Labor Finders. Labor Finders then scheduled an appointment at the UCHealth Longmont Clinic for Monday, March 17, 2014.

6. On March 17, 2014 Claimant visited Andrew Klein, PA at the UCHealth Longmont Clinic for an evaluation. Claimant reported that she experienced pain in her right shoulder while mopping at work. She noted worsening right shoulder pain with overhead movement and lifting. A physical examination revealed pain with forward flexion and abduction greater than 90 degrees. PA Klein assigned Claimant five pound lifting and carrying restrictions. He also referred her to physical therapy.

7. On March 24, 2014 Claimant underwent physical therapy at Physiotherapy Associates. Claimant reported that approximately two Saturdays earlier she was lifting about 30 pounds and suffered a "pop" in her right shoulder. She continued to work, but approximately one week later she was moving a microwave oven and experienced another "pop of pain" in her right shoulder.

8. On May 5, 2014 Claimant returned to PA Klein for an examination. She reported improved range of motion and strength after one month of physical therapy. PA Klein assigned 10 pound lifting restrictions.

9. On May 13, 2014 Claimant returned to PA Klein and reported a 50% improvement in right shoulder symptoms. She reported continued shoulder popping and difficulties with overhead movements. PA Klein referred Claimant to Mindy Gehrs, M.D. for an examination and reassigned five pound lifting restrictions.

10. On June 4, 2014 Claimant visited Dr. Gehrs at the UCHealth Longmont Clinic for an examination. She reported some improvement with physical therapy but constant pain in the deltoid region of her right shoulder with episodes of popping and significant pain aggravated by backward reaching. Dr. Gehrs diagnosed Claimant with right shoulder impingement. Claimant underwent a subacromial injection with some immediate relief.

11. On June 19, 2014 Claimant underwent a right shoulder MRI. The MRI revealed a full thickness tear in the anterior aspect of the supraspinatous tendon near its insertion site.

12. Claimant subsequently visited Dr. Gehrs for an evaluation. Dr. Gehrs diagnosed Claimant with a right shoulder full-thickness rotator cuff tear of the supraspinatus. She referred Claimant for an orthopedic evaluation.

13. On July 3, 2014 Claimant visited Nirav Shah, M.D. for an orthopedic evaluation. Claimant reported that she had experienced a "pop" in her right shoulder while lifting a 30 pound box at work and then suffered increased pain during a lifting incident approximately one week later. After reviewing Claimant's right shoulder MRI,

Dr. Shah diagnosed Claimant with a full thickness tear of the rotator cuff at the supraspinatus. Based on the failure of conservative measures and symptoms consistent with a rotator cuff tear, Dr. Shah recommended right shoulder surgery. He specifically recommended a right shoulder arthroscopy, decompression, rotator cuff repair, distal clavicle excision and extensive debridement under her Workers' Compensation claim. Dr. Shah assigned work restrictions of no lifting, carrying, pushing or pulling in excess of five pounds.

14. Nolan Smith testified that he has been the Operations Director at Huron Produce for three years. In April 2014 Labor Finders' contract with Huron Produce ended. Claimant continued to work at Huron Produce but was employed by temporary employment agency Labor Max. She worked within her restrictions and avoided lifting heavy items. Claimant specifically denied lifting any 30 pound boxes after her March 15, 2014 right shoulder injury.

15. Mr. Smith explained that Claimant worked with restrictions for approximately one to two months after her March 15, 2014 injury. Claimant's restrictions were then lifted and she returned to full duty work. Claimant did not have any work restrictions from July 2014 until the end of the year.

16. Claimant testified that her right shoulder pain never ceased after the March 15, 2014 lifting incident. However, in approximately March or April 2015 Claimant requested a lighter duty position because of her continued right shoulder symptoms. Claimant denied that her right shoulder condition worsened while working for Labor Max. She acknowledged that she has experienced the waxing and waning of right shoulder symptoms since her March 15, 2014 injury.

17. On January 15, 2015 Claimant underwent an independent medical examination with John Hughes, M.D. Claimant reported that she initially injured her right shoulder when she was lifting a 30 pound box of product at work. She then was moving a microwave oven with a co-worker and suffered an increase in right shoulder pain. Dr. Hughes noted that Claimant's account was consistent with the medical records. He remarked that there were some discrepancies in Claimant's history of her injury because she initially stated that she developed right shoulder pain from mopping. However, Claimant subsequently gave a more detailed history that was consistent with her account at the independent medical examination. After reviewing medical records and conducting a physical examination, Dr. Hughes determined that Claimant suffered a "right shoulder sprain/strain with development of a rotator cuff tear involving the suprespinatus tendon" on March 15, 2014. He also determined that Claimant's medical treatment was reasonable, necessary and related to the March 15, 2014 right shoulder incident. Dr. Hughes remarked that Claimant had not reached Maximum Medical Improvement (MMI). Finally, he agreed with Dr. Shah's recommendation for right shoulder rotator cuff repair surgery.

18. On July 29, 2015 Claimant underwent an independent medical examination with John J. Raschbacher, M.D. Claimant reported that she injured her

right shoulder while moving a microwave oven to perform her cleaning duties at work on March 15, 2014. She denied any shoulder symptoms as a result of a mopping incident but noted that she had injured her right shoulder while carrying 30 pound boxes of produce a few weeks prior to the March 15, 2014 accident. After conducting a physical examination and reviewing medical records, Dr. Raschbacher diagnosed Claimant with a possible right rotator cuff tear. He determined that, because Claimant had presented "grossly different" histories to medical provides, he did not recommend "accepting her current complaints of right shoulder pain and the possible diagnosis of rotator cuff tear as clearly work-related in causation." However, Dr. Raschbacher summarized that he would reserve judgment "with respect to work-relatedness of the current complaints and also further delineating those current complaints by obtaining an MRI arthrogram of the shoulder at this time."

19. On August 30, 2015 Claimant underwent an independent medical examination with Lloyd J. Thurston, D.O. Claimant reported that on March 15, 2014 she injured her right shoulder while lifting a microwave oven with a co-worker in order to perform her cleaning duties. Approximately one week earlier Claimant had experienced a "pop" or pull in her right shoulder while lifting boxes of tomatoes. However, her symptoms resolved prior to the March 15, 2014 microwave incident. After reviewing Claimant's medical records and conducting a physical examination, Dr Thurston concluded that Claimant suffered an acute right rotator cuff injury during the course and scope of her employment with Labor Finders on March 15, 2014. He noted that Claimant has not responded to conservative treatment and has continued to experience significant right shoulder pain, popping, burning and weakness. Dr. Thurston commented that surgery was recommended but had not been performed. He summarized that, although Claimant "continues to complain of right shoulder pain since changing employers, the injury occurred [on March 15, 2014] and has not been exacerbated or aggravated by her current employer/employment."

20. Dr. Raschbacher testified at the hearing in this matter. He explained that Claimant has a full thickness tear of the supraspinatus tendon in her right shoulder. He explained that Claimant's March 15, 2014 injury gradually improved and her condition stabilized in the summer of 2014. Dr. Raschbacher remarked that Claimant reached MMI when her condition stabilized for nine months However, when she continued to work for Labor Max subsequent to July 2014 she had a flare-up of symptoms. Claimant's job duties for Labor Max from July 2014 through April 2015 aggravated her original industrial injury and caused her current symptoms. Accordingly, any future medical treatment would be related to the aggravation of her condition caused by her full duty work for Labor Max. He thus concluded that Claimant's need for right shoulder surgery was related to the aggravation of her condition while working for Labor Max. Nevertheless, Dr. Raschbacher acknowledged that Claimant's medical treatment prior to July 2014 was reasonable, necessary and related to her March 15, 2014 industrial injury while working for Labor Finders.

21. Claimant has established that it is more probably true than not that she suffered a compensable right shoulder injury on March 15, 2014 during the course and

scope of his employment with Labor Finders. On March 15, 2014 Claimant was cleaning and moving a microwave oven in the kitchen with a co-worker when she experienced pain and a "pop" in her right shoulder. In early March 2014 Claimant had been lifting two boxes of tomatoes weighing approximately 30 pounds when she experienced a "pop" in her right shoulder. Despite some minor inconsistencies in the medical records, the bulk of the evidence reveals that Claimant initially suffered a right shoulder incident at work and a recurrent injury on March 15, 2014 that precipitated medical treatment. After undergoing conservative treatment and physical therapy, an MRI revealed that Claimant had suffered a right shoulder full-thickness rotator cuff tear at the supraspinatus.

22. During an independent medical examination with Dr. Hughes, Claimant reported that she initially injured her right shoulder when she was lifting a 30 pound box of product at work. She then was moving a microwave oven with a co-worker and suffered an increase in right shoulder pain. After reviewing medical records and conducting a physical examination, Dr. Hughes persuasively determined that Claimant suffered a "right shoulder sprain/strain with development of a rotator cuff tear involving the suprespinatus tendon." He noted that there were some discrepancies in Claimant's history of her injury because she initially stated that she had developed right shoulder pain from mopping. However, Claimant subsequently gave a more detailed history that was consistent with her account at the independent medical examination. Dr. Hughes concluded that Claimant suffered an acute rotator cuff tear on March 15, 2014. Dr. Thurston also persuasively concluded that Claimant suffered an acute right rotator cuff injury during the course and scope of her employment with Labor Finders on March 15, 2014. He summarized that, although Claimant "continues to complain of right shoulder pain since changing employers, the injury occurred [on March 15, 2014] and has not been exacerbated or aggravated by her current employer/employment."

23. Dr. Raschbacher agreed that on March 15, 2014 Claimant suffered an acute right shoulder full thickness tear at the supraspinatus tendon in her right shoulder. However, he explained that Claimant's March 15, 2014 injury gradually improved and her condition stabilized in the summer of 2014. Dr. Raschbacher remarked that Claimant reached MMI when her condition stabilized for nine months However, when she continued to work for Labor Max subsequent to July 2014 she had a flare-up of symptoms. Claimant's job duties for Labor Max from July 2014 through April 2015 thus aggravated her original industrial injury and caused her current symptoms. However, Claimant credibly testified that her right shoulder pain never ceased after the March 15, 2014 lifting incident. In approximately March or April 2015 Claimant requested a lighter duty position because of her continued right shoulder symptoms. Claimant denied that her right shoulder condition worsened while working for Labor Max. She acknowledged that she has experienced the waxing and waning of right shoulder symptoms since her March 15, 2014 injury. Claimant's credible testimony, in conjunction with the persuasive opinion of Dr. Thurston, reflects that Claimant did not suffer a worsening of her right shoulder condition while working for Labor Max. She suffered an acute injury while working for Labor Finders and no additional incident occurred while Claimant was working for Labor Max that constituted an efficient intervening cause. Claimant was in a

weakened condition as a result of her March 15, 2014 right rotator cuff tear while working for Labor Finders. Her request for additional restrictions while working for Labor Max simply did not sever the causal chain originating from her right rotator cuff tear that occurred while she was working for Labor Finders on March 15, 2014.

24. 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. Claimant received conservative medical treatment including physical therapy and diagnostic testing for her March 15, 2014 right rotator cuff tear. Dr. Hughes determined that Claimant's medical treatment was reasonable, necessary and related to her March 15, 2014 right shoulder injury. He remarked that Claimant has not reached MMI. Dr. Raschbacher acknowledged that Claimant's medical treatment prior to July 2014 was reasonable, necessary and related to her March 15, 2014 industrial injury while working for Labor Finders. Accordingly, the record reveals that Claimant has received reasonable, necessary and related conservative medical treatment for her March 15, 2014 right shoulder rotator cuff tear.

25. Claimant has proven that it is more probably true than not that the right shoulder surgery recommended by Dr. Shah is reasonable, necessary and related to her March 15, 2014 right shoulder injury. After reviewing Claimant's right shoulder MRI, Dr. Shah diagnosed Claimant with a full thickness tear of the rotator cuff at the supraspinatus. Based on the failure of conservative measures and symptoms consistent with a rotator cuff tear, Dr. Shah persuasively recommended right shoulder surgery. He specifically recommended a right shoulder arthroscopy, decompression, rotator cuff repair, distal clavicle excision and extensive debridement under her Workers' Compensation claim. Dr. Hughes agreed with Dr. Shah's recommendation for right shoulder rotator cuff repair surgery. In contrast, Dr. Raschbacher explained that any future medical treatment would be related to the aggravation of Claimant's condition caused by her full duty work for Labor Max. He thus concluded that Claimant's need for right shoulder surgery was related to the aggravation of her condition while working for Labor Max. However, the record reveals that Claimant suffered an acute right rotator cuff tear while working for Labor Finders on March 15, 2014. Based on the persuasive medical records of Drs. Shah and Hughes, Claimant's need for right rotator cuff repair surgery is reasonable, necessary and related to the March 15, 2014 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).

Compensability

4. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. § 8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAP, May 16, 2005). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAP, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

7. As found, Claimant has established by a preponderance of the evidence that she suffered a compensable right shoulder injury on March 15, 2014 during the course and scope of his employment with Labor Finders. On March 15, 2014 Claimant was cleaning and moving a microwave oven in the kitchen with a co-worker when she experienced pain and a "pop" in her right shoulder. In early March 2014 Claimant had been lifting two boxes of tomatoes weighing approximately 30 pounds when she experienced a "pop" in her right shoulder. Despite some minor inconsistencies in the medical records, the bulk of the evidence reveals that Claimant initially suffered a right shoulder incident at work and a recurrent injury on March 15, 2014 that precipitated medical treatment. After undergoing conservative treatment and physical therapy, an MRI revealed that Claimant had suffered a right shoulder full-thickness rotator cuff tear at the supraspinatus.

8. As found, during an independent medical examination with Dr. Hughes, Claimant reported that she initially injured her right shoulder when she was lifting a 30 pound box of product at work. She then was moving a microwave oven with a co-worker and suffered an increase in right shoulder pain. After reviewing medical records and conducting a physical examination, Dr. Hughes persuasively determined that Claimant suffered a "right shoulder sprain/strain with development of a rotator cuff tear involving the suprespinatus tendon." He noted that there were some discrepancies in Claimant's history of her injury because she initially stated that she had developed right shoulder pain from mopping. However, Claimant subsequently gave a more detailed history that was consistent with her account at the independent medical examination. Dr. Hughes concluded that Claimant suffered an acute rotator cuff tear on March 15, 2014. Dr. Thurston also persuasively concluded that Claimant suffered an acute right rotator cuff injury during the course and scope of her employment with Labor Finders on March 15, 2014. He summarized that, although Claimant "continues to complain of right shoulder pain since changing employers, the injury occurred [on March 15, 2014] and has not been exacerbated or aggravated by her current employer/employment."

9. As found, Dr. Raschbacher agreed that on March 15, 2014 Claimant suffered an acute right shoulder full thickness tear at the supraspinatus tendon in her right shoulder. However, he explained that Claimant's March 15, 2014 injury gradually improved and her condition stabilized in the summer of 2014. Dr. Raschbacher remarked that Claimant reached MMI when her condition stabilized for nine months However, when she continued to work for Labor Max subsequent to July 2014 she had a flare-up of symptoms. Claimant's job duties for Labor Max from July 2014 through April 2015 thus aggravated her original industrial injury and caused her current symptoms. However, Claimant credibly testified that her right shoulder pain never ceased after the March 15, 2014 lifting incident. In approximately March or April 2015 Claimant requested a lighter duty position because of her continued right shoulder symptoms. Claimant denied that her right shoulder condition worsened while working for Labor Max. She acknowledged that she has experienced the waxing and waning of right shoulder symptoms since her March 15, 2014 injury. Claimant's credible testimony, in conjunction with the persuasive opinion of Dr. Thurston, reflects that Claimant did not suffer a worsening of her right shoulder condition while working for Labor Max. She suffered an acute injury while working for Labor Finders and no

additional incident occurred while Claimant was working for Labor Max that constituted an efficient intervening cause. Claimant was in a weakened condition as a result of her March 15, 2014 right rotator cuff tear while working for Labor Finders. Her request for additional restrictions while working for Labor Max simply did not sever the causal chain originating from her right rotator cuff tear that occurred while she was working for Labor Finders on March 15, 2014.

Medical Benefits

10. 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).

11. 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. Claimant received conservative medical treatment including physical therapy and diagnostic testing for her March 15, 2014 right rotator cuff tear. Dr. Hughes determined that Claimant's medical treatment was reasonable, necessary and related to her March 15, 2014 right shoulder injury. He remarked that Claimant has not reached MMI. Dr. Raschbacher acknowledged that Claimant's medical treatment prior to July 2014 was reasonable, necessary and related to her March 15, 2014 industrial injury while working for Labor Finders. Accordingly, the record reveals that Claimant has received reasonable, necessary and related conservative medical treatment for her March 15, 2014 right shoulder rotator cuff tear.

12. As found, Claimant has proven by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Shah is reasonable, necessary and related to her March 15, 2014 right shoulder injury. After reviewing Claimant's right shoulder MRI, Dr. Shah diagnosed Claimant with a full thickness tear of the rotator cuff at the supraspinatus. Based on the failure of conservative measures and symptoms consistent with a rotator cuff tear, Dr. Shah persuasively recommended right shoulder surgery. He specifically recommended a right shoulder arthroscopy, decompression, rotator cuff repair, distal clavicle excision and extensive debridement under her Workers' Compensation claim. Dr. Hughes agreed with Dr. Shah's recommendation for right shoulder rotator cuff repair surgery. In contrast, Dr. Raschbacher explained that any future medical treatment would be related to the aggravation of Claimant's condition caused by her full duty work for Labor Max. He thus concluded that Claimant's need for right shoulder surgery was related to the aggravation of her condition while working for Labor Max. However, the record reveals that Claimant suffered an acute right rotator cuff tear while working for Labor Finders on March 15, 2014. Based on the persuasive medical records of Drs. Shah and Hughes, Claimant's need for right rotator cuff repair surgery is reasonable, necessary and related to the March 15, 2014 incident.

AWW

13. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

14. As found, Claimant stated that she earned $9.75 per hour while working for Labor Finders. She also received time and a half pay for working overtime in excess of 40 hours each week. Claimant noted that she also earned a $50.00 annual bonus. Claimant's wage records reflect that she earned $6,638.88 for the 10 weeks preceding March 15, 2014. Including her annual bonus, Claimant earned an AWW of $664.84. An AWW of $664.84 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant suffered a compensable right shoulder injury during the course and scope of her employment with Employer on March 15, 2014.

2. Labor Finders is financially responsible for Claimant's reasonable, necessary and related medical treatment.

3. The right shoulder surgery recommended by Dr. Shah is reasonable, necessary and related to Claimant's March 15, 2014 right shoulder injury.

4. Claimant earned an AWW of $664.84..

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, 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 4, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-957-282-01

ISSUES

- Whether Claimant overcome the DIME by clear and convincing evidence?
- If not, whether Respondents are permitted to recoup the overpayment?

FINDINGS OF FACT

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

1. Claimant was employed by employer as a warehouse man. He stocked orders for Employer. Claimant had been employed for three years by Employer when on June 11, 2014, he felt sore during the middle of his shift. He finished working that day and later reported his alleged injury. No specific incident that gave rise to his pain complaints.

2. Claimant was evaluated at Concentra Medical Centers and was diagnosed with a lumbar strain. Provider Nancy Strain prescribed physical therapy and medications and gave Claimant work restrictions.

3. On July 25, 2014, Claimant underwent an MRI. The radiologist concluded that there were mild degenerative disc changes at L4-L5, but no indication of an acute injury.

4. On August 27, 2014, Claimant saw Dr. Bryan Castro on an orthopedic referral. Dr. Castro examined Claimant and determined he was not a surgical candidate and that he should undergo a trial of injections. Dr. Castro did not find any neurological deficits on exam. He noted that Claimant had good range of motion. Dr. Castro made no specific treatment recommendations. Claimant continued to treat and remain off work.

5. On October 3, 2014, Dr. Allison Fall examined Claimant and found him to be neurologically intact. She performed injections but Claimant did not respond well and the injections were determined to be non-diagnostic and non-therapeutic.

6. On February 23, 2015, Claimant underwent an FCE. Claimant's effort was demonstrated to be valid and Claimant was placed in the medium to heavy work category.

7. On February 27, 2015, Dr. Fall placed Claimant at MMI. She assigned a 7% whole person rating comprised of a 5% Table 53II B rating plus 2% for loss of range of motion. Dr. Fall assigned maintenance care over the next six months including medication refills.

8. On March 17, 2015, Respondents filed an FAL admitting for this rating and awarded Claimant PPD in the amount of $21,327.30. These benefits were paid out by June 16, 2015.

9. Claimant elected to proceed to a DIME. On June 10, 2015, Dr. Lloyd Thurston performed the DIME. Dr. Thurston conducted a records review, physical examination, and took Claimant's history. Dr. Thurston recorded the onset of injury and Claimant's then-current symptoms. Dr. Thurston considered his range of motion measurements invalid. However, they were valid, but Dr. Thurston made a mathematical error in his calculations. The error was irrelevant, though, because Dr. Thurston opined that Claimant did not have a ratable impairment under Table 53 IIB of the *Guides*. And a ratable impairment must be found before any impairment rating can be given for reduced range of motion.

10. Dr. Thurston explained in his report that he disagreed with Dr. Fall's application of Table 53 IIB of the *Guides.* He opined that Claimant experienced a non-specific disorder of the spine. Dr. Thurston cited several low back pain medical treatises explaining his conclusions. He noted in his summary that the MRI did not show a specific acute injury and that the changes were age related minimal degenerative changes. Because he did not find a ratable injury, Dr. Thurston did not have Claimant return for range of motion testing. Dr. Thurston assigned a 0% impairment rating.

11. Claimant applied for Hearing to overcome the DIME.

12. On September 10, 2015, Dr. Fall submitted a follow-up report responding to Dr. Thurston's findings and opinions. Dr. Fall opined that Dr. Thurston's opinion that Claimant did not suffer a work related injury was "inconsistent with the medical records provided." She concluded, "in summary, I would say that I respectfully disagree with the opinion of Dr. Thurston. It has generally been agreed upon by the treating providers and myself that he did have a work-related injury. I believe that the impairment rating I assigned was reasonable and appropriate as related to the work-related injury." Dr. Fall did not opine that Dr. Thurston had erred, only that they disagreed.

13. On September 22, 2015, Claimant underwent an IME with Dr. Marc Steinmetz at Respondent's request. Dr. Steinmetz performed a record review, noted Claimant's initial care and low back strain diagnosis, and read Claimant's MRI showing mild degenerative changes. He noted the difference between Dr. Castro's recording of good range of motion and Dr. Fall's finding of lack of extension. Dr. Steinmetz reviewed both ATP Dr. Fall and DIME Dr. Thurston's ratings.

14. Dr. Steinmetz took Claimant's history, performed a physical exam, and measured Claimant's flexion and extension. In his medical opinion the MRI did not show an acute injury and he noted that Claimant had been observed lifting nearly seventy pounds. Dr. Steinmetz agreed with Dr. Thurston that Claimant's injury should

have resolved in a shorter period of time, and noted that the injections were non-diagnostic and non-therapeutic. As to the impairment rating, Dr. Steinmetz noted that Claimant displayed normal to inconsistent extension and flexion findings. Dr. Dr. Steinmetz did not detect any errors or misapplications of the rating tips or the *AMA Guides* in the DIME. He agreed that there was no specific disorder and thus the range of motion was moot.

15. On October 1, 2015, Claimant underwent an IME with Douglas Hemler, M.D. upon Claimant's request. Dr. Hemler assessed Claimant with an 8% whole person impairment rating and maintenance medical care in the form of ongoing medication, additional physical therapy, and 4-6 follow-up visits over an 18 month period. Dr. Hemler was critical of Dr. Thurston for not providing an explanation for Claimant's pain. In evaluating whether Table 53 II A. or B. applied, Dr. Hemler concluded

    - "There is a well documented date of injury/mechanism of injury."
    - Claimant had well defined localized tenderness.
    - Claimant's pain "could be from the left L5-S1 facet although injections in this regard have been equivocal."

    The ALJ finds each of these conclusions to be contrary to the preponderance of the evidence.

16. On December 9, 2015, Respondents took the post-hearing deposition of Dr. Thurston. Dr. Thurston explained that Claimant suffered myofacial pain complaints and that pain is not a ratable condition. Dr. Thurston persuasively opined that if Claimant had an injury, it was minor and in his opinion not ratable.

17. The ALJ finds the opinions of Dr. Fall and Dr. Hemler reflect a difference of medical opinion with the DIME but do not constitute clear and convincing evidence to overcome the opinion of the DIME physician. The ALJ finds the opinions of Dr. Fall and Dr. Hemler less credible and persuasive than the opinions of Dr. Thurston and Dr. Steinmetz.

18. Considering the totality of the evidence, the ALJ finds that Claimant has not met the burden of overcoming the Dime by a preponderance of the evidence.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. §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.

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). 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).

IMPAIRMENT and RATING

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).

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). Clear and convincing evidence means evidence which is stronger than a mere preponderance; it is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, supra. To further the public policy of speedy and just resolution of workers' compensation cases, the clear and convincing evidence standard should be systematically applied.

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). A mere difference of opinion between physicians fails to

constitute error. *Garner v. Home Depot USA, Inc.*, W.C. No. 4-644-099 (July 23, 2008); *Villalobos-Chaparro v. Benny's Concrete*, W. C. No. 4-356-868 (Jan. 4, 2001).

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). 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).

The dispute in this claim is whether or not there was ratable impairment. Both Drs. Steinmetz and Thurston agreed that while claimant had an injury, there was no ratable impairment and that Table 53 II B did not apply. Dr. Thurston credibly testified as to his reasoning in coming to his conclusions in the DIME. Dr. Steinmetz noted that there was no error or deviation from the *AMA Guides* or DOWC rating tips. Dr. Steinmetz noted that Dr. Hemler's critique of the DIME was flawed and gave his reasoning as to why the DIME should not be disturbed.

Dr. Thurston persuasively explained in his report and testimony why he concluded that Claimant did not have a specific disorder of the spine. Given the findings on MRI, mechanism of injury, and the non-diagnostic response to injections and other treatments, Dr. Thurston concluded that there was no indication of a specific injury for this claim.

Dr. Steinmetz noted that Dr. Hemler was incorrect in his criticism of Dr. Thurston for relying upon journals and treatises in his report. As Dr. Steinmetz explained, it is the duty of the DIME physician to substantiate any differences in a rating. In this case, Dr. Thurston properly substantiated why and how he concluded that there was no ratable impairment for claimant. The *AMA Guides* mandate that when the DIME physician has a substantially different rating from the ATP, the physician must explain how they came to a different conclusion. In this case, Dr. Thurston properly explained how he concluded claimant did not sustain a specific disorder to his spine. He not only relied upon the treatises that he listed, but the degenerative changes on the MRI and the inconsistent range of motion measurements.

This case appears to involve a difference of opinion as to whether or not Claimant sustained a ratable impairment. Dr. Steinmetz agreed that Dr. Thurston used the correct methodology in classifying this case under Table 53 IIA versus IIB. Dr. Steinmetz opined, and Dr. Thurston concurred, that the examining physician has discretion in a case such as this as to which table to apply. Dr. Steinmetz testified that this was not abuse of discretion, in that there was no sign, as Dr. Thurston explained, of an acute injury, i.e. there was no specific disorder of the spine. This is substantiated by the medical record and Claimant's FCE.

Dr. Steinmetz agreed with Dr. Thurston that Claimant's was a minor injury which should have resolved in six to eight weeks. He also agreed that there was no acute change on MRI. Dr. Steinmetz noted in his testimony that the inconsistent range of motion as well as the non-diagnostic results of the injections supported Dr. Thurston's

conclusions. Dr. Steinmetz credibly testified that the use of 53 II A or B was a difference of opinion and Dr. Hemler was incorrect to assert that II B was the "only" table that should have been applied. Dr. Thurston credibility explained his conclusions, and as Dr. Steinmetz' noted, Dr. Hemler's critique is flawed on multiple counts. The DIME report has not been overcome by clear and convincing evidence and will not be disturbed.

ENTITLEMENT to OVERPAYMENT

Pursuant to § 8-40-201(15.5), C.R.S., "three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money 'that exceeds the amount that should have been paid'; the second category is for money received that a 'claimant was not entitled to receive,' and the final category is for money received that 'results in duplicate benefits because of offsets that reduce disability or death benefits' payable under articles 40 to 47 of title 8. § 8-40-201(15.5)." *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354, 359 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). An overpayment does not have to exist at the time the monies are received. *Grandstaff v. United Airlines,* W.C. No. 4-717-644 December 12, 2013.

This case is analogues to *In re Marquez,* 080714 COWC, 4-896-504-04, August 7, 2014. In *Marquez*, as here, the claimant received an admitted PPD rating from the ATP which the insurer admitted to, followed by the claimant electing to challenge the impairment rating via a DIME. That case also resulted in the claimant receiving a lower impairment rating at the DIME. There is an inherent risk in going to a DIME in that it is within the DIME physicians' prerogative to assign a lower impairment rating. At that point it becomes the statutory duty of the Insurer to either admit or challenge the DIME. By asserting the right to admit to the DIME with a lower impairment rating, the PPD previously paid becomes an overpayment and thus creates Respondents right to recovery. Thus, Respondents are entitled to recoup the overpayment of $21,327.20.

ORDER

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

1. Claimant has not sustained his burden and the DIME shall not be disturbed.

2. Respondents are entitled to recoup the overpayment of $21,327.20.

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

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

DATED: March 7, 2016

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

ISSUES

The issues presented for determination are as follows:

1. Did Respondents prove by a preponderance of the evidence there was sufficient evidence to prospectively withdraw their General Admission of Liability ("GAL").

2. Whether the chondrocyte implantation surgery recommended by Dr. Papilion is reasonable, necessary and related to the Claimant's injury.

FINDINGS OF FACT

1. Claimant's medical history was significant in that she had a prior injury to her left knee in 2004, which required surgery. This was a work-related injury sustained while working for Disney on Ice and she was treated by John Reister, M.D. She underwent an arthroscopy and developed a staph infection for which she required treatment. In particular, she required three arthroscopic procedures to eliminate the staph infection from the knee. Claimant testified she recovered fully from the 2004 injury, including the surgeries and complications. She was able to perform her duties for Employer without difficulty.

2. On March 22, 2004, an MRI was done on Claimant's left knee, which was read by Steven Hughes, M.D. Dr. Hughes' impression was small nonspecific joint effusion; edema seen in the soft tissues, anterior to the patella, anterior to the patellar tendon and the distal patella could relate to repetitive microtrauma and overuse or could relate to focal acute trauma; minimal mucoid degenerative signal change in the body and posterior horn of the medical meniscus, but no evidence of meniscal tear. The ALJ notes Dr. Hughes felt the effusion and edema could be related to repetitive injuries or focal acute trauma.

3. On April 13, 2004, Claimant underwent another MRI in Texas. Dr. Andrew Bauer read the films and his impression was no evidence of internal derangement; no other evidence of significant pathology on this MRI. There was no evidence of bone contusion or joint effusion.

4. The ALJ notes there was no reference to a defect or lesion present in the lateral femoral condyle in the 2004 MRI-s.

5. An MRI was also done on March 22, 2006, after Claimant underwent surgery performed by Dr. Reister for the staph infection and sepsis. The films were read by William Dunfee, M.D., whose impression was minimal myositis involving the vastus lateralis and medialis muscles; no drainable abscess or fluid collection; probable

reactive marrow changes to the weight bearing surface of the lateral femoral condyle; and more patchy edema extending to the articular surface at the level of the tibial spines. Dr. Dunfee felt this edema represented infection extending along the distal attachment of the ACL. The ALJ notes that Dr. Dunfee did not describe a large lesion or defect in the lateral femoral condyle.

6. Claimant also experienced of knee pain in May 2007 while running after a small dog. She was examined by Dr. Reister on May 31, 2007. No effusion was noted, but Claimant had a loss of flexion and extension. Claimant was treated with anti-inflammatory medications. There was no evidence before the ALJ that she required treatment for her left knee from June 2007 to August, 2014 after this appointment with Dr. Reister.

7. Claimant worked for Employer as a stagehand, loading and unloading concert equipment. Claimant testified that she was involved in a work-related incident on August 18, 2014. Claimant was "loading out" equipment after a Bruno Mars concert at the Fiddler's Green Amphitheatre. Claimant testified she was injured in the early morning hours of August 18, 2014. Specifically, she and a co-employee took three (3) confetti cannons (weighing approximately 300 lbs[1]) down a ramp to a loading dock. She was on one side and felt something happen to her left knee in between moving the second and third cannons. Her knee then gave out. Claimant stated she did very little in the way of moving heavy equipment for the rest of the evening, as her knee hurt.

8. Claimant told a co-worker about the incident that evening. She called her supervisor the next day, as her knee was swollen.

9. After she spoke to her supervisor, Claimant was sent to Littleton Adventist Hospital on 8/18/14. The nurse's note described the injury as follows: "PT PRESENTS TO ED WITH C/O OF LT KNEE PAIN. PT STATES UNK OBVIOUS TRAUMA BUT WAS CARRYING HEAVY BOXES AT WORK WHEN KNEE GAVE OUT." Further down in the record, it was noted: "Patient reports that yesterday while she was at work she felt her knee 'give out'." Claimant was examined by Sarah Foss PA-C and Ashley-Alpana Rawloo Pekoo, M.D. was identified as the attending physician. There was no significant swelling, but a small effusion was present. X-rays of the knee were negative for fracture or dislocation. She was given a knee immobilizer and referred to an orthopedic surgeon.

10. Claimant completed an Employee Accident Report on August 19, 2014. When describing how the accident occurred: she said "Take confetti cannon down ramp to loading dock 3 times. The knee gave out standing."

11. On August 20, 2014, Claimant was evaluated by Nancy Strain, D.O. at Concentra, the ATP for Employer. The description of the injury was:"This is the result of twisting and Her knee gave way after a lot of walking on an incline at Fiddler's Green".

[1] Claimant testified she originally estimated the weight of a confetti cannon to be approximately 200 lbs, but looked it up and found that a confetti cannon weighed almost 300 lbs.

Dr. Strain's assessment was left knee strain and left knee effusion. Claimant was given work restrictions. The ALJ infers Dr. Strain believed the injury was work related.

12. An MRI was done on Claimant's left knee on September 3, 2014, which was read by Robert Leibold, M.D. Dr. Leibold's impression was focal cartilage loss within the central weight-bearing portion of the medial femoral condyle measuring 8X5mm in diameter, which may be a "chronic defect"; and probable small non-displaced horizontal cleavage tear of the anterior horn of the lateral meniscus. On September 5, 2014, Claimant was seen by Nancy Okamatsu, who diagnosed a left knee effusion and sprain. FNP Okamatsu referred Claimant for an orthopedic consult.

13. On September 18, 2014, Claimant was evaluated by Mark Failinger, M.D. She reported pain on the inner side of her knee and deep in the front. On examination, Dr. Failinger found no effusion in the left knee, full extension and flexion to 130 degrees. Claimant had medial joint line pain and mild retropatellar crepitation. Dr. Failinger noted the MRI showed chondromalacia with focal cartilaginous loss in the medial femoral condyle and smaller change of symptomatic later meniscus tear. Dr. Failinger did not believe a scope was the best option, but if there was no improvement, he recommended viscosupplementation.

14. Claimant was seen by Evan Schwartz, M.D. at Concentra on September 25, 2014, complaining of "moderate" aching pain in her left knee. Mild anterior, posterior, medial and lateral tenderness was noted with flexion and palpation. No laxity was found. Dr. Schwartz' assessment was knee effusion and left knee sprain. He referred Claimant to an orthopedic surgeon for a second opinion because she continued to experience pain and swelling.

15. On October 2, 2014, John Papilion, M.D. examined Claimant and documented her history including the prior surgery and subsequent infection. Dr. Papilion reviewed her MRI from 2005 and did not visualize any chondral defect nor meniscal pathology. He noted she walked with an antalgic gait. Claimant reported her symptoms were worsening and she wore the brace full-time. Dr. Papilion found no effusion, but noted moderate subpatellar crepitus and positive grind test. Dr. Papilion's assessment was post-traumatic high-grade partial-thickness chondral defect on weightbearing surface of medial femoral condyle, left knee. He recommended consideration of arthroscopy with chondroplasty and possible microfracture arthroplasty.

16. Insurer filed a GAL on October 14, 2014 admitting for medical benefits only.

17. Dr. Papilion saw Claimant in follow-up on November 13, 2014, at which time her symptoms were noted to be about the same. Dr. Papilion reviewed the records related to Claimant's arthroscopies in 2006-07 and noted there was no evidence of a chondral defect in those records. He recommended surgery.

18. Dr. Papilion performed arthroscopy partial medial menisectomy and chondroplasty on the Claimant's left knee on January 5, 2015. Dr. Papilion performed a

biopsy of the trochlea in anticipation of future chondrocyte implantation, as the chondral lesion was too large for a microfracture procedure. He requested authorization from the carrier for this surgery. In his operative report, Dr. Papilion stated the injury was work-related, although he incorrectly noted it occurred in June, 2014 rather than August. He found a full thickness chondral defect on the weight-bearing surface of the medial compartment. This was not seen on the prior MRI from 2004. Dr. Papilion noted the medial meniscus had a complex degenerative-type tear in the posterior horn, which was smoothed. The ALJ finds the arthroscopy performed by Dr. Papilion was reasonable and necessary given Claimant's pain complaints and the presurgical concern for a meniscal tear.

19. Dr. Papilion authored a letter to Dr. Schwartz (dated January 15, 2015) in which he summarized the surgery performed on Claimant's left knee and noted authorization was requested from the carrier for the autologous chondrocyte implantation. Claimant's work restrictions were sedentary. Dr. Papilion described this as a "reasonable" course of treatment[2]. The ALJ infers that Dr. Papilion recommended this procedure to increase Claimant's function and reduce her symptoms. Dr. Papilion did not offer an opinion whether Claimant would have developed the chondral lesion as result of her prior injury, staph infections and multiple arthroscopies.

20. Claimant testified the arthroscopic procedure did not relieve her symptoms. She wishes to undergo the surgery Dr. Papilion recommended. Claimant was scheduled to return to Dr. Papilion on 1/29/15, but that record was not introduced.

21. Timothy O'Brien, M.D. conducted a review of the Claimant's medical records at the request of the Respondents and authored a report, dated February 16, 2015. He did not interview or examine Claimant. Dr. O'Brien opined there was no work-related injury, rather the pain was a result of her personal health. In support of this, he cited Dr. Fallinger, who noted Claimant did not fall or twist but that the knee just gave out. Dr. O'Brien also stated that Dr. Papilion's records referred to "pain that resulted from walking up and down an incline at Fiddler's Green" that made the Claimant's knee feel like it was giving way. Dr. O'Brien said there was no sign of a trauma but rather a degenerative condition was causing Claimant's knee pain[3]. Dr. O'Brien stated there was no reference to any effusion[4] or hemarthrosis was an indication there was no acute injury. The ALJ notes Dr. O'Brien did not consider the specific question of whether moving an object the size of a confetti cannon could aggravate or accelerate the degenerative changes in Claimant's knee. Also, Dr. O'Brien did not have the 2006 medical records when he authored this report.

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[2] The autologous chondrocyte implantation procedure was described as the best treatment option and potentially the only long-term option by Dr. Papilion's surgical case manager in the letter requesting authorization of the procedure. A review by a board-certified orthopedic surgeon was requested for the medical necessity and appropriateness of the proposed procedure. (See Exhibit pp. 12-13.)

[3] Dr. O'Brien apparently did not have the Littleton Adventist Hospital records or the initial Concentra records, which provided more detail regarding Claimant's injury.

[4] The ALJ notes there were references to a knee effusion in the aforementioned records.

22. On the issue of whether the autologous chondrocyte implantation procedure was needed, Dr. O'Brien opined it was reasonable to recommend the surgery, but felt the results could be unpredictable. Dr. O'Brien said there was no scientific evidence which indicated the surgery would be successful because Claimant was 41 years old and had a history of nicotine abuse and multiple prior arthroscopies. The ALJ notes Dr. O'Brien believed the proposed procedure was reasonable, but disagreed the 8/18/14 industrial injury aggravated or accelerated Claimant's condition in such a way that she required surgery. As referenced *infra,* Dr. O'Brien's testimony provided additional information as to why he felt degenerative changes led to Claimant's need for surgery.

23. On September 21, 2015, Christopher Ryan, M.D. performed an IME at the request of Claimant's counsel. Dr. Ryan noted Claimant denied having any problems with her knee from the time her earlier condition resolved and the injury in August, 2014. Dr. Ryan reviewed photos of where Claimant was working at Fiddler's Green which showed a long downhill ramp and a steep uphill ramp to the loading dock. Dr. Ryan opined that the act of moving the 300 lb. cannons down the ramp and up onto the loading dock was what caused Claimant's injury. Dr. Ryan opined Claimant would not have been able to do the relatively heavy work that she performed for Employer if she had this injury prior to August, 2014. The ALJ credited Dr. Ryan's opinion that moving the confetti cannons could have caused an injury to Claimant's knee.

24. Dr. Ryan also commented on Dr. O'Brien's opinion that Claimant's work activities could not have caused the injury. After looking at the pictures of the ramps and hearing the description of moving the 300 pound loads by Claimant, Dr. Ryan felt some of the medical records did not accurately describe what occurred on the day of the injury. He said that it was not merely a matter "a lot of walking" that caused the Claimant's knee to give way. He also took issue with Dr. O'Brien's conclusion that it was probable that the chondral defect of the medial femoral condyle was present in 2006. Dr. Ryan pointed out the MRI from that time did not show such a defect.

25. Dr. O'Brien issued a supplemental record review dated October 5, 2015, in which he reviewed additional medical records from both prior to and after the injury. Dr. O'Brien believed the records which were more contemporaneous with Claimant's injury established she was not pushing confetti cannons at the time, but rather was only walking when her knee gave out[5]. He opined the report of injury given Dr. Ryan by Claimant constituted "revised historical input". Dr. O'Brien stated the additional medical records he reviewed supported his position that this was a pre-existing condition. Dr. O'Brien's credibility was diminished on this point since Claimant reported how she was injured within 24 hours, as well as by the fact he did not examine Claimant and take a history directly from her.

[5] Claimant reported her movement of the confetti cannons as the cause of her injury in 8/19/14 Employee Accident Report [Exhibit 11], which was prepared immediately after this incident. Dr. O'Brien did not address this document, which would appear to meet the contemporaneous requirement.

26. Dr. O'Brien testified as an expert in orthopedic surgery, the specialty in which he was board-certified. Dr. O'Brien was Level II accredited pursuant to the W.C.R.P. Dr. O'Brien estimated he has performed five thousand (5000) knee surgeries over the course of his career and three thousand (3000) of those were knee replacements. Dr. O'Brien opined Claimant did not have an acute osteochondral or chondral injury. If that had been the case, Claimant would have experienced an immediate onset of pain, swelling and dysfunction. In support of this opinion, Dr. O'Brien noted the 9/3/14 MRI showed edema which was peripherally distributed around the chondral lesion. If it ws na acute injury, the edema would be present directly beneath the osteochondral lesion. Dr. O'Brien believed Claimant probably had episodic pain as a result of an osteochondral defect in the bone and the thinning of the cartilage; both of which were forms of arthritis.

27. Dr. O'Brien did not believe there was anything at Claimant's work which aggravated, accelerated or combined with the pre-existing condition to require treatment. Dr. O'Brien testified Claimant's need for surgery was a result of the degenerative process in the left knee. More particularly, Dr. O'Brien opined that evidence of the degenerative changes was found in the thinning of the joint space as documented in the 2014 MRI. Dr. O'Brien concluded Claimant's staph infection and the arthroscopies were traumatic to the knee joint, which weakened and damaged the medial femoral condyle. Dr. O'Brien also testified a staph infection of this type could invade the bone.

28. Prior to his deposition, Dr. O'Brien reviewed several articles related to chondrocyte implantation, which he testified about and were admitted into evidence. The conclusion in one study was that in an acute injury where hemarthrosis was present an osteochondral lesoin was associated with inflammation. There were also studies was that absent a significant trauma, the implantation surgery was being performed to replace cartilage and for chondral defects in patients who had osteoarthritis. Dr. O'Brien testified that these studies supported his opinion regarding that the need for surgery was a result of the degenerative process in Claimant's knee. The ALJ was persuaded by Dr. O'Brien's testimony that it was more probable the arthritis in Claimant's left knee was why she required surgery.

29. Dr. Ryan testified as an expert in physical medicine and rehabilitation, the specialty in which he was board-certified. Dr. Ryan was Level II accredited pursuant to the W.C.R.P. Dr. Ryan testified Claimant probably had some degenerative arthritis in her left knee prior to August, 2014. However, it was asymptomatic. Dr. Ryan reiterated his conclusion Claimant's work duties aggravated her knee condition. Dr, Ryan did not offer an opinion as to what caused the chondral lesion or defect to develop. He also did not offer an opinion whether Claimant's prior surgeries was a causative factor in the degenerative changes in Claimant's left knee.

30. The ALJ concluded Claimant's knee injury arose out of her employment with Employer. The ALJ credited Claimant's testimony and was persuaded that Claimant's act of moving a confetti cannon down a ramp could cause the injury to Claimant's knee as she described. The confetti cannons were of sufficient size and

weight to cause an injury as alleged. Respondents failed to meet their burden of proof on this issue.

31. The ALJ was not persuaded Claimant's need for surgery was related to her industrial injury. While the incident on 8/18/14 aggravated her underlying degenerative knee condition, the evidence demonstrates her need for surgery was a result of arthritic changes. Claimant failed to meet her burden of proof on this issue.

CONCLUSIONS OF LAW

Generally

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

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

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

Withdrawal of GAL

Respondents seek to withdraw the GAL filed on 10/14/14. In this regard, Respondents argued Claimant did not suffer a compensable injury, contending she gave several versions of the alleged accident as reflected in the medical records. In addition to Claimant's credibility, Respondents averred Claimant's need for surgery was a natural consequence of the degenerative condition in her left knee. Respondents' request to withdraw the GAL is governed by Section 8-43-201(1), C.R.S. and the recent holding by the Colorado Supreme Court in *City of Brighton v. Rodriquez*, 318 P.3d 496,

508 (Colo. 2014). Respondents have the burden of proving by a preponderance of the evidence that the modification to the GAL is warranted in this instance. *Id.*

In *City of Brighton,* the Court considered the withdrawal of an admission by Respondent where Claimant suffered an unexplained fall. More particularly, the issue was whether a truly unexplained fall was compensable under the Colorado Worker's Compensation Act was before the Court. The Supreme Court noted there must be a causal connection between Claimant's employment and the injury. See also *Madden v. Mountain West Fabricators,* 977 P.2d 861, 863 (Colo. 1999). The Court then analyzed when a fall would arise out of Claimant's employment and reviewed the three categories of risk that caused injuries to employees. The first category encompassed risks inherent to the work environment itself (direct); the second category contained risks which are entirely personal or private (which includes idiopathic injuries); and the third category included injuries caused by neutral risks (risks generally not associated with work or the Claimant). *City of Brighton v. Rodriquez*, 318 P.3d at 503-504.

The Court concluded Claimant's unexplained fall fell within the third category which contained neutral risks. Reversing the Court of Appeals, the Supreme Court held Claimant suffered a compensable injury because Claimant would not have been injured, "but for" her employment. The Court also held that Respondent City of Brighton had the burden to prove by a preponderance of the evidence that Claimant's injuries were not compensable in order to withdraw the GAL. Since Claimant's injury was compensable, Respondents failed to meet their burden of proof.

Pursuant to *City of Brighton v. Rodriquez*, subsumed within the issue of whether Respondents should be allowed to withdraw their admission of liability in this case is whether Claimant suffered a compensable injury while working for Employer. The ALJ determined Claimant suffered a compensable injury on 8/18/14 for two reasons. First, Claimant was a credible witness and her description of how her injury occurred was plausible. Although there were variations in the description of how the accident occurred in the medical records, the ALJ notes that Claimant's description of the injury was consistent, starting with the report of injury completed in 8/19/14.

There was no dispute that Claimant was performing the job of breaking down equipment for Employer after a concert on 8/18/14. Claimant was moving very heavy confetti cannons, down a ramp. There was sufficient evidence that this activity could cause her left knee (which had previous issues) to become symptomatic. Accordingly, this injury fits within the first category of risks as identified by the Court in *City of Brighton v. Rodriquez, supra.* Claimant was engaged in an activity (i.e. moving confetti cannons) which caused her previous asymptomatic knee condition to become symptomatic.

In this regard, the ALJ credited the testimony of Claimant and the opinions of Dr. Ryan that this activity could cause Claimant to develop symptoms in the knee. The ALJ notes that Dr. O'Brien did not offer an opinion regarding what impact moving a confetti cannon weighing 300 lbs down a ramp would have on the anatomical structures in Claimant's left knee. Dr. O'Brien believed Claimant's description to Dr. Ryan was

"revised historical input" given to Dr. Ryan more than a year after the injury when, in fact, Claimant reported how she was injured to Employer. There was no evidence Claimant required treatment from 2007-2014. Notwithstanding Dr. O'Brien's opinions, Claimant did not require treatment until her work injury. This was sufficient evidence to establish Claimant's physical work on 8/18/14 aggravated and/or accelerated her pre-existing degenerative knee condition.

Under these circumstances there was evidence to show Claimant's work duties on 8/18/14 were the proximate cause of her injury and need for treatment. Stated another way, the ALJ finds "but for" moving the confetti cannons, Claimant would not have aggravated her pre-existing knee condition and required treatment. (Finding of Fact No. 29).

Second, there was objective medical evidence which supported the conclusion that Claimant was injured as alleged. An effusion was noted in Claimant's left knee at Littleton Hospital, as well as by Dr. Strain at Concentra on 8/20/14. On 9/25/14, Dr. Schwartz also found a left knee effusion and referred Claimant for an orthopedic consult. FNP Okamatsu observed a left knee effusion and diagnosed a sprain on 9/5/14. Further, there were descriptions of increased pain and swelling with activity in the medical records. The ALJ found Claimant's treating physicians believed she required treatment, including those doctors who evaluated her at Littleton Hospital and Concentra. For the reasons set for in Finding of Fact Nos. 21 and 25, the contrary opinions of Dr. O'Brien on compensability were not persuasive.

Based upon the totality of the evidence, the ALJ concluded Claimant suffered a compensable injury on 8/19/14 while working for Employer. *Triad Painting Co. v. Blair,* 812 P.2d 638, 641 (Colo. 1991). Since Respondents failed to meet their burden of proof that Claimant's injury was not compensable, their request for withdrawal of the GAL is denied.

Medical Benefits

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

Claimant asserted the injury of 8/18/14 caused her previously asymptomatic left knee to develop symptoms and require treatment. Claimant argued the degenerative condition of her knee worsened as a result and her need for surgery is a direct consequence of her work activities on 8/18/14. Claimant proffered the opinions of Dr. Ryan and Dr. Papilion to support her contentions. The ALJ concluded that Claimant did not meet her burden of proof that the proposed surgery was related to the work injury in this instance. While the ALJ determined Claimant suffered a compensable injury, he was not convinced that the chondral defect was a result of the 8/18/14 injury. In

addition, Claimant failed to meet the criteria set forth in the Medical Treatment Guidelines-Lower Extremity Injury, Rule 17, Exhibit 6 ("Treatment Guidelines") for the proposed surgery.

As a starting point, the chondral defect was not present when the MRI-s were done in 2004 (Findings of Fact Nos. 2 and 3). The 2006 MRI did not identify a chondral defect, however, there was evidence of reactive marrow changes to the weightbearing surface of the lateral femoral condyle.

The ALJ then considered the evidence admitted at hearing to determine whether the chondral defect or lesion was caused directly by or developed over time as a result of the 8/18/14 injury. In this regard, Dr. O'Brien's testimony was persuasive that this was a degenerative process. Dr. O'Brien testified that the methicillin resistant staph infection would have weakened Claimant's knee and set the stage for the condition to develop.

On the other hand, the evidence proffered by Claimant did not convince the ALJ that her industrial injury required her to undergo surgery. Dr. Papilion did not offer an opinion regarding what caused the osteochondral injury to develop, nor was there anything within his records that provided an explanation. Dr. Papilion also did not address whether Claimant's need for surgery would have developed because of progressive arthritic changes regardless of the 8/18/14 injury. Also, Dr. Ryan did not offer any opinions on this subject and deferred to the orthopedic opinions. In short, the expert testimony offered by Claimant did not rebut Dr. O'Brien's conclusions

Furthermore, the ALJ considered the Treatment Guidelines-Lower Extremity Injury, Rule 17, Exhibit 6 as these applied to the requested knee surgery. The Guidelines are contained in W.C.R.P. 17, 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the Guidelines adopted by the Division of Workers' Compensation ("Division").

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

Section 2(d)(vi), provides in pertinent part :

> **Surgical Indications/Considerations**: Surgery for isolated chondral defects may be indicated when functional deficits interfere with activities of daily living and/or job duties after 6-12 weeks of active patient participation in non-operative therapy."
>
> [Treatment Guidelines Exhibit 6 page 56]

More particularly, Section 2(d)(vi)C) specifies:

"Autologous chondrocyte implantation (ACI): These procedures are technically difficult and require specific physician expertise…This procedure is controversial but may be appropriate in a small subset of patients with physically rigorous employment or recreational activities. It requires prior authorization.

Indications : The area of lesion should be between 2 square cm and 10 square c m. The patient should have failed 4 or more months of active participation in therapy and a microfracture, abrasion, arthroplasty or drilling with sufficient healing time which may be from 4 months to over one year…"

[Treatment Guidelines Exhibit 6 page 57]

The record demonstrates Claimant did not participate in 4 or more months of active participation in therapy. In fact, as of 2/27/15, Claimant had only 4 PT treatments[6]. Accordingly, Claimant did not meet this surgical indication under the Treatment Guidelines and conservative therapies should be completed before surgery is performed.

In this regard, there was also no evidence that Claimant had some of the non-operative treatment procedures identified in the Treatment Guidelines. [See Exhibit 6, Section 2(a)(v).] Claimant did not receive injections (steroidal and/or viscosupplementation). The ALJ is persuaded these conservative treatment measures should be exhausted before surgery is performed.

Finally, one of the contraindications for this procedure was smoking, as soft tissue healing is affected. Dr. Papilion's records indicated Claimant had quit smoking, but the record was unclear whether that was still the case as the last appointment with Dr. Papilion was more than a year ago. This should be confirmed before surgery is performed.

For the foregoing reasons, ALJ finds Claimant failed to meet her burden of proof and her request for authorization of the surgery proposed by Dr. Papilion is denied.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw the General Admission of Liability is DENIED.

2. Claimant's request for authorization of the chondrocyte implantation surgery recommended by Dr. Papillion is DENIED.

[6] Exhibit 8, p. 39.

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 1, 2016

Digital signature

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

PROCEDURAL HISTORY

The Claimant proceeded to hearing against AMS before ALJ Michelle Jones on March 19 and May 4, 2015. ALJ Jones entered her Findings of Fact, Conclusions of Law, and Order on June 23, 2015. ALJ Jones found that Claimant did not prove that a contract of employment existed between him and AMS. She concluded that AMS, as an agent of the Respondent, facilitated a contract of hire between the Claimant and the Respondent. The Claimant appealed ALJ Jones' decision and ICAP declined to review it stating that her decision was not final for the purposes of review. In the meantime, the Claimant filed a claim against the Respondent as a potential employer, and applied for hearing with the Office of Administrative Courts.

At the commencement of hearing before the undersigned ALJ, the Respondent moved for a directed verdict arguing that "claim preclusion" would apply to these proceedings based upon the prior hearings and decision entered by ALJ Jones. Respondent asserted that Claimant should have pursued his claim against both AMS and the Respondent prior to the first hearings held in this claim. The Claimant objected asserting that Respondent had failed to plead "claim preclusion" as an affirmative defense in its response to application for hearing. After reviewing the pleadings, and applicable case law, the ALJ found that the Respondent had not identified claim preclusion as an affirmative defense on its response to application for hearing. As such, the Respondent's motion for directed verdict was denied and the hearing commenced.

ISSUES

The issues presented for determination in this proceeding are whether the Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S.; and if the Claimant is not an independent contractor, whether Claimant sustained an injury while in the course and scope of his employment with the Respondent; whether Claimant is entitled to medical benefits; whether Claimant is entitled to temporary total disability benefits; and whether penalties should be imposed against the Respondent for failure to carry workers' compensation insurance and for failing to admit or deny the claim.

FINDINGS OF FACT

1. The Respondent ("PPCOA") is a condominium association for the Pagosa Pines Condominium ("PPC") properties located in Pagosa Springs, Colorado.

2. AMS is a property management company owned and operated by Jace Johnson.

3. On December 1, 2008, PPCOA and Jace Johnson, doing business as AMS entered into a management agreement (hereinafter the "agreement").

4. As relevant to these proceedings, the agreement provided as follows:

- PPCOA appointed AMS as the agent and exclusive manager for PPCOA.
- AMS would provide for the day-to-day management of PPCOA.
- Everything done by AMS for the PPCOA under the provisions of the agreement shall be done as the agent for PPCOA
- AMS will provide and supervise persons to perform various duties assigned under the agreement.
- AMS shall arrange for the maintenance and repair of all common elements and negotiate and execute contracts for necessary services.
- AMS shall manage the PPCOA financial accounts and collect assessments from condominium owners, deposit the monies collected, and provide an accounting to the board on at least a quarterly basis.
- AMS shall disburse funds necessary for the operation and maintenance of the PPCOA property in accordance with the budget adopted by the PPCOA board of directors. AMS shall prepare a statement of income and expenses and present it at monthly PPCOA board meetings.
- Each year in the fourth quarter, AMS and the board shall prepare an operating budget setting forth anticipated income and expense for the upcoming year, which if approved, became the major fiscal document under with AMS would operate during the next year.
- AMS shall arrange for the maintenance of the property within the budget approved by PPCOA.

5. As agent for PPCOA, AMS placed advertisements in the local paper requesting bids for specific contract work. AMS collected the bids, presented them to the PPCOA board for review, and arranged for the hire of the contractor that the PPCOA board selected. AMS ensured the work was performed properly by the contractors, issued payment to the contractors from PPCOA accounts, and also ensured the contractors carried proper insurance before beginning service.

6. As agent for PPCOA, AMS had signatory authority on PPCOA accounts and signed the checks that PPCOA issued to contractors.

7. According to Johnson, AMS ran a newspaper advertisement seeking bids for a six-month contract to perform flowerbed maintenance for PPCOA. The advertisement stated that PPCOA was seeking a subcontractor to do light landscaping work.

8. The Claimant did not recall responding to a newspaper advertisement because he already was acquainted with Johnson at that time. Regardless, the Claimant submitted a resume to AMS which listed "Above and Beyond, LLC" on the top and he described himself as the owner of Above and Beyond from June 2004 through January 2008.

9. Claimant's resume stated that his objective was to "care for flower beds in the Pines Condos using my experience obtained through my years of owning and running my own landscaping maintenance business….beautifying the flower beds in the Pines Condos for owners and tenants would be my pleasure."

10. AMS, as agent for PPCOA, negotiated a monthly contract for the flowerbed work with Claimant. Claimant was aware that AMS was the property manager for PPCOA. Claimant began performing flowerbed maintenance at the PPC property during the spring of 2011 at the agreed upon rate.

11. Claimant and AMS had no written agreement outlining the employment relationship. Claimant and AMS had only verbal discussions about the rate of pay and what work Johnson expected Claimant to perform for the PPCOA.

12. No formal written contractual arrangement between PPCOA and Claimant ever existed. No formal written contractual arrangement between AMS and Claimant ever existed.

13. AMS required the Claimant to submit proof of liability insurance in order to perform the flowerbed work.

14. After the completion of the flowerbed contract, Claimant continued to perform work at the PPC property under a verbal agreement with AMS. AMS, as agent for PPCOA, would typically ask Claimant if he could perform whatever work, usually general maintenance, the PPCOA needed. AMS and Claimant would agree upon an hourly rate. The Claimant performed the work and submitted invoices to AMS.

15. The relationship between AMS and Claimant continued with verbal agreements as to the type of work and hourly wage. Claimant did not bid on any job or for any work that he continued to perform for PPCOA. On almost a weekly basis, the Claimant performed work varying from snow and ice removal to window installation and general cleanup. Claimant worked all over the PPC property from 2011 through January 2014.

16. For most other work performed at PPC, AMS would obtain bids from various vendors, present those bids to the PPCOA board who would then vote on which bid to accept. PPCOA or AMS would then enter into a contract to perform the work at the bid

price. Those other vendors were required to supply proof of liability insurance and proof of workers' compensation insurance if the vendor had employees.

17. According to Johnson, the vendors largely remained the same over the years, and PPCOA rarely sought bids concerning the routine work such as snow removal and landscaping. Most of the routine contracts were for six months. As an example, Johnson explained that the snow removal vendor entered into a six-month contract to perform snow removal services during the winter season and flowerbed maintenance vendors would enter into a six-month contract during the nicer weather.

18. Neither PPCOA nor AMS required the Claimant to submit proof of liability insurance to continue performing work for PPCOA after the initial flowerbed contract.

19. During this period of time, AMS was required to update the PPCOA board as to the monthly expenses and assist with developing annual budgets.

20. In 2012, PPCOA decided to begin replacing the siding on the entire condominium complex and approved the budget for this project.

21. Johnson approached Claimant to ask if Claimant wanted to perform the work. The Claimant agreed and he and Johnson negotiated an hourly rate. The Claimant did not bid for the job or compete with any other vendor or contractor to obtain the siding work.

22. Johnson testified that PPCOA had a budget for the siding work and that due to that budget and any unanticipated issues with replacing old siding, he believed obtaining bids would be difficult. Johnson further explained that once the budgeted funds ran out, then the siding work would end.

23. Thereafter, Claimant began to work on re-siding the entire condominium complex, building by building, subject to the funds available and the budget of PPCOA. Claimant performed siding work for PPCOA for approximately two years.

24. PPCOA supplied all of the materials Claimant needed to perform the re-siding work. The Claimant was not required to purchase the siding, batten, nails, glue or any other material associated with the siding work.

25. Johnson showed Claimant how he wanted the siding project to look, and explained how he wanted Claimant to hang the siding, but he did not specifically show the Claimant how to install siding. Claimant had never hung siding before. Claimant testified that he figured out for himself how to hang the siding because "it's not rocket science." Claimant had significant experience with hand tools and maintenance work, thus he did not need specific instruction or oversight in order to perform the work.

26. Claimant used a nail gun he borrowed from Johnson. He also had borrowed a nail gun from a friend. Claimant also used his own sander and other tools for the siding

work. The ladder belonged to Claimant although he testified at the prior hearing that he had borrowed ladders and other tools from AMS or Johnson at times.

27. At the prior hearing, Claimant testified that AMS had authorized him to charge tools to the AMS account and two hardware stores in town. In actuality, the PPCOA held the hardware store accounts, and Claimant did charge "odds and ends" to the PPCOA accounts.

28. Johnson periodically checked on Claimant's progress. Johnson did not constantly oversee Claimant's work. Johnson did not need to constantly oversee Claimant's work because he and Claimant were friends, and he knew Claimant could do the work based on Claimant's prior experience on the PPCOA property. It was apparent from the testimony that Johnson trusted Claimant immensely.

29. When Claimant nearly completed a job, Johnson would identify a new area for Claimant to being siding replacement. Claimant also testified that, "there was [sic] always other things in between that needed to be done" which is evidenced by the invoices reflecting various work being performed in addition to the siding.

30. Johnson did not give Claimant a specific completion deadline for the siding work but provided a general deadline.

31. Claimant had no set work hours. Claimant was not required to clock in or clock out, but he was expected to complete his work within reasonable hours and within a reasonable timeframe. Claimant's hours varied each week.

32. Claimant testified he felt like the "on call" guy for the PPCOA. Johnson disagreed with Claimant's characterization. The ALJ finds Claimant's testimony more credible and persuasive than that of Johnson.

33. Claimant provided invoices for completed work to PPCOA on a weekly basis or when a portion of the project was complete. The invoices stated "Above and Beyond" at the top and the invoices indicated that checks should be made payable to Claimant, personally. Claimant submitted his invoices to the PPCOA and addressed his invoices either "To: Pines" or "To: Pines Association" with c/o AMS next to or below the address to Pines.

34. Claimant explained that he used a computer application to generate the invoices and never changed it to remove Above and Beyond from the top of the invoice.

35. A review of the invoices for the calendar year 2013 through the date of injury reflects that Claimant worked part-time at the PPCOA property. He worked almost every week for PPCOA and his hours varied from six hours to 40 hours per week. No invoices for the calendar year 2013 reflect that Claimant worked anywhere else other than PPCOA and for his own skunk removal business.

36. AMS, as agent for PPCOA, issued checks to Claimant personally. No taxes were withheld.

37. In 2012 and 2013 for all the work performed at the PPC property, PPCOA issued Claimant a 1099-Misc tax document.

38. In 2012 and 2013, Claimant filed his income taxes with the IRS and identified his income as "self-employment income."

39. Claimant's wife had formed Above and Beyond, LLC, as a prerequisite to obtaining government contracts.

40. The Claimant did not obtain business cards for Above and Beyond, LLC, and there was no evidence that he advertised or solicited work on behalf of himself or Above and Beyond, LLC.

41. Claimant and his wife failed to file annual reports with the Colorado Secretary of State concerning Above and Beyond, LLC, essentially allowing the registration of the LLC to lapse as of April 1, 2012. Individuals unrelated to the Claimant have now registered Above and Beyond, LLC with the Colorado Secretary of State.

42. The Claimant had a bank account in the name of Above and Beyond, LLC, as well as a personal bank account.

43. PPCOA did not offer Claimant vacation or sick time nor did it offer him other benefits such as medical or dental insurance.

44. PPCOA did not require Claimant to work exclusively for it. Claimant had a skunk removal business and performed skunk removal for PPCOA and at other locations.

45. Claimant also performed landscaping work at the San Juan Motel, which is owned by Doug Dragoo. Claimant performed work for the Dragoo family, including watching their home during the winter months. Claimant also checked on the home of Clyde Grimm during the winter months. Claimant obtained all this work through Johnson.

46. Johnson testified that the Claimant set his own work schedule and if he had work to perform for someone else, it was within Claimant's discretion to do so.

47. An individual named Chris Tressler also performed siding work at the PPCOA property in March 2013. According to the PPCOA payment ledgers, Tressler primarily performed painting work, and had done no siding work since March 2013. PPCOA and AMS also treated Tressler like an independent contractor. Two other individuals also did some siding work for PPCOA in March 2013 according to the payment ledgers.

48. On January 30, 2014, the Claimant fell off a ladder while performing siding work at the PPC property. Claimant injured his right leg. Specifically, he suffered a shattered tibia and fractured fibula, and later developed complications from this injury.

49. The Claimant continues to require medical treatment for his injuries. He is presently residing in California and receiving medical treatment under the California Medicaid plan.

50. Neither PPCOA nor AMS, as agent for PPCOA, referred the Claimant to a doctor.

51. Claimant has not worked since the date of his injury and has not been released to return to work.

52. Claimant initially filed a Worker's Claim for Compensation naming AMS as his employer in this claim.

53. After the first hearing held on March 19, 2015 regarding this claim Claimant filed a second Workers' Claim for Compensation naming PPCOA as his employer on March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts.

54. PPCOA filed a Notice of Contest on April 15, 2015 asserting that Claimant is not an employee of PPCOA.

55. The PPCOA timely issued its Notice of Contest thus no penalties for failure to timely admit or deny shall be imposed. The Claimant did not even believe PPCOA was a potential employer until March 19, 2015 so any notice to the PPCOA via its agent, AMS, is inadequate to show that Claimant intended to file a claim for workers' compensation benefits against PPCOA.

56. The PPCOA does not maintain workers' compensation insurance thereby entitling the Claimant to a 50 percent increase in his indemnity benefits.

57. Based on the foregoing findings, the Respondent has failed to prove that Claimant was an independent contractor at the time he sustained an injury to his right leg on January 30, 2014.

58. In order to arrive at a fair approximation of Claimant's wages, the ALJ considered Claimant's earnings beginning with the invoice dated October 7, 2013 through the invoice dated January 31, 2014. Claimant's earnings over that period of 16 weeks totaled $4,415.75 making his average weekly wage $275.99 with a corresponding TTD rate of $183.99 increased to $275.99. The average weekly wage proposed by Claimant inappropriately inflates Claimant's average weekly wage and is rejected.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

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

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

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

Principal-Agency Relationship

4. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957). The one for whom the action is to be taken is the principal, and the one who is to act is the agent. Id. § 1(2) and 1(3). Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Id. § 7. Agency is thus a legal relation having its source in the mutual consent of the parties. The existence of an agency relationship is ordinarily a question of fact. *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937); *Eckhardt v. Greeley Nat'l Bank*, 79 Colo. 337, 245 P. 710 (1926); *Schoelkopf v. Leonard*, 8 Colo. 159, 6 P. 209 (1884). A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service," Restatement (Second) of Agency § 3(1), such as one "who is an integral part of a business organization and does not require fresh authorization for each transaction." Id. § 3 comment a. An "agent" is generally

one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc*. v. *Ironwood IX*, 713 P.2d 424, (Colo. App. 1985).

5. ALJ Jones concluded, and this ALJ agrees that AMS was acting as the general agent of PPCOA when entering into a verbal contract of hire with the Claimant to perform work at the PPC property in exchange for payment. As agent for PPCOA, AMS was authorized to act on behalf of PPCOA and to bind PPCOA to this contractual relationship.

Employment Status

6. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

7. Under §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 service, both under the contract for performance of service and in fact ***and*** such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." [Emphasis added]

8. The Respondent has the burden of proving that Claimant was an independent contractor rather than an employee. To prove that Claimant was free from control and direction, the Respondent must prove the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), 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. *Nelson v. Industrial Claim Appeals Office, supra.*

9. In addition to proving that the Claimant is free from control and direction, the Respondent must also establish the Claimant is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-40-202(2)(a), C.R.S. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or

business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. The court further stated that there is no dispositive single factor or series of factors that would resolve the nature of the relationship between the employee and putative employer.

10. Based on the foregoing findings of fact, the ALJ concludes that PPCOA has failed to meet its burden of proof that Claimant was an independent contractor at the time he sustained an injury on January 30, 2014. While it is true that Claimant initially worked as a landscaping/flowerbed vendor, that relationship changed significantly over the ensuing years. Claimant and Johnson offered conflicting testimony about the nature of the relationship between Claimant and PPCOA, which the ALJ resolves in favor of the Claimant. Claimant essentially became an on-call handyman for the PPCOA property.

Further, the Claimant was not customarily engaged in the independent trade of hanging siding or performing handyman services at the time he was injured. The invoices presented by both parties reflect that Claimant was working exclusively (although he was not required to) for the PPCOA as a handyman at the time of his injury. The fact that Claimant had a skunk removal business does not sever the employment relationship between PPCOA and Claimant. Rather, the skunk removal business merely represents concurrent employment. In addition, PPCOA paid Claimant personally at an hourly rate, instead of through a trade or business name. PPCOA established a quality standard and provided some oversight of Claimant's work. The ALJ recognizes that PPCOA did not provide more than minimal training, but Claimant had significant experience and did not need training. The ALJ also recognizes that PPCOA did not provide tools or benefits to Claimant, although at times Claimant was permitted to borrow tools from AMS or purchase tools at the expense of PPCOA. Finally, the ALJ acknowledges that PPCOA did not dictate time of performance other than providing general deadlines. However, balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S., and considering the totality of the circumstances and nature of the relationship between Claimant and the PPCOA, the ALJ concludes that the PPCOA has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

11. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). As found, Claimant was in the course and scope of his employment on January 30, 2014 when he fell from a ladder and suffered a broken right leg.

Penalties

12. In any case where the employer fails to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. Here, PPCOA failed to carry the requisite workers' compensation insurance. As such, Claimant is entitled to a fifty-percent increase in his compensation or benefits.

13. Under §8-43-203(1), C.R.S., Respondent is required to notify the Division whether Respondent is admitting or contesting the claim within 20 days after a report is filed, or should have been filed. The ALJ concludes that under the circumstances of this case, there was no indication that Claimant intended to pursue a claim against PPCOA until March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts. Thus, the ALJ declines to impose penalties under §8-43-203(1), C.R.S.

Temporary Disability Benefits and Average Weekly Wage

14. Pursuant to §8-42-103, C.R.S., when a disability lasts longer than two weeks from the date of injury, disability indemnity is recoverable from the day injured employee leaves work. In this case, Claimant never returned to work for the PPCOA following his January 30, 2014 work injury. Claimant has not returned to work in any capacity has he remains on work restrictions and has not been released to full duty. Based on Claimant's average weekly wage of $275.99 the Claimant's TTD rate is $183.99. As of the date this decision, the Claimant has been out of work for 109 weeks and 1 day resulting in a total wage loss of $20,081.19. However, due to the 50 percent penalty, Claimant's total wages loss is increased to $30,122.34. Interest on $30,122.34 at 8 percent per annum totals $2,614.37 with a corresponding daily interest rate of $7.18.

Medical Benefits

15. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant received medical treatment from various providers to cure and relieve him of the effects of her injury. There is no evidence that the treatment Claimant has received thus far has not been reasonable, necessary or related to the Claimant's injury. Further, all treatment received has been authorized given that PPCOA did not refer the Claimant to a physician. Claimant is further entitled to future reasonable and necessary medical treatment. PPCOA is liable for past medical treatment (subject to the Division of Workers' Compensation fee schedule) and for future medical treatment.

ORDER

It is therefore ordered that:

1. On January 30, 2014, Claimant sustained an injury while in the course and scope of his employment with PPCOA.

2. PPCOA failed to comply with the insurance provisions of the Workers' Compensation Act. Claimant is entitled to a 50 percent increase in his benefits.

3. The Claimant is entitled to medical benefits, including all treatment which he has already received. Because PPCOA is liable for payment of Claimant's medical costs associated with his work injury, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S.

4. All treatment Claimant has received is authorized.

5. Claimant is entitled to reasonable and necessary medical treatment in the future.

6. Claimant's AWW is $275.99.

7. Claimant is entitled to TTD benefits commencing on January 31, 2014 for a period of 109 weeks and 1 day for a total award of $30,122.34 (this amount accounts for the 50 percent increase due to the penalty).

8. The Claimant is entitled to interest in the total amount of $2,614.37 with daily interest continuing to accrue at the rate of $7.18.

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

10. Claimant's claim for penalties for failure to admit or deny liability is denied and dismissed.

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

12. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

    a. Within ten (10) days of the date of service of this order, deposit the sum of $35,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

    b. Within ten (10) days of the date of service of this order, file a bond in the sum of $35,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

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

DATED: March 4, 2016

DIGITAL SIGNATURE:

L. Broniak

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

PROCEDURAL HISTORY

The Claimant proceeded to hearing against AMS before ALJ Michelle Jones on March 19 and May 4, 2015. ALJ Jones entered her Findings of Fact, Conclusions of Law, and Order on June 23, 2015. ALJ Jones found that Claimant did not prove that a contract of employment existed between him and AMS. She concluded that AMS, as an agent of the Respondent, facilitated a contract of hire between the Claimant and the Respondent. The Claimant appealed ALJ Jones' decision and ICAP declined to review it stating that her decision was not final for the purposes of review. In the meantime, the Claimant filed a claim against the Respondent as a potential employer, and applied for hearing with the Office of Administrative Courts.

At the commencement of hearing before the undersigned ALJ, the Respondent moved for a directed verdict arguing that "claim preclusion" would apply to these proceedings based upon the prior hearings and decision entered by ALJ Jones. Respondent asserted that Claimant should have pursued his claim against both AMS and the Respondent prior to the first hearings held in this claim. The Claimant objected asserting that Respondent had failed to plead "claim preclusion" as an affirmative defense in its response to application for hearing. After reviewing the pleadings, and applicable case law, the ALJ found that the Respondent had not identified claim preclusion as an affirmative defense on its response to application for hearing. As such, the Respondent's motion for directed verdict was denied and the hearing commenced.

ISSUES

The issues presented for determination in this proceeding are whether the Claimant is an "independent contractor" pursuant to §8-40-202(2), C.R.S.; and if the Claimant is not an independent contractor, whether Claimant sustained an injury while in the course and scope of his employment with the Respondent; whether Claimant is entitled to medical benefits; whether Claimant is entitled to temporary total disability benefits; and whether penalties should be imposed against the Respondent for failure to carry workers' compensation insurance and for failing to admit or deny the claim.

FINDINGS OF FACT

1. The Respondent ("PPCOA") is a condominium association for the Pagosa Pines Condominium ("PPC") properties located in Pagosa Springs, Colorado.

2. AMS is a property management company owned and operated by Jace Johnson.

3. On December 1, 2008, PPCOA and Jace Johnson, doing business as AMS entered into a management agreement (hereinafter the "agreement").

4. As relevant to these proceedings, the agreement provided as follows:

- PPCOA appointed AMS as the agent and exclusive manager for PPCOA.
- AMS would provide for the day-to-day management of PPCOA.
- Everything done by AMS for the PPCOA under the provisions of the agreement shall be done as the agent for PPCOA
- AMS will provide and supervise persons to perform various duties assigned under the agreement.
- AMS shall arrange for the maintenance and repair of all common elements and negotiate and execute contracts for necessary services.
- AMS shall manage the PPCOA financial accounts and collect assessments from condominium owners, deposit the monies collected, and provide an accounting to the board on at least a quarterly basis.
- AMS shall disburse funds necessary for the operation and maintenance of the PPCOA property in accordance with the budget adopted by the PPCOA board of directors. AMS shall prepare a statement of income and expenses and present it at monthly PPCOA board meetings.
- Each year in the fourth quarter, AMS and the board shall prepare an operating budget setting forth anticipated income and expense for the upcoming year, which if approved, became the major fiscal document under with AMS would operate during the next year.
- AMS shall arrange for the maintenance of the property within the budget approved by PPCOA.

5. As agent for PPCOA, AMS placed advertisements in the local paper requesting bids for specific contract work. AMS collected the bids, presented them to the PPCOA board for review, and arranged for the hire of the contractor that the PPCOA board selected. AMS ensured the work was performed properly by the contractors, issued payment to the contractors from PPCOA accounts, and also ensured the contractors carried proper insurance before beginning service.

6. As agent for PPCOA, AMS had signatory authority on PPCOA accounts and signed the checks that PPCOA issued to contractors.

7. According to Johnson, AMS ran a newspaper advertisement seeking bids for a six-month contract to perform flowerbed maintenance for PPCOA. The advertisement stated that PPCOA was seeking a subcontractor to do light landscaping work.

8. The Claimant did not recall responding to a newspaper advertisement because he already was acquainted with Johnson at that time. Regardless, the Claimant submitted a resume to AMS which listed "Above and Beyond, LLC" on the top and he described himself as the owner of Above and Beyond from June 2004 through January 2008.

9. Claimant's resume stated that his objective was to "care for flower beds in the Pines Condos using my experience obtained through my years of owning and running my own landscaping maintenance business….beautifying the flower beds in the Pines Condos for owners and tenants would be my pleasure."

10. AMS, as agent for PPCOA, negotiated a monthly contract for the flowerbed work with Claimant. Claimant was aware that AMS was the property manager for PPCOA. Claimant began performing flowerbed maintenance at the PPC property during the spring of 2011 at the agreed upon rate.

11. Claimant and AMS had no written agreement outlining the employment relationship. Claimant and AMS had only verbal discussions about the rate of pay and what work Johnson expected Claimant to perform for the PPCOA.

12. No formal written contractual arrangement between PPCOA and Claimant ever existed. No formal written contractual arrangement between AMS and Claimant ever existed.

13. AMS required the Claimant to submit proof of liability insurance in order to perform the flowerbed work.

14. After the completion of the flowerbed contract, Claimant continued to perform work at the PPC property under a verbal agreement with AMS. AMS, as agent for PPCOA, would typically ask Claimant if he could perform whatever work, usually general maintenance, the PPCOA needed. AMS and Claimant would agree upon an hourly rate. The Claimant performed the work and submitted invoices to AMS.

15. The relationship between AMS and Claimant continued with verbal agreements as to the type of work and hourly wage. Claimant did not bid on any job or for any work that he continued to perform for PPCOA. On almost a weekly basis, the Claimant performed work varying from snow and ice removal to window installation and general cleanup. Claimant worked all over the PPC property from 2011 through January 2014.

16. For most other work performed at PPC, AMS would obtain bids from various vendors, present those bids to the PPCOA board who would then vote on which bid to accept. PPCOA or AMS would then enter into a contract to perform the work at the bid

price. Those other vendors were required to supply proof of liability insurance and proof of workers' compensation insurance if the vendor had employees.

17. According to Johnson, the vendors largely remained the same over the years, and PPCOA rarely sought bids concerning the routine work such as snow removal and landscaping. Most of the routine contracts were for six months. As an example, Johnson explained that the snow removal vendor entered into a six-month contract to perform snow removal services during the winter season and flowerbed maintenance vendors would enter into a six-month contract during the nicer weather.

18. Neither PPCOA nor AMS required the Claimant to submit proof of liability insurance to continue performing work for PPCOA after the initial flowerbed contract.

19. During this period of time, AMS was required to update the PPCOA board as to the monthly expenses and assist with developing annual budgets.

20. In 2012, PPCOA decided to begin replacing the siding on the entire condominium complex and approved the budget for this project.

21. Johnson approached Claimant to ask if Claimant wanted to perform the work. The Claimant agreed and he and Johnson negotiated an hourly rate. The Claimant did not bid for the job or compete with any other vendor or contractor to obtain the siding work.

22. Johnson testified that PPCOA had a budget for the siding work and that due to that budget and any unanticipated issues with replacing old siding, he believed obtaining bids would be difficult. Johnson further explained that once the budgeted funds ran out, then the siding work would end.

23. Thereafter, Claimant began to work on re-siding the entire condominium complex, building by building, subject to the funds available and the budget of PPCOA. Claimant performed siding work for PPCOA for approximately two years.

24. PPCOA supplied all of the materials Claimant needed to perform the re-siding work. The Claimant was not required to purchase the siding, batten, nails, glue or any other material associated with the siding work.

25. Johnson showed Claimant how he wanted the siding project to look, and explained how he wanted Claimant to hang the siding, but he did not specifically show the Claimant how to install siding. Claimant had never hung siding before. Claimant testified that he figured out for himself how to hang the siding because "it's not rocket science." Claimant had significant experience with hand tools and maintenance work, thus he did not need specific instruction or oversight in order to perform the work.

26. Claimant used a nail gun he borrowed from Johnson. He also had borrowed a nail gun from a friend. Claimant also used his own sander and other tools for the siding

work. The ladder belonged to Claimant although he testified at the prior hearing that he had borrowed ladders and other tools from AMS or Johnson at times.

27. At the prior hearing, Claimant testified that AMS had authorized him to charge tools to the AMS account and two hardware stores in town. In actuality, the PPCOA held the hardware store accounts, and Claimant did charge "odds and ends" to the PPCOA accounts.

28. Johnson periodically checked on Claimant's progress. Johnson did not constantly oversee Claimant's work. Johnson did not need to constantly oversee Claimant's work because he and Claimant were friends, and he knew Claimant could do the work based on Claimant's prior experience on the PPCOA property. It was apparent from the testimony that Johnson trusted Claimant immensely.

29. When Claimant nearly completed a job, Johnson would identify a new area for Claimant to being siding replacement. Claimant also testified that, "there was [sic] always other things in between that needed to be done" which is evidenced by the invoices reflecting various work being performed in addition to the siding.

30. Johnson did not give Claimant a specific completion deadline for the siding work but provided a general deadline.

31. Claimant had no set work hours. Claimant was not required to clock in or clock out, but he was expected to complete his work within reasonable hours and within a reasonable timeframe. Claimant's hours varied each week.

32. Claimant testified he felt like the "on call" guy for the PPCOA. Johnson disagreed with Claimant's characterization. The ALJ finds Claimant's testimony more credible and persuasive than that of Johnson.

33. Claimant provided invoices for completed work to PPCOA on a weekly basis or when a portion of the project was complete. The invoices stated "Above and Beyond" at the top and the invoices indicated that checks should be made payable to Claimant, personally. Claimant submitted his invoices to the PPCOA and addressed his invoices either "To: Pines" or "To: Pines Association" with c/o AMS next to or below the address to Pines.

34. Claimant explained that he used a computer application to generate the invoices and never changed it to remove Above and Beyond from the top of the invoice.

35. A review of the invoices for the calendar year 2013 through the date of injury reflects that Claimant worked part-time at the PPCOA property. He worked almost every week for PPCOA and his hours varied from six hours to 40 hours per week. No invoices for the calendar year 2013 reflect that Claimant worked anywhere else other than PPCOA and for his own skunk removal business.

36. AMS, as agent for PPCOA, issued checks to Claimant personally. No taxes were withheld.

37. In 2012 and 2013 for all the work performed at the PPC property, PPCOA issued Claimant a 1099-Misc tax document.

38. In 2012 and 2013, Claimant filed his income taxes with the IRS and identified his income as "self-employment income."

39. Claimant's wife had formed Above and Beyond, LLC, as a prerequisite to obtaining government contracts.

40. The Claimant did not obtain business cards for Above and Beyond, LLC, and there was no evidence that he advertised or solicited work on behalf of himself or Above and Beyond, LLC.

41. Claimant and his wife failed to file annual reports with the Colorado Secretary of State concerning Above and Beyond, LLC, essentially allowing the registration of the LLC to lapse as of April 1, 2012. Individuals unrelated to the Claimant have now registered Above and Beyond, LLC with the Colorado Secretary of State.

42. The Claimant had a bank account in the name of Above and Beyond, LLC, as well as a personal bank account.

43. PPCOA did not offer Claimant vacation or sick time nor did it offer him other benefits such as medical or dental insurance.

44. PPCOA did not require Claimant to work exclusively for it. Claimant had a skunk removal business and performed skunk removal for PPCOA and at other locations.

45. Claimant also performed landscaping work at the San Juan Motel, which is owned by Doug Dragoo. Claimant performed work for the Dragoo family, including watching their home during the winter months. Claimant also checked on the home of Clyde Grimm during the winter months. Claimant obtained all this work through Johnson.

46. Johnson testified that the Claimant set his own work schedule and if he had work to perform for someone else, it was within Claimant's discretion to do so.

47. An individual named Chris Tressler also performed siding work at the PPCOA property in March 2013. According to the PPCOA payment ledgers, Tressler primarily performed painting work, and had done no siding work since March 2013. PPCOA and AMS also treated Tressler like an independent contractor. Two other individuals also did some siding work for PPCOA in March 2013 according to the payment ledgers.

48. On January 30, 2014, the Claimant fell off a ladder while performing siding work at the PPC property. Claimant injured his right leg. Specifically, he suffered a shattered tibia and fractured fibula, and later developed complications from this injury.

49. The Claimant continues to require medical treatment for his injuries. He is presently residing in California and receiving medical treatment under the California Medicaid plan.

50. Neither PPCOA nor AMS, as agent for PPCOA, referred the Claimant to a doctor.

51. Claimant has not worked since the date of his injury and has not been released to return to work.

52. Claimant initially filed a Worker's Claim for Compensation naming AMS as his employer in this claim.

53. After the first hearing held on March 19, 2015 regarding this claim Claimant filed a second Workers' Claim for Compensation naming PPCOA as his employer on March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts.

54. PPCOA filed a Notice of Contest on April 15, 2015 asserting that Claimant is not an employee of PPCOA.

55. The PPCOA timely issued its Notice of Contest thus no penalties for failure to timely admit or deny shall be imposed. The Claimant did not even believe PPCOA was a potential employer until March 19, 2015 so any notice to the PPCOA via its agent, AMS, is inadequate to show that Claimant intended to file a claim for workers' compensation benefits against PPCOA.

56. The PPCOA does not maintain workers' compensation insurance thereby entitling the Claimant to a 50 percent increase in his indemnity benefits.

57. Based on the foregoing findings, the Respondent has failed to prove that Claimant was an independent contractor at the time he sustained an injury to his right leg on January 30, 2014.

58. In order to arrive at a fair approximation of Claimant's wages, the ALJ considered Claimant's earnings beginning with the invoice dated October 7, 2013 through the invoice dated January 31, 2014. Claimant's earnings over that period of 16 weeks totaled $4,415.75 making his average weekly wage $275.99 with a corresponding TTD rate of $183.99 increased to $275.99. The average weekly wage proposed by Claimant inappropriately inflates Claimant's average weekly wage and is rejected.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

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

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

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

Principal-Agency Relationship

4. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957). The one for whom the action is to be taken is the principal, and the one who is to act is the agent. Id. § 1(2) and 1(3). Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Id. § 7. Agency is thus a legal relation having its source in the mutual consent of the parties. The existence of an agency relationship is ordinarily a question of fact. *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937); *Eckhardt v. Greeley Nat'l Bank*, 79 Colo. 337, 245 P. 710 (1926); *Schoelkopf v. Leonard*, 8 Colo. 159, 6 P. 209 (1884). A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service," Restatement (Second) of Agency § 3(1), such as one "who is an integral part of a business organization and does not require fresh authorization for each transaction." Id. § 3 comment a. An "agent" is generally

one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc*. v. *Ironwood IX*, 713 P.2d 424, (Colo. App. 1985).

5. ALJ Jones concluded, and this ALJ agrees that AMS was acting as the general agent of PPCOA when entering into a verbal contract of hire with the Claimant to perform work at the PPC property in exchange for payment. As agent for PPCOA, AMS was authorized to act on behalf of PPCOA and to bind PPCOA to this contractual relationship.

Employment Status

6. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

7. Under §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 service, both under the contract for performance of service and in fact ***and*** such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." [Emphasis added]

8. The Respondent has the burden of proving that Claimant was an independent contractor rather than an employee. To prove that Claimant was free from control and direction, the Respondent must prove the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), 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. *Nelson v. Industrial Claim Appeals Office, supra.*

9. In addition to proving that the Claimant is free from control and direction, the Respondent must also establish the Claimant is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-40-202(2)(a), C.R.S. In *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court held that whether an individual is customarily engaged in an independent trade, occupation, profession, or

business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer. The court further stated that there is no dispositive single factor or series of factors that would resolve the nature of the relationship between the employee and putative employer.

10. Based on the foregoing findings of fact, the ALJ concludes that PPCOA has failed to meet its burden of proof that Claimant was an independent contractor at the time he sustained an injury on January 30, 2014. While it is true that Claimant initially worked as a landscaping/flowerbed vendor, that relationship changed significantly over the ensuing years. Claimant and Johnson offered conflicting testimony about the nature of the relationship between Claimant and PPCOA, which the ALJ resolves in favor of the Claimant. Claimant essentially became an on-call handyman for the PPCOA property.

Further, the Claimant was not customarily engaged in the independent trade of hanging siding or performing handyman services at the time he was injured. The invoices presented by both parties reflect that Claimant was working exclusively (although he was not required to) for the PPCOA as a handyman at the time of his injury. The fact that Claimant had a skunk removal business does not sever the employment relationship between PPCOA and Claimant. Rather, the skunk removal business merely represents concurrent employment. In addition, PPCOA paid Claimant personally at an hourly rate, instead of through a trade or business name. PPCOA established a quality standard and provided some oversight of Claimant's work. The ALJ recognizes that PPCOA did not provide more than minimal training, but Claimant had significant experience and did not need training. The ALJ also recognizes that PPCOA did not provide tools or benefits to Claimant, although at times Claimant was permitted to borrow tools from AMS or purchase tools at the expense of PPCOA. Finally, the ALJ acknowledges that PPCOA did not dictate time of performance other than providing general deadlines. However, balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S., and considering the totality of the circumstances and nature of the relationship between Claimant and the PPCOA, the ALJ concludes that the PPCOA has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

11. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). As found, Claimant was in the course and scope of his employment on January 30, 2014 when he fell from a ladder and suffered a broken right leg.

Penalties

12. In any case where the employer fails to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. Here, PPCOA failed to carry the requisite workers' compensation insurance. As such, Claimant is entitled to a fifty-percent increase in his compensation or benefits.

13. Under §8-43-203(1), C.R.S., Respondent is required to notify the Division whether Respondent is admitting or contesting the claim within 20 days after a report is filed, or should have been filed. The ALJ concludes that under the circumstances of this case, there was no indication that Claimant intended to pursue a claim against PPCOA until March 30, 2015. It is apparent from the transcript of the March 19, 2015 Claimant was unsure who employed him on January 30, 2014. He believed he worked for AMS until realizing that his paychecks were issued from the PPCOA bank accounts. Thus, the ALJ declines to impose penalties under §8-43-203(1), C.R.S.

Temporary Disability Benefits and Average Weekly Wage

14. Pursuant to §8-42-103, C.R.S., when a disability lasts longer than two weeks from the date of injury, disability indemnity is recoverable from the day injured employee leaves work. In this case, Claimant never returned to work for the PPCOA following his January 30, 2014 work injury. Claimant has not returned to work in any capacity has he remains on work restrictions and has not been released to full duty. Based on Claimant's average weekly wage of $275.99 the Claimant's TTD rate is $183.99. As of the date this decision, the Claimant has been out of work for 109 weeks and 1 day resulting in a total wage loss of $20,081.19. However, due to the 50 percent penalty, Claimant's total wages loss is increased to $30,122.34. Interest on $30,122.34 at 8 percent per annum totals $2,614.37 with a corresponding daily interest rate of $7.18. **In addition to the TTD owed to Claimant from January 30, 2014 through March 4, 2016, the Claimant is entitled to ongoing TTD until terminated by operation of law.**

Medical Benefits

15. Pursuant to §8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. Claimant received medical treatment from various providers to cure and relieve him of the effects of her injury. There is no evidence that the treatment Claimant has received thus far has not been reasonable, necessary or related to the Claimant's injury. Further, all treatment received has been authorized given that PPCOA did not refer the Claimant to a physician. Claimant is further entitled to future reasonable and necessary medical treatment. PPCOA is liable for past medical treatment (subject to the Division of Workers' Compensation fee schedule) and for future medical treatment.

ORDER

It is therefore ordered that:

1. On January 30, 2014, Claimant sustained an injury while in the course and scope of his employment with PPCOA.

2. PPCOA failed to comply with the insurance provisions of the Workers' Compensation Act. Claimant is entitled to a 50 percent increase in his benefits.

3. The Claimant is entitled to medical benefits, including all treatment which he has already received. Because PPCOA is liable for payment of Claimant's medical costs associated with his work injury, no medical provider shall seek to recover such costs from the employee. Section 8-42-101(4), C.R.S.

4. All treatment Claimant has received is authorized.

5. Claimant is entitled to reasonable and necessary medical treatment in the future.

6. Claimant's AWW is $275.99.

7. Claimant is entitled to TTD benefits commencing on January 31, 2014 for a period of 109 weeks and 1 day for a total award of $30,122.34 (this amount accounts for the 50 percent increase due to the penalty). **Claimant is also entitled to ongoing TTD until terminated by operation of law.**

8. The Claimant is entitled to interest in the total amount of $2,614.37 with daily interest continuing to accrue at the rate of $7.18.

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

10. Claimant's claim for penalties for failure to admit or deny liability is denied and dismissed.

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

12. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

    a. Within ten (10) days of the date of service of this order, deposit the sum of $35,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

    b. Within ten (10) days of the date of service of this order, file a bond in the sum of $35,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

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

DATED: March 25, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable work related injury to her left knee arising out of and in the course and scope of her employment on September 8, 2014.

II. If a compensable injury was sustained, whether Claimant established by a preponderance of the evidence that the left knee arthroscopy performed on November 7, 2014 by Dr. Romero was reasonably necessary and causally related to the September 8, 2014 incident.

III. If a compensable injury occurred, whether Claimant established by a preponderance of the evidence that a left total knee replacement surgery is reasonably necessary and causally related to the September 8, 2014 incident.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Dr. O'Brien, the ALJ enters the following findings of fact:

1. Claimant is employed as a forensic case manager at the Colorado Mental Health Institute in Pueblo (CMHIP). Her duties include managing the care and compliance of mental health offenders who have been released into the community. Claimant works out of an office located in Building 126 when at the CMHIP.

2. On September 8, 2014, between approximately 12:15 pm and 12:30 pm Claimant and Bernadine Villanueva left Building 126 and walked to the parking lot on the north side of the building to go to lunch. Claimant parks in this lot 80% of the time as she prefers to park in the lot closest to her office. The lot is open to all who wish to park there; there are no permits required.

3. Ms. Villanueva went to her own car to retrieve her cigarettes. Claimant went to her own car as it was her intention to drive the two to lunch off campus. When she got to her car she put her right foot into the car and twisted her whole body to get in and sit down when she felt extreme pain in her left knee causing her to holler out in pain. Both Claimant and Ms. Villanueva testified that the parking lot was older and poorly maintained with holes, pits, and uneven areas. Claimant did not testify that any particular flaw in the parking lot caused her injury. Rather, the ALJ finds from the evidence presented, that Claimant principally alleges a discrete injury, i.e. a tear of the medial meniscus and ACL occurred as she pivoted on her foot in an attempt to get her body into the car and sit down. The ALJ also finds that Claimant asserts that she

suffered an aggravation of her preexisting osteoarthritis as a consequence of her twisting action.

4. Ms. Villanueva testified that she did not see Claimant get into her car and did not hear her cry out. She only knew what happened in that lot based upon what Claimant told her.

5. Claimant testified that she sat down and tried to regain her composure. After two to three minutes, the intense pain in her knee subsided and she was able to move her leg around. Consequently, Claimant thought she would be OK so she decided to proceed to lunch. When they got to the restaurant a short distance away Claimant attempted to exit her car by placing her left foot on the ground. As she attempted to stand up, Claimant experienced pain in the left leg and it gave way, causing her to fall to the ground. Claimant testified that she needed assistance to get up off of the ground. After she was helped back into her car, Claimant drove herself and Ms. Villanueva to the Parkview Emergency Room (ER) downtown. As the ER was crowded, Claimant elected to drive herself and Ms. Villanueva to the Parkview ER in Pueblo West. Ms. Villanueva confirmed that Claimant drove them to the Parkview ER in Pueblo West. She did not testify regarding the Parkview downtown location.

6. Claimant provided a consistent story of having twisted while getting into her car and feeling left knee pain and then falling when she tried to get out of the car to the physicians at Parkview Medical Center. (Exhibit C) Claimant did not report to the physicians at Parkview Medical Center that any particular flaw in the parking lot caused her injury. Claimant reported no pain at the emergency room only a sense of instability and an inability to put weight on her left leg. (Exhibit C, bate stamp 6) Claimant's range of motion was normal; she had minimal effusion, pop with no pain medially and laterally with McMurry's test, negative anterior and posterior drawer, and no joint line or popliteal ttp (tenderness to palpation). (Exhibit C, bate stamp 7) X-rays showed diffuse changes of degenerative arthritis with no evidence of acute fracture or displacement. (Exhibit C, bate stamp 12) Claimant was supplied with a knee immobilizer, crutches and a prescription for a walker secondary to difficulty using crutches and her weight.

7. Once she returned home, Claimant spoke with her supervisor at which time she was informed to report to work the next morning to complete claim paperwork. Claimant completed the necessary paperwork on September 9, 2015. Claimant elected to be seen at Centura Centers for Occupational Medicine (CCOM) for evaluation.

8. Claimant was first seen by Dr. Nanes at CCOM on September 10, 2014. During his encounter, Claimant reported that she "twisted left knee on uneven pavement while getting into car:" She also completed a pain diagram indicating stabbing pain when her left knee pops and pain only 10% of the time. (Exhibit D, bate stamp 23) Dr. Nanes made no notation that Claimant attributed any particular flaw in the parking lot to her injury. Dr. Nanes noted that Claimant's left knee was not swollen but that she has popping when she goes to stand up. (Exhibit D, bate stamp 21) Dr. Nanes

recommended an MRI[1] to determine the exact cause of Claimant's left knee condition. (Exhibit D, bate stamp 21) Claimant was also referred to Dr. Nakamura at SMC Physician Partners Orthopedics for evaluation.

9. Claimant testified and the medical records submitted into evidence support that, while Claimant had treatment for left leg swelling associated with cellulitis, she has not had prior treatment for left knee problems. Claimant testified that she had previously been treating with Dr. Nakamura at SMC Physician Partners Orthopedics for severe degenerative arthritis in her right knee and had been scheduled for a right total knee arthroplasty prior the September 8, 2014 incident. (*See also* Exhibit E, bate stamp 67-69) On October 22, 2014, Antonio Ramos, a nurse practitioner in Dr. Nakamura's office, noted that Claimant was scheduled for a right total knee arthroplasty but that she had "a fall" specifically injuring her left knee. (Exhibit E, bate stamp 64) On October 29, 2014, Claimant was seen by Dr. Romero, Dr. Nakamura's partner, along with Dr. Romero nurse practitioner, who documented a history of having tripped while stepping off of a curb causing her to fall 6-8 weeks ago. (Exhibit E, bate stamp 60-61) This history is not consistent with Claimant's testimony or the history reported at Parkview Medical Center. Consistent with the testimony of Dr. O'Brien, the ALJ finds the history provided contemporaneously with the injury event is likely the more accurate history of the injury mechanism. The ALJ attributes the inconsistencies between the history documented on September 8 and October 29, 2014 to Dr. Romero's office rather than Claimant as she has been consistent regarding the history otherwise.

10. Dr. Romero interpreted the MRI as showing an anterior cruciate ligament tear and bucket handle medial meniscus tear. (Exhibit E, bate stamp 62). Surgery was recommended. Claimant's claim was denied. Nonetheless, Claimant proceeded with treatment on her own with Dr. Romero because she was unable to ambulate without the assistance of crutches. Prior to the injury on September 8, 2014, Ms. Villanueva testified she had never seen Claimant use a device such as a cane or crutches to walk around the office. She testified that she had not seen Claimant fall from a knee problem prior to September 8, 2014. She testified that since the injury, she has seen Claimant use various walking aids.

11. On November 7, 2014, Claimant underwent a left knee arthroscopy with partial medial meniscectomy with Dr. Romero. The surgical report from this date continuously notes grade 3 chondromalacia throughout Claimant's left knee. (Exhibit F) The surgical report also indicates that Claimant's left medial meniscus was "remarkable for a large vertical tear peripherally, that was extended into the meniscus root." Finally, the report documents that Claimant had a completely torn ACL at its origin. Surgical treatment was directed to the meniscus tear only.

12. Claimant has torn her right ACL on two occasions. She testified that the

[1] Although neither party submitted the MRI report to the ALJ for consideration, the balance of the evidence, including Dr. O'Brien's independent medical examination report, persuades the ALJ that the MRI was probably preformed October 14, 2014.

symptoms she experienced in her left knee on September 8, 2014 were similar to the symptoms she had when she torn the right ACL previously.

13. Claimant continues to treat with Dr. Nakamura for her right knee. (Exhibit E, bate stamp 35-51) Both Drs. Romero and O'Brien have opined that any treatment associated with Claimant's right knee is unrelated to the September 8, 2014 incident.

14. On April 27, 2015, Claimant was seen by Dr. Nakamura for her right knee and for left leg swelling. (Exhibit E, bate stamp 35) Claimant was seen again on June 25, 2015 for severe bicompartmental degenerative joint disease in her left knee and chronic left lower extremity edema. The physician assistant (PA) noted that Claimant has chronic anterior cruciate ligament deficiency of her left knee and that they did not reconstruct the anterior cruciate ligament during the November 7, 2014 surgery given her advanced arthritis. The PA further noted that Claimant's chief complaint was recurrence of left lower extremity swelling. (Exhibit E, bate stamp 30-34) Claimant testified that following her right knee total arthroplasty she developed increased swelling and pain in the left knee. A total left knee arthroplasty has been recommended.

15. Claimant underwent an IME with Dr. O'Brien on May 15, 2015. (Exhibit G) Claimant reported to Dr. O'Brien that she put her right foot into the wheel well of her car and then was twisting to rotate around so she could sit when she noted the immediate onset of pain and a popping sensation in her left knee. Dr. O'Brien did not note that any particular flaw in the parking lot caused Claimant's injury. Dr. O'Brien noted Claimant's prior right knee problems and that the MRIs for both her right knee and left knee demonstrated fairly identical findings. (Exhibit G, bate stamp 96) Dr. O'Brien opined that it was "medically improbable" that the September 8, 2014 incident caused an injury. Furthermore, Dr. O'Brien opined that the tears to the ACL and medial meniscus, visualized on MRI, were pre-existing and that these conditions were in "no way substantially aggravated or accelerated by a non-existent work injury." (Exhibit G, bate stamp 105) According to Dr. O'Brien, twisting while getting into a car is a "daily activity" and because Claimant's demonstrated mechanism of injury was not "atypical" from the movement he uses to get into his car, he opined that no injury resulted. Dr. O'Brien noted that "[i]f this daily activity is not associated with pain, then there is no injury." (Exhibit G, bate stamp 104) Dr. O'Brien explained that Claimant demonstrated a classic manifestation of pain on September 8, 2014 associated with her pre-existing long-standing medial meniscus tear and anterior cruciate ligament tear. Dr. O'Brien further explained that there was not enough energy associated with getting into or out of her car on September 8, 2014 to result in an injury. Dr. O'Brien also explained that the MRI demonstrated chronic degenerative changes without a massive hemarthrosis. Dr. O'Brien opined that the November 7, 2014 surgery "was in no way causally related" to the September 8, 2014 incident nor was it reasonably necessary but rather, contraindicated.

16. Dr. Romero testified, via deposition, as an expert in orthopedic medicine. Dr. Romero testified that Claimant's explanation of how she injured her left knee on September 8, 2014 while getting into her car was "unusual" to tear the ACL, that

generally those tears are seen as a result of trauma. (Romero Depo., p.10, ll.1-8) Nonetheless, Dr. Romero noted that Claimant had torn her right ACL in the absence of significant trauma previously. Specifically, in that instance Claimant "twisted and her foot stuck on the carpet" resulting in an ACL tear. (Id.) The ALJ finds the mechanism of injury (MOI) resulting in a torn right ACL similar to the MOI challenged by respondents as sufficient to cause injury in the instant case.

17. Dr. Romero described the typical symptoms of a torn ACL as being a popping and early onset of swelling. Pain would be present at the onset of the tear, but could decrease thereafter. He described instability of the knee as the biggest complaint of someone who had torn his or her ACL. He found Claimant's reports of injury at the Parkview Medical Center ER to be consistent with ACL tear symptoms.

18. Dr. Romero testified that based upon his review of the MRI images, Claimant's ACL tear appeared acute. According to Dr. Romero, the fibers of the ACL were visible on MRI appearing as very swollen "white inflamed . . . fibers where the ALC should be, which is what we see in an acute tear." (Romero Depo., p. 23, ll. 2-14) Nevertheless, Dr. Romero agreed that MRI does not pinpoint a date of injury. Consequently, Dr. Romero could only opine that it was possible that Claimant tore her ACL and medial meniscus during the September 8, 2014 incident. (Romero Depo., p. 23, ll. 15-21, p. 10, ll.14-18)

19. Regarding Dr. O'Brien's opinion that the tears were chronic (old) because the MRI did not demonstrate a large hemarthrosis; Dr. Romero testified that the MRI demonstrated a large effusion but no hemarthrosis in the joint space. According to Dr. Romero, the likelihood of Claimant "still having blood in the knee seven weeks after the injury [was] unlikely", although it was possible for there to be continued swelling (effusion).

20. Dr. Romero agreed that Claimant had arthritis in her left knee that predated the September 8, 2014 incident and that the arthritis was not "mild." (Romero Depo., p. 13, ll. 20-22, p. 15, ll. 8-17) While Dr. Romero agreed that Claimant had preexisting arthritis in the left knee, he testified that her "twisting action" likely aggravated it. (Romero Depo., p. 14, ll. 5-11)

21. Dr. Romero also testified that the need for a total knee replacement was due to her pre-existing arthritic condition but that the injury to her ACL and particularly her meniscus accelerated her need for a knee replacement. (Romero Depo., p. 20, ll. 11-18, p. 25, ll. 16-25) Based upon the testimony presented, the ALJ infers that the acceleration issue raised by Dr. Romero is due to the partial meniscectomy, occasioned by Claimant's acute tear, resulting in the loss of the cushion between the articulating surfaces of the knee joint.

22. Dr. O'Brien testified, via deposition, as an expert in orthopedic surgery with substantial surgical experience. Dr. O'Brien described the history provided to him by Claimant and noted that she did not tell him she slipped or fell into a chuckhole in the

asphalt or otherwise forcefully twist her knee. (O'Brien Depo., pp. 13-14) Dr. O'Brien explained that to create tissue breakage, you have to generate enough energy such that that dissipation through tissue literally disrupts the tissue and that neither getting into nor getting out of a car, given the absence of a slip or a chuckhole or oil, generates enough energy to rupture tissue. (O'Brien Depo., p. 17, ll. 3-10) Dr. O'Brien further testified that the ACL is one of the strongest ligaments in the human body and that it takes impact and rotation, derotation, acceleration, and/or deceleration like on a football field, basketball court, or soccer field to generate enough energy to tear the ACL. (O'Brien Depo. p. 30 ll. 5-16) Dr. O'Brien reviewed Claimant's MRI film and thoroughly explained how the MRI findings were, in his opinion, chronic in nature and why the absence of a hemarthrosis was significant in that determination. (*See* O'Brien Depo., pp. 22-25 and pp. 25-29) Dr. O'Brien went on to testify that it is so improbable that Claimant's tears were caused by twisting while getting into her car that it bordered on the impossible. (O'Brien Depo., pp. 30-31) Dr. O'Brien opined that Claimant had a badly arthritic knee and that the surgery performed on November 7, 2014 was not reasonably necessary or causally related to the September 8, 2014 incident. (O'Brien Depo. pp. 33-36) Dr. O'Brien also credibly testified that a total knee replacement would not be causally related to the September 8, 2014 incident and that nothing that happened on September 8, 2014 aggravated or accelerated the need for a total knee replacement or the arthroscopy. (O'Brien Depo., pp. 40-41)

23. Although Dr. O'Brien opined that the medial meniscus and ACL tears were present prior to September 8, 2014, there are no previous imaging studies to compare with the October 14, 2014 MRI. Consequently, the ALJ finds there is no way to determine the nature and extent of ACL and medial meniscus tearing prior to October 14, 2014. Further, careful review of the medical reports admitted into evidence fails to document a treatment history for left knee problems, due to instability or functional deficits, prior to September 8, 2014. Thus, while the ALJ is persuaded that Claimant had pre-existing osteoarthritis in her left knee, he is not persuaded by Dr. O'Brien's testimony that the medial meniscus and ACL tears were chronic in nature. Rather, the ALJ credits the testimony of Dr. Romero to find that Claimant's clinical findings and complaints of instability upon presentation to the ER on September 8, 2014 coupled with Dr. Romero's description of the MRI findings supports a conclusion that Claimant, more probably than not, tore her medial meniscus and ACL while pivoting to get into her car on September 8, 2014. While, twisting the knee represents a low energy action, Claimant has a history of tearing her right ACL in a similar fashion as noted above. Consequently, for her unique anatomy, the ALJ finds the energy involved sufficient to cause injury. The evidence presented also persuades the ALJ that Claimant's left ACL and medial meniscus tears aggravated Claimant's pre-existing arthritis by accelerating her need for a left TKA.

24. The ALJ has carefully considered Dr. O'Brien's opinions and has weighed them against the balance of the competing evidence. Based upon the totality of the evidence presented, the ALJ finds Dr. O'Brien's opinions less persuasive than those of Dr. Romero.

25. Based upon the evidence presented, the ALJ persuaded that Claimant suffered acute tears of the medial meniscus and ACL of the left knee as a direct consequence of pivoting to get into her car on September 8, 2014. Claimant has proven by a preponderance of the evidence that her left knee injury is compensable.

26. Based upon the evidence presented, including Claimant's testimony concerning her functional abilities, the ALJ finds that the left knee arthroscopy performed on November 7, 2014 by Dr. Romero was reasonably necessary and causally related to the September 8, 2014 incident. The evidence presented also persuades the ALJ that Claimant's left knee injury, chiefly the medial meniscus tear accelerated her need for a left TKA as her knee was substantially diseased previously and the partial meniscectomy performed November 7, 2014 resulted in further loss of the "cushion" between the articulating surfaces of the knee joint. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that there is an occupational relationship between her September 8, 2014 injury and her need for a total knee arthroplasty. Accordingly, Claimant's need for a left total knee arthroplasty is related to her July 14, 2013 work injury. Claimant's failure to improve following her November 7, 2014 arthroscopy convinces the ALJ that the recommendation to proceed with a left TKA is reasonable and necessary to relieve Claimant from the effects of her industrial injury.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that her alleged injuries occurred in the scope of employment. Indeed Respondent's advance no assertions that Claimant was not in the scope of her employment.

E. Even if Respondents had argued that Claimant was not in the scope of her employment because she was on her way to lunch when the injury occurred, the argument would have been unconvincing. Actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. As an example, injuries sustained on the employer's premises while eating lunch are generally compensable under that doctrine because the employee is at a place he might reasonably be, within the time limits of the employment, and engaged in an activity reasonably incidental to the work. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988)(rape of an employee as she was walking on her employer's premises to the company cafeteria compensable); *Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952); (Colo. 1988) *Ventura v.*

Albertsons, Inc., 856 P.2d 35 (Colo. App. 1992) Underlying this doctrine is the principle that actions taken to satisfy the employee's "personal comfort" are necessary to maintain the employee's health, and are indirectly conducive to the employer's purposes. *See Ocean Accident & Guaranty Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919). Here, the persuasive evidence demonstrates that Claimant was on her employers premises preparing to engage in an activity reasonably incidental to her work. Having determined that Claimant was in the course and scope of her employment, the question remains whether or not Claimant's alleged injuries "arose out of" her employment.

F. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

G. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As found in this case, Claimant has established the requisite causal connection between her work duties and her left knee injury. In concluding that Claimant has proven, by a preponderance of the evidence, that she suffered a compensable work injury, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Sharon Bastian v. Canon Lodge Care Center*, W.C. No. 4-546-889 (August 27, 2003) instructive. In *Bastian*, the claimant, a CNA was on an authorized lunch break when she injured her left knee. Claimant was returning to her employer's building with the intention of resuming her duties when she "stepped up the step at the door to the facility", heard a

pop in her left knee and felt severe pain. Claimant did not "slip, fall, or trip." Claimant was diagnosed with a meniscus tear and "incidental arthritis." The claim was found compensable. On appeal the respondents contended that the ALJ erred in part on the grounds that the claimant was compelled to prove that her knee injury resulted from a "special hazard" of employment. Relying on their decision in *Fisher v. Mountain States Ford Truck Sales*, W.C. No. 4-304-126 (July 29, 1997), the Panel concluded that there was no need for claimant to establish the step constituted a "special hazard" as claimant "did not allege, and the ALJ did not find, that the knee injury was "precipitated" by the claimants preexisting arthritis." The same is true of the instant case. As in *Bastian*, Claimant in the instant case asserts that she suffered a discrete injury to her knee while pivoting on her left leg to get into her car. Dr. Romero credibly opined the Claimant's post injury presentation and symptom complaints in the ER were consistent an ACL tear, that the tears appeared acute on MRI and that Claimant had previously torn her right ACL in a twisting incident involving her carpet outside of work. Thus, the ALJ concludes that Claimant was not required to prove that her injury resulted from a "special hazard" of employment as argued by Respondents.

H. The instant case is analogous to *Bastian* and *Fisher* in that the activities involved in each case are activities that, per Dr. O'Brien are the type which should not lead to a finding of compensability as they are performed daily and in a similar fashion by others. Merely because Claimant was engaged in activity, specifically pivoting to get into a car and/or rising from a seated position to get out, which is performed daily outside of work and similarly by others does not compel a finding that Claimant's injury is not work-related as suggested by Dr. O'Brien. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). As found, Claimant has established the requisite causal connection between her pivoting while getting into her car to go to lunch and her left knee injury. Consequently, the injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. 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). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, the evidence demonstrates that Claimant's medical care as provided at CCOM and their referrals, including the orthopedic evaluation and subsequent surgery performed by Dr. Romero was reasonable, necessary and related to her acute left ACL and medial meniscus tears sustained September 8, 2014. The aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referrals were reasonable and necessary to determine the extent of injury in light of Claimant's ongoing difficulty with ambulation without an assistive device. Moreover, the evidence presented persuades the ALJ that the recommendation to proceed with a left TKA is reasonable and necessary given Claimant's continued pain and functional decline. Consequently, Respondents are liable for the aforementioned medical treatment and Claimant's TKA as proposed by Dr. Romero.

ORDER

It is therefore ordered that:

1. Claimant has established by preponderance of the evidence that she suffered a compensable injury to her left knee on September 8, 2014.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left knee condition, including, but not limited to the treatment afforded Claimant at CCOM, the left knee arthroscopic procedure performed by Dr. Romero on November 7, 2014, and the left sided TKA as proposed by Dr. Romero.

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

DATED: March 2, 2016

/s/ Richard M. Lamphere

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

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

ISSUES

1. Whether the claimant is entitled to temporary partial disability benefits (TPD); and,

2. Whether the claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. The claimant was injured on September 15, 2014. He suffered an injury to his left foot.

2. The claimant did not miss any time from work, however, he was returned to work by his treating physician with significant work restrictions including having his foot elevated above his heart.

3. The claimant underwent a course of care and treatment and was returned to full duty work on January 6, 2015.

4. The claimant was placed at maximum medical improvement on February 20, 2015.

5. The claimant's admitted average weekly wage is $1016. 54.

6. From the date of the injury until January 6, 2015, the claimant was on modified duty.

7. The claimant was paid on a bi-weekly basis.

8. During his modified duty the claimant's wages decreased markedly after he suffered the injury on September 15, 2014.

9. The first pay period after the claimant's injury ended on September 28, 2014. During that pay period, based upon his average weekly wage, the claimant should have been paid $2033.08 had he not been injured. However, since the claimant was on modified duty he only received $1,481.60. The difference between the amount

the claimant received and the amount the claimant would have received had he not been on light duty is $551.48. Two thirds of this amount is $367.65.

10. The second pay period ending on October 12, 2014 is identical to the first pay period. Two thirds of this amount is $367.65.

11. The third pay period ending October 26, 2014 the claimant was paid 1,333.44. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $699.64. Two thirds of this amount is $466.43.

12. The fourth pay period ending November 9, 2014 the claimant was paid $1,341.77. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $460.87. Two thirds of this amount is $271.25.

13. The fifth pay period ending November 23, 2014 the claimant was paid $1,426.97. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $606.11. Two thirds of this amount is $404.07.

14. The sixth pay period ending December 7, 2014 the claimant was paid $1,487.71. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $545.37. Two thirds of this amount is $363.58.

15. The seventh pay period ending December 21, 2014 the claimant was paid 1,563.56. . During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $469.52. Two thirds of this amount is $313.01.

16. The eight pay period ending January 4, 2015 the claimant was paid $1,545.49. During that pay period the claimant should have received $2033.08 had he not been injured. The difference between the amount the clamant received on modified duty and the amount he would have received is $487.59. Two thirds of this amount is $325.06.

17. The claimant was on light duty on January 5 and January 6, 2015. The amount he would have received had he not been injured for those two days is $406.62. The claimant was paid $256.90. The difference between the amount the claimant received on modified duty and the amount he would have received is $149.72. Two thirds of this amount is $99.81.

18. The claimant did not receive any temporary disability benefits of any kind during the pendency of his workers' compensation case.

19. The claimant's pay during these pay periods is depicted as follows:

Start Pay	End Pay	Actual 2-week Pay	AWW x 2	Difference	2/3 of Difference
9/15/2014	9/28/2014	$ 1,481.60	$ 2,033.08	$ 551.48	$ 367.65
9/29/2014	10/12/2014	$ 1,481.60	$ 2,033.08	$ 551.48	$ 367.65
10/13/2014	10/26/2014	$ 1,333.44	$ 2,033.08	$ 699.64	$ 466.43
10/27/2014	11/9/2014	$ 1,341.77	$ 2,033.08	$ 691.31	$ 460.87
11/10/2014	11/23/2014	$ 1,426.97	$ 2,033.08	$ 606.11	$ 404.07
11/24/2014	12/7/2014	$ 1,487.71	$ 2,033.08	$ 545.37	$ 363.58
12/8/2014	12/21/2014	$ 1,563.56	$ 2,033.08	$ 469.52	$ 313.01
12/22/2014	1/4/2015	$ 1,545.49	$ 2,033.08	$ 487.59	$ 325.06
1/5/2015	1/6/2015	$ 256.90	$ 406.62	$ 149.72	$ 99.81
					$ 3,168.15

20. The ALJ finds that the respondent-insurer is liable to the claimant for $3,168.15 in temporary partial disability benefits.

21. The ALJ finds that as a result of his September 15, 2014 work injury, the claimant has a visible disfigurement to the body consisting of the following: the claimant's second toe in from the small toe of the left foot has a permanent downward bend. The great toe of the left foot has a slight deformity to the nail bed. The claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

1. The claimant bears the burden of proving entitlement to TPD benefits by a preponderance of the evidence.

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

3. The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of an injured worker or the rights of the employer. *See* §8-43-201, C.R.S. (2010).

4. Temporary partial disability benefits pay for loss of wages while the claimant is able to return to limited duty and is not yet at maximum medical improvement. *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 107 (Colo. App. 1986); *State Compensation Insurance Fund v. Lyttle*, 151 Colo. 590, 380 P.2d 62 (1963). The rate of compensation is two-thirds of the difference between the average weekly wage at the time of injury and weekly earnings during the continuance of the partial disability. These benefits are limited to the same weekly maximum applying to temporary total disability benefits and must be paid every two weeks. C.R.S.A. section 8-42-106.

5. The only evidence cited by the respondents to deny TPD benefits is the claimant's wages for the period of time leading up to the date of injury, where the claimant was receiving his full wage amount. The respondents do not address the claimant's earnings subsequent to the date of injury.

6. After considering all of the evidence, the ALJ concludes that the claimant has met his burden of proof, as detailed in the findings of fact above.

7. It is clear that the claimant is entitled to two thirds the difference in his AWW at the time of the injury and the amount that he was actually paid.

8. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to $3,168.15 in temporary partial disability benefits.

9. The ALJ concludes that as a result of his September 15, 2014 work injury, the claimant has a visible disfigurement to the body, which entitles the claimant to additional compensation. Section 8-42-108 (1), C.R.S.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant $3,168.15 in temporary partial disability benefits.

2. The respondent-insurer shall pay the claimant $800.00 for disfigurement. The respondent-insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

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

DATE: March 30, 2016

/s/ original signed by:

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-965-879-02

ISSUES

- Whether Claimant has proven by a preponderance of evidence that she is entitled to temporary total disability benefits as of May 6, 2015, through January 19, 2016.

- Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for her separation of employment from the Employer.

STIPULATIONS

The parties stipulate that the time period at issue for temporary total disability benefits is May 6, 2015, through January 19, 2016. On January 20, 2016, Claimant underwent right elbow surgery, and Respondents are admitting for temporary disability benefits as of January 20, 2016.

FINDINGS OF FACT

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

1. On October 28, 2014, Claimant, a former inventory specialist for the Employer, sustained an injury to her right upper extremity. On November 21, 2014, Respondents filed a General Admission of Liability (GAL), admitting liability for medical and temporary disability benefits.

2. On April 13, 2015, Claimant treated at Concentra with Theodore Villavicencio, M.D., the authorized treating physician, and reported that she tried to work full duty without her brace and as a result was experiencing increased pain in her wrist. Dr. Villavicencio gave Claimant work restrictions, including limited use of right hand and occasional keyboarding with her right hand.

3. On April 22, 2015, Claimant treated at Concentra with Casey McKinney, PA-C, and reported increased right hand and wrist pain after returning to keying for three hours per day. Ms. McKinney recommended additional physical therapy and medications and gave Claimant work restrictions including no use of her right upper extremity.

4. On April 29, 2015, Claimant treated with Ms. McKinney, who maintained Claimant's treatment plan and work restrictions, including no use of her right upper extremity.

5. On May 6, 2015, Claimant treated with Ms. McKinney, who placed Claimant at maximum medical improvement (MMI) with no permanent medical

impairment. Ms. McKinney released Claimant to modified work/activity with permanent work restrictions of no keying with her right hand and no repetitive motion with her right hand. On May 9, 2015, Dr. Villavicencio signed the WC164 form, addressing Ms. McKinney's findings regarding MMI, permanent medical impairment, maintenance medical benefits, and permanent work restrictions. Ms. McKinney recommended Claimant follow-up in the next twelve months to address permanent work restrictions.

6. On May 7 or 8, 2015, Claimant met with Employer's district manager, Victoria Benton, to discuss whether Employer could accommodate Claimant's permanent work restrictions.

7. On May 13, 2015, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Villavicencio's report.

8. Also on May 18, 2015, Claimant treated with Ms. McKinney, who assigned Claimant additional permanent working restrictions, including no 10-keying with her right hand, no repetitive lifting or sorting with her right hand, and no lifting greater than ten pounds.

9. On July 15, 2015, Claimant treated with Ms. McKinney, who maintained Claimant's work restrictions.

10. On August 19, 2015, Claimant underwent a Division Independent Medical Examination (Division IME) with Stephen Lindenbaum, M.D. Dr. Lindenbaum determined Claimant was not at MMI and recommended Claimant be evaluated for radial tunnel syndrome. On September 15, 2015, Respondents filed a GAL reopening the claim consistent with Dr. Lindenbaum's findings. Respondents admitted for medical benefits only.

11. On October 2, 2015, Claimant treated with Ms. McKinney and reported ongoing pain, numbness, and tingling in her right arm. Ms. Mckinney addressed the Division IME's findings and referred Claimant to a hand surgeon, Dr. In Sok Yi, for an examination regarding radial tunnel syndrome. Ms. McKinney maintained Claimant's work restrictions.

12. On October 8, 2015, Claimant applied for a hearing on the issue of temporary total disability benefits from May 6, 2015, to the present. On November 5, 2015, Respondents filed a Response to Claimant's Application for Hearing and endorsed "Voluntary resignation, Claimant ended [employment] after being offered work within her restrictions, Respondents not responsible for ongoing temporary disability benefits under C.R.S. 8-42-103(1)(g) and 8-42-105(4)."

13. At Hearing, Claimant testified that she worked for the Employer as an inventory auditor and a team leader from October 2013 to May 2015. Claimant testified that prior to her October 2014 injury, she worked multiple different jobs for the employer, including healthcare supervisor and different inventory jobs. Claimant testified that after her October 28, 2014 industrial injury, she was assigned work restrictions which specifically limited use of her right upper extremity, and that she worked different light

duty jobs, including some counting or scanning jobs, as well as some office work. Claimant testified that the light duty jobs she worked required use of both upper extremities. Claimant testified that she had her work restriction of limited use of her right upper extremity continued until April 2015, when she attempted a trial of full duty at the direction of her authorized treating physician. Claimant testified that after doing the trial of full duty, she was "back at square one;" with increased right elbow pain and swelling.

14. Claimant testified that on April 29, 2015, her doctor assigned the work restriction of no use of her right upper extremity. Claimant testified that from April 29, 2015, through May 6, 2015, the date she was placed at MMI by her ATP, she did not work for the Employer. Claimant testified that she met with Victoria Benton on or about April 29, 2015, to discuss whether the Employer could accommodate her restriction of no use of her right upper extremity. Claimant testified that she reviewed the schedule with Ms. Benton and that no jobs were available within her work restrictions.

15. Claimant testified that on May 6, 2015, she was placed at MMI and given permanent work restrictions, including no lifting of greater than ten pounds, no keying, and no repetitive motion with her right upper extremity.

16. Medical documentation supports the finding that Claimant was released to modified work/activity with permanent work restrictions of no keying with her right hand and no repetitive motion with her right hand.

17. Claimant testified that after being placed at MMI, she met with Victoria Benton on May 7 or 8, 2015, to discuss her permanent work restrictions and whether the Employer could accommodate them. Claimant testified that both she and Ms. Benton had copies of her permanent work restrictions at the meeting. Claimant testified that she and Ms. Benton reviewed specific jobs, including supervising the 7-Eleven gas station team, a healthcare supervisor position, auto-quantity (AQ) counting positions, the DePuy medical device account, and a national vendor position.

18. 7-Eleven supervisor position: Claimant testified that this job requires keying merchandise into her work scanner and manipulating the merchandise in gas stations on a repetitive basis, which requires use of both upper extremities.

19. Healthcare supervisor position: Claimant testified the position primarily involves counting medications, specifically pills and blister packs containing pills, and other medical supplies, including syringes, IV bags, and compounds, at pharmacies. The pharmacy based position is an manual quantity (MQ) position. Alternatively, the Healthcare supervisor position could involve counting medical devices, and would be warehouse based and involve auto-quantity (AQ) counting. Claimant testified, based on her experience working the healthcare supervisor position, that the MQ position required physically opening pill bottles and specifically manipulating and counting the number of pills in each bottle. Claimant testified that she cannot open a pill bottle with one hand and the healthcare supervisor position requires repetitive use of both upper extremities. Claimant testified that when counting blister packs of pills, the blister packs

are stacked in rows on shelves and that she has to manipulate the blister packs with one hand and then use the other hand to count. Claimant testified that following her injury and while restricted to limited use of her right upper extremity, she attempted to work a healthcare supervisor job and attempted to work the job just using her left upper extremity. Claimant testified that she was unable to complete the jobs and was sent home early by her supervisor for failing to meet productivity standards.

20. DePuy project position: The DePuy project involves counting medical devices, specifically prosthetics, and is an AQ counting position. Claimant testified this involves going to hospitals or warehouses and physically manipulating the medical devices to count them. Claimant testified the devices are typically stored on shelves or pallets and wrapped in some material. Claimant testified that she is required to unwrap the devices and physically manipulate or sort through the devices with both hands in order to count them. Claimant testified that she scans a bar code on each device to count it, but if the bar code does not work, she is required to key in the identification number using the alpha-numeric system on her keying machine. Claimant testified that based on her prior experience working DePuy project jobs, she has had to manually key in identification numbers on a regular basis.

21. National Vendor positions: Claimant testified that national vendor jobs require her to work with insurance companies following natural disasters or fires and to go into homes or businesses and inventory the damaged items. Claimant testified this requires her to sort through and manipulate items and then to take pictures of the items with a digital camera. Claimant testified that based on her experience this job requires repetitive motion with and use of both upper extremities.

22. AQ positions: Claimant testified that AQ jobs require the use of a finger scanner to scan bar codes, tags, or other identification markers on medications and other items in pharmacies or merchandise, including clothes, jackets, and other items in department stores. Claimant testified that this job requires her to manipulate the merchandise with both hands in order to find the tag and then scan it using the finger scanner. While on light duty under restriction of limited use of her right upper extremity, Claimant attempted to work AQ jobs but was not able to complete the jobs. Claimant testified that AQ jobs require use of both upper extremities and also require her to lift a printer that weighs more than 10 pounds.

23. Claimant testified that when she met with Ms. Benton in May 2015, Claimant did not unilaterally state that she was resigning her job with the Employer. Claimant testified that she reviewed and discussed her restrictions and the available jobs with Ms. Benton, that she had concerns that the jobs offered to her violated her work restrictions, and that she and Ms. Benton mutually agreed that none of the available jobs was within Claimant's work restrictions. Claimant testified that she loved her work with Employer and that if it were up to her, she would still be working for Employer. The ALJ finds Claimant's testimony credible and persuasive.

24. At hearing, Victoria Benton testified that her job duties include overseeing multiple offices and over one hundred employees and that she assists with contracting,

scheduling, and staffing. Ms. Benton testified that following Claimant's industrial injury, she helped assigned Claimant different light duty positions. Ms. Benton testified that she never knowingly assigned Claimant work outside her work restrictions. Ms. Benton testified that while generic job descriptions exist for different jobs, including the healthcare supervisor position and AQ jobs, the jobs have a lot of variability and that each job has specific job duties, meaning that some jobs have lighter lifting requirements than 25 pounds.

25. Ms. Benton testified that on approximately May 7 or 8, 2015, she met with Claimant to discuss whether any jobs were available within Claimant's work restrictions. Although she acknowledged having a copy of the permanent work restrictions at the meeting, she understood Claimant's work restrictions were no lifting with her right arm and no keying with her right hand. Ms. Benton testified that at the May 2015 meeting, she verbally offered Claimant different jobs including the healthcare supervisor position and a few AQ jobs. Ms. Benton testified that differences exist between AQ jobs and MQ jobs. Ms. Benton testified that MQ jobs involve specific counting, manipulation, and manual keying. For example, MQ jobs require actual manipulation of pill bottles to open and count the contents. The AQ and other healthcare supervisor positions require meeting with drug representatives and scanning each sample of drug. Ms Benton testified that AQ pharmacy jobs do not require opening pill bottles; Ms. Benton testified that MQ jobs involve opening pill bottles. Ms. Benton testified that MQ jobs, which involve more repetitive motion than AQ jobs, are not within Claimant's permanent work restrictions. Ms. Benton testified that AQ jobs involve keying when there is an issue with the drug identification number on the label.

26. Ms. Benton testified that healthcare supervisor positions, and all other supervisor positions, require the supervisor to transport all of the equipment to and from the job sites for all of the employees. Ms. Benton testified that this includes carrying a printer, which she believes weights approximately 20 pounds, a laptop computer, scanning and laser devices, and often stepstools or ladders. Ms. Benton testified that a person "can't possibly lift the printer with one hand." Ms. Benton also acknowledged that no employees in her district performed with one hand the jobs she discussed with Claimant.

27. Ms. Benton testified that she also verbally offered Claimant different retail jobs, including a retail supervisor position. Ms. Benton testified that all retail jobs, including the supervisor job, require counting clothes and other merchandise and require the employee to scan each item. Ms. Benton testified that the retail supervisor job also requires transporting all the equipment, including the 20 pound printer, to and from the different jobsites. Ms. Benton testified that Claimant thought it would be best if she worked as a non-counting supervisor, but there were no available non-counting supervisor positions available in May 2015.

28. Respondents introduced job descriptions for their inventory associate and team leader positions. The physical requirements of both jobs include frequent repetitive motions of both wrists, and hands, and fingers.

29. Ms. Benton testified that the May 2015 meeting with Claimant was "emotional" and that Claimant did not appear to want to leave her job with Employer. Ms. Benton testified that it would be extremely difficult to perform with one arm the jobs she and Claimant discussed. Ms. Benton testified that she and Claimant mutually agreed that there were no jobs available within Claimant's work restrictions. While Ms. Benton testified that that she had the ability to make accommodations to the job duties Claimant would be required to perform, no persuasive evidence was offered to support a finding that such information was communicated to Claimant.

30. It appears from Claimant's testimony and from Ms. Benton's testimony, that both women misapprehended the actual permanent work restrictions which the ALJ finds were no keying with her right hand and no repetitive motion with her right hand.

31. Respondents presented no persuasive evidence that Employer provided Claimant any written offer of modified employment.

32. Claimant's personnel file contains a letter dated May 18, 2015, from Ms. Benton to Claimant which stated, "We accept your resignation effective 5/18/2015." However, no documentary evidence was offered to support a finding that Claimant resigned.

33. At hearing, Ms. Deborah Redd testified that she currently works for Employer in different AQ jobs, including healthcare and retail jobs. Ms. Redd testified that pharmacy AQ jobs require opening pill bottles and that all pharmacy AQ jobs require use of and repetitive work with both arms. Ms. Redd testified that it would be impossible to work a pharmacy AQ job with only one arm. Ms. Redd testified that all retail AQ jobs require use of both arms and repetitive motion with both arms. The ALJ finds Ms. Redd's testimony credible and persuasive. [check this against notes]

34. The parties stipulate that the time period at issue for temporary total disability benefits is from May 6, 2015, through January 19, 2016. On January 20, 2016, Claimant underwent right elbow surgery. Respondents are admitting for temporary total disability benefits as of January 20, 2016. The ALJ accepts the stipulation.

35. On May 6, 2015, Claimant was initially placed at MMI with permanent work restrictions. Dr. Lindenbaum, the Division IME physician, later determined Claimant was not at MMI on May 6, 2015, and Respondents admitted liability per Dr. Lindenbaum's findings. As of May 6, 2015, Claimant has had work restrictions directly related to her work injury. Claimant established a disability directly related to her industrial injury. The ALJ finds that Claimant has proven by a preponderance of the evidence that she is entitled to temporary disability benefits between May 6, 2015 and January 19, 2016.

36. The ALJ finds that Respondents have not proven by a preponderance of the evidence that Claimant voluntarily resigned her employment with Employer. Claimant testified that at the May 2015 meeting with Ms. Benton, both she and Ms.

Benton agreed that Employer did not have any available jobs within Claimant's permanent work restrictions. Ms. Benton testified that she and Claimant mutually agreed that no available jobs were within Claimant's work restrictions and that Employer was unable to accommodate Claimant's work restrictions. Furthermore, Employer did not offer Claimant a written offer of modified employment. Claimant is entitled to TTD benefits from May 6, 2015, through January 19, 2016.

CONCLUSIONS OF LAW

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

Generally

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

The 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, 389 (Colo. App. 2000).

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 (2007).

Temporary Total Disability Benefits

Claimant seeks an award of temporary total disability (TTD) benefits from May 6, 2015, through January 19, 2016. Claimant has the burden of proving she is entitled to TTD benefits by a preponderance of the evidence. § 8-42-103(1)(a), C.R.S. C.R.S. section 8-42-103(1) requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Apps. Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate an entitlement to TTD benefits, a claimant must prove that the industrial

injury caused a disability lasting more than three work shifts, she is off work due to the disability, and the disability resulted in the 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).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that impair the claimant''s ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. No requirement exists that the claimant produce evidence of medical restrictions imposed by an authorized treating physician or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, on May 6, 2015, Claimant was initially placed at MMI with permanent work restrictions. Dr. Lindenbaum then determined Claimant was not at MMI on May 6, 2015, and on September 15, 2015, Respondents filed a GAL reopening the claim consistent with Dr. Lindenbaum's findings. As of May 6, 2015, Claimant has had work restrictions directly related to her work injury. Claimant established a disability directly related to her industrial injury.

The inquiry then turns to whether Respondents have established by a preponderance of the evidence that Claimant is responsible for her separation of employment. Respondents assert that Claimant is precluded from receiving TTD benefits because she is responsible for her separation of employment from the Employer pursuant to C.R.S. sections 8-42-105(4) and 8-42-103(1)(g). Specifically, Respondents contend Claimant voluntarily resigned her position with Employer effective May 18, 2015. This affirmative defense is governed by the termination statutes and *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

Section 8-42-105 (3)(d)(1) provides, "Temporary disability benefits shall continue until the first occurrence of any one of the following: (d)(1) The attending physician gives the employee a written release to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." Because Employer never offered Claimant modified employment in writing, her temporary total disability benefits continue.

"In cases where it is determined that a temporarily disabled employee is responsible for her termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". §§ 8-42-203(1)(g) and 8-42-105(4)(a), C.R.S.. Under these termination statutes, a claimant who is responsible for her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his or her

termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that a claimant is responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that a claimant committed a volitional act, or exercised some control over her termination, under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of her employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001). When an employee is responsible for her separation of employment, TTD benefits may be denied. *Anderson,* 102 P.3d at 326; *see also Apex Trans., Inc. v. Indus. Claim Apps. Office*, 321 P.3d 630, 631 (Colo. App. 2014). In *Anderson*, the Colorado Supreme Court construed section 8-42-105(4), C.R.S., holding that termination for cause may bar temporary disability benefits. More particularly, the Court noted the statute bars "TTD wage loss claims when voluntary or for-cause termination of modified employment causes wage loss." *Anderson*, 102 P.3d at 325-326.

As found, Respondents have failed to prove by a preponderance of the evidence that Claimant is responsible for her separation of employment from the Employer. Claimant testified that after meeting with Ms. Benton to discuss her permanent work restrictions, Claimant and Ms. Benton agreed that there were no available jobs within her work restrictions. Similarly, Ms. Benton testified that she and Claimant mutually agreed that there were no available jobs within Claimant's work restrictions, and, thus, the Employer was unable to accommodate Claimant's permanent work restrictions. Accordingly, Claimant did not voluntarily resign her employment with Employer, and Claimant is not responsible for her separation of employment.

As found, Claimant is entitled temporary total disability benefits from May 6, 2015, through January 19, 2016.

ORDER

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

1. Claimant is entitled to temporary total disability benefits from May 6, 2015, through January 19, 2016.

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

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

4. If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman 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 the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at **http://www.colorado.gov/dpa/oac/forms-WC.htm.**

DATED: March 23, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-967-090-02

ISSUES

I. Whether Claimant's left shoulder injury is a compensable consequence of her November 4, 2014 admitted workers' compensation claim.

II. If Claimant's left shoulder injury is not a compensable consequence of her November 4, 2014 claim, whether Claimant established, by a preponderance of the evidence, that she sustained a compensable left shoulder injury on November 12, 2014 as a result of an alleged slip and fall in Employer's parking lot.

III. Whether Respondents have produced clear and convincing evidence to overcome Dr. Tyler's Division IME opinion that Claimant has not reached Maximum Medical Improvement ("MMI") for her injuries sustained on either November 4, 2014 or November 12, 2014.

IV. If Claimant's left shoulder condition is compensable, either as a compensable consequence of her November 4, 2014 admitted claim or as an separate independent injury, whether Respondents are liable for treatment related expenses for the left shoulder treatment, including but not limited to out-of-pocket expenses associated with Claimant's left shoulder surgery performed by Christopher Jones, M.D.

V. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment precluding her entitlement to temporary total disability (TTD) benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Jessica Lopez, Shannon Lemons, Rebecca Manuszak, and Aaron Griffen, Ph.D., the ALJ enters the following findings of fact:

Claimant's November 4, 2014 Work Related Incident and Her Prior Medical History

1. Claimant worked for Employer from August of 2013 to June 26 of 2015 as an assistant principal.

2. Claimant testified and the persuasive documentary evidence supports that on November 4, 2014, she responded to an altercation involving some students and a security guard on the Employer's educational campus. While attempting to separate the combatants, Claimant was hit from behind and knocked to the floor along with one of the students who fell on Claimant's ankle. According to the security guard on scene,

Claimant struck her head on the floor and lost consciousness for approximately thirty seconds.

3. Emergency medical technicians (EMT) were summoned to the scene and contacted Claimant who was, by the time EMT's arrived, sitting in a wheelchair. Claimant reported right ankle pain and a worsening headache. She specifically denied "dizziness, blurred vision, diplopia, chest pain, back pain, abdominal pain, pain in her right leg, left lower extremity, and bilateral upper extremities. Claimant was noted to have a Glasgow Coma Scale score of 15 and was alert and oriented to person, place, time and event.

4. Claimant was transported to Penrose-St. Francis Hospital where she was evaluated in the Emergency Room by Dr. Christopher Johnson. Claimant's loss of consciousness was noted and it was documented further that she was "amnesic to the event." Claimant reported pain in the right eye, the head, right hip, right ankle and right foot. She again specifically denied any vomiting, diarrhea, altered mentation, numbness, tingling or weakness. Claimant was provided with an aircast for a "potential sprained ankle." It was specifically noted that it was "okay" for Claimant to bear weight.

5. Claimant followed-up at Integrity Urgent Care (Integrity), Employers designated provider, on November 5, 2014. She was evaluated Edwin Baca, M.D. During this visit, Claimant reported a "moderate" headache and "intermittent" vision changes. She also reported "mild" nausea and one episode of vomiting prior to her appointment; however, she denied "current dizziness, nausea, vision changes memory loss or confusion." She had moderate ankle pain and difficulty weight bearing and walking. Claimant was given a prescription for medications and provided with a "lace up" ankle brace and crutches which, according to a November 5, 2014 "Physicians Report of Workers' Compensation Injury", she was to use 100% of the time as she was instructed to engage in no weight bearing with the right leg.

6. On November 13, 2014, Claimant returned to Integrity on a "walk-in" basis. She was evaluated by Dr. Autumn Dean for complaints of intermittent dizziness and forgetfulness and well as shoulder pain which Claimant associated with crutch use. Claimant testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident. Claimant completed a pain diagram on this date depicting burning and aching pain in the left shoulder. According to Dr. Dean's report from this date of encounter, Claimant reported that she thought her "concussion symptoms were improving, but a day or so after her last visit, she started noticing intermittent dizziness and forgetfulness again." Claimant also specifically reported that the "crutches she is using hurt her shoulder, which was injured in a previous accident."[1] Claimant was provided with a walker to use for ambulation.

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[1] Based upon Claimant's specific pain complaints and prior history of left shoulder injury/surgery, the ALJ finds Claimant's reference to "previous accident", more probably than not, meant her remote car accident occurring around 1980 wherein she injured her left shoulder and not the November 4, 2014 incident.

7. Claimant has a pre-existing history of anxiety and prior injury to the left shoulder resulting in a rotator cuff surgery. According to records from Claimant's primary care physician (PCP),Dr. Michael Yoesel, Claimant was evaluated for anxiety, likely associated with her high stress job, on April 10, 2014. During this visit, Claimant complained of "fatigue, lightheadedness, difficulty with concentration, headaches and visual disturbances. Dr. Yoesel also noted a prior 1979 left rotator cuff surgery.

8. Careful inspection of subsequent records submitted into evidence from Dr. Yoesel's office indicates that Claimant received treatment, primarily in the form of medications for her anxiety between April 10, 2014 and September 8, 2014. Claimant's anxiety symptoms improved with the use of medication and by September 8, 2014, she was denying any anxiety and/or depression. Dr. Yoesel noted that Claimant appeared "alert and cooperative" with "normal mood and affect" and with "normal attention span and concentration."

9. Claimant testified that since the November 4, 2014 incident, she has had difficulty with balance, dizziness, and her short-term memory.

Claimant's Alleged November 12, 2014 Slip and Fall and Continued Treatment at Integrity Urgent Care for the November 4, 2014 Work-Related Incident

10. Claimant testified that she fell in the parking lot of the school on November 12, 2014 as a result of her balance and dizziness issues This fall injured her left shoulder. She testified that she told Dr. Dean that she injured both shoulders during the November 4, 2014 incident and further that she fell on November 12, 2014 during her appointment on November 13, 2014. As noted above, Claimant was seen by Dr. Dean on November 13, 2014 in follow-up for injuries sustained during the November 4, 2014 incident. During this visit, Dr. Dean documented that Claimant reported left shoulder pain as a consequence of using crutches secondary to her right ankle injury. The report of Dr. Dean is devoid of any discussion/reference to a left shoulder injury occurring during the November 4, 2014 incident or a fall in Employer's parking lot occurring on November 12, 2014.

11. Claimant testified she hit her shoulder against a vehicle in the parking lot on November 12, 2014 and then landed on the parking lot surface with her outstretched arm. Claimant could not remember whether she had scrapes or bruises on her left shoulder, arm, elbow, wrist or hand when she fell against her car and then landed on the pavement with her outstretched left hand, but she testified the entire left arm hurt. Following physical examination, Dr. Dean reported the entire left upper extremity had normal appearance. Examination and testing of the entire left upper extremity revealed normal function.

12. In addition to seeing Dr. Dean on November 13, 2014, Claimant was seen for her initial physical therapy evaluation on the 13th. Similar to Dr. Dean's report, the initial physical therapy note fails to mention a fall occurring on November 12, 2014 in the parking lot which resulted in injury to Claimant's left shoulder. There is no evidence of

any fall onto a parking lot surface in the physical therapist's examination (i.e., no evidence of any scrapes, bruising or other skin changes one would expect to see of a person fell and landed on her outstretched arm as testified to by Claimant. Claimant did complain the crutches caused her discomfort and that she had a prior history of a rotator cuff tear. Nonetheless, there is no mention of falling; there is no report of a new injury the day before; and there are no examination findings consistent with Claimant's allegation of a fall injuring her left shoulder on November 12, 2014.

13. On November 21, 2014, Claimant returned to Integrity for follow-up for what she reported was "severe pain from injury received at work when I fell on crutches." Dr. Baca noted that Claimant was "using a cane now b/c she is having a great deal of pain in her left shoulder and it was worse when using the walker." According to Dr. Baca's note, Claimant was "reporting pain in her shoulder secondary to her fall. She fell onto her left shoulder she believes and had immediate pain the day of the injury." Mention is made of Claimant's prior left shoulder surgery from 1980 with indication that Claimant reported no "problems with the shoulder" following that surgery until she fell again. The report is devoid of any reference to the date of Claimant's alleged fall while using crutches.

14. Claimant completed a pain diagram dated November 20, 2014 depicting pain in the left shoulder caused by what is reported on the diagram as an "injury [occurring] at school when [Claimant] fell on crutches last week. The ALJ finds the date referenced on the pain diagram likely a documentation error as Claimant did not have a medical appointment on November 20, 2014. Rather, Claimant was evaluated on November 21, 2014.

15. On December 3, 2014, Claimant was seen in the offices of her PCP for a productive cough of one month duration. She was diagnosed with bronchitis and exacerbation of her asthma. However, she also complained of left shoulder pain during this appointment, although discussion regarding a specific cause for her left shoulder pain is not included in the record. It was noted that Claimant was using a cane in the right hand. The ALJ finds that Claimant likely held the cane in her right hand secondary to left shoulder pain.

16. On December 4, 2014, Claimant was re-evaluated by Dr. Baca who ordered an MRI of the left shoulder for "possible RCT" (rotator cuff tear). Dr. Baca noted that Claimant was to continue use of the cane and "may engage in sedentary activities only. No reaching with L (left) shoulder or arm. Regarding causation, Dr. Baca noted: " >50% probability for causation."

17. MRI of the left shoulder was preformed December 8, 2014. The MRI demonstrated what Dr. Baca described as "moderate to severe degenerative changes and rotator cuff tendonopathy, with associated labral fraying and tears.

18. On December 11, 2014, Dr. Baca reviewed the findings of the December 8,

2014, MRI with Claimant. After reviewing the MRI findings, Dr. Baca opined that there was a less than 50% chance of Claimant's shoulder injury being caused by her accident. Dr. Baca referred Claimant to Dr. Christopher Jones for orthopedic consult.

19. As Claimant's treatment with Dr. Baca progressed he clarified his opinion concerning the cause of Claimant's left shoulder condition. On January 1, 2015, Dr. Baca noted that Claimant sustained a "secondary injury" as a consequence of falling while using crutches. Consequently he noted the following regarding causation for Claimant's left shoulder condition: ">50% probability for causation; however, L (left) shoulder injury is <50% probability for causation for initial injury; however, PT (patient) fell using crutches and landed directly onto L (left) shoulder exacerbating chronic deg (degenerative) changes and causing labral tear." The ALJ infers from this causality statement that Dr. Baca does not ascribe any left shoulder injury to the November 4, 2014 incident, i.e. "initial injury." Rather, Dr. Baca's concluded that Claimant's left shoulder condition (injury) was caused by a secondary fall she experienced while using crutches which fall aggravated chronic degenerative changes in the shoulder and which caused a labral tear.

20. As noted above, Claimant previously injured her left shoulder in a car accident resulting in rotator cuff surgery. Claimant testified that her prior left shoulder injury occurred as a consequence of a car accident in 1981. She testified that she had no trouble with her left shoulder after this surgery and the shoulder had time to heal. According to Claimant, her last treatment was likely in 1981. Respondents noted at the first hearing that Claimant's shoulder surgeon noted "degeneration" and "gout" in her shoulder. Nonetheless, Claimant testified that her shoulder "didn't really hurt" much before her work accident, but it was a "12 out of ten" after. Moreover, the ALJ is unable to find record support demonstrating that Claimant obtained treatment or even complained of left shoulder pain/symptoms between 1981 and November 13, 2014.

Dr. Jones' Treatment

21. As noted above, Claimant was referred to Dr. Christopher Jones for orthopedic consult. Dr. Jones first evaluated Claimant on December 29, 2014. During this visit, Dr. Jones documented what he understood to be the events surrounding Claimant's injuries sustained on November 4, 2014. Regarding those events, Dr. Jones noted that Claimant had been "pushed into a door and struck her shoulder." He does not indicate which shoulder was struck however. Assuming Dr. Jones is referencing the left shoulder, the ALJ finds no record support, outside of Claimant's contention, for such conclusion. Nonetheless, Dr. Jones also documents that following the November 4, 2014 incident, Claimant was using crutches when she fell at "work on 11/10/14, and that is when she really feels like she re-hurt her shoulder." The reference to a date of injury occurring November 10, 2014 is inconsistent with the balance of the record evidence suggesting that Claimant fell and injured her left shoulder on November 12, 2014.

22. Dr. Jones also commented on the findings of Claimant's December 8, 2014 MRI,

noting that the MRI demonstrated "a lot of intra-articular debris consistent with possible lose chondral debris and some synovitis associated with that" along with "some tendinopathy of [the] rotator cuff and possibly a partial tear, but I do not see a full-thickness defect."

23. Regarding the cause of Claimant's left shoulder symptoms', Dr. Jones noted: "Given the mechanism of injury, this could certainly be a traumatic injury with impaction of the humeral head onto the glenoid. However, it could also be all chronic with some exacerbation of her previously existing injury." Dr. Jones elected to proceed conservatively by injecting the shoulder with a 2:2:1 solution of Marcaine, Lidocaine and Depo-Medrol.

24. By January 19, 2015, it was evident Claimant had failed conservative treatments such as physical therapy and injections. Dr. Jones requested surgical authorization from Respondents on January 30, 2015. Respondents denied the request on February 11, 2015.

25. Claimant testified to having two surgeries on her left shoulder following her November fall while using crutches. The first surgery took place on February 11, 2015, and the second occurred in March of that year. The second surgery was necessary to correct a "popeye" deformity in Claimant's left biceps caused by the first surgery. During Claimant's February 11, 2015 procedure it was discovered that she had pseudo gout. Claimant's surgery was covered by her private health insurance although she had out-of-pocket costs for the surgery and subsequent physical therapy.

Maximum Medical Improvement, Dr. Lindberg's Evaluation, Dr. Hall's Evaluation and Dr. Tyler's Division Independent Medical Examination (DIME)

26. Dr. Baca placed Claimant at maximum medical improvement (MMI) without permanent impairment on March 3, 2015. At the time he placed Claimant at MMI, Dr. Baca noted she was not working secondary to her left shoulder condition. Claimant testified she missed work from February 11, 2015 until March 20, 2015, as a result of her left shoulder surgery. Dr. Baca's opinion concerning causality of the left shoulder condition/injury was unchanged from his January 1, 2015 opinion.

27. Respondents sought an opinion from Dr. James Lindberg regarding the cause of Claimant's left shoulder condition. Dr. Lindberg examined Claimant on May 5, 2015 after which he opined that he did not believe Claimant had an injury to her left shoulder as a result of the November 4, 2014 incident. He also concluded that there were multiple inconsistencies surrounding Claimant's alleged second injury stemming from a fall on or about November 12, 2014.

28. Claimant sought an opinion from Dr. Timothy Hall. Dr. Hall evaluated Claimant on June 19, 2015. Dr. Hall concluded that while Claimant had pre-existing degenerative changes in the left shoulder, the two events in November, i.e. the original incident of November 4, 2014 and particularly the November 12, 2014 fall caused those changes to

become symptomatic. But for the November 12, 2014 fall, Dr. Hall opined that Claimant "would not have gone to surgery." Consequently, he opined that Claimant's left shoulder condition/injury was a direct result of the work-related event of November 12, 2014. Dr. Hall also felt that Claimant needed additional work-up for ongoing symptoms related to her concussion. According to Dr. Hall's independent medical examination (IME) report, Claimant needed referral to a neuro ophthalmologist and testing/treatment for ongoing cognitive complaints. The ALJ credits the opinions of Dr. Hall to find that Claimant's use of crutches for her right ankle injury sustained during the November 4, 2014 incident, more probably than not, aggravated the pre-existing degenerative changes in her left shoulder resulting in her symptoms and subsequent need for treatment, including the surgeries preformed by Dr. Jones.

29. Claimant requested a Division Independent Medical Examination (DIME) with Dr. John Tyler. Dr. Tyler completed the requested DIME on July 24, 2015. Dr. Tyler concluded: "[t]his patient is not and has never been at a point of maximum medical improvement. I find it insulting, to be honest with all parties, that this patient was ever thought not to have an injury to her left shoulder." Claimant was only on crutches because of her work injury. While she may have had an underlying shoulder condition, this fall exacerbated that condition and created a need for surgery. "Whether or not this patient had previous trauma to the shoulder, that trauma went back nearly 34 years ago and was asymptomatic until this event."

30. Dr. Tyler also opined that Claimant was not at MMI for her head injury, indicating Claimant should be seen by a neuro optometrist. Dr. Tyler believes Claimant may have a mid-line shift brought on by the trauma of November 4, 2014.

31. Dr. Tyler further opined that Claimant should be evaluated by a psychologist for emotional counseling stemming from the fact that she had become a victim of a violent altercation between a student and a security guard that she unfortunately became entangled in.

The Testimony of Claimant's Co-Workers

32. Aaron Griffen, Ph.D. testified Claimant did not report a left shoulder injury as a consequence of a fall in the parking lot to him on November 12, 2014, the date Claimant asserts it occurred. This contradicts Claimant's report that she immediately told Dr. Griffen of the injury. Had Claimant reported an injury, Dr. Griffen testified he would have followed standard protocol, i.e. provide the employee with medical aide, contact Risk Management, and complete an accident report. Dr. Griffen testified that he did not learn about the alleged November 12, 2014 injury until February of 2015 when Claimant finally reported the injury.

33. Claimant's report of an injury on February 10, 2015 for the alleged November 12, 2014 fall came after Dr. Griffen counseled her in December of 2014 and January of 2015 on her need to improve her work performance. Claimant was working under restricted duty when Dr. Griffen spoke with her regarding her work. Claimant was

missing crucial deadlines necessary and important to the employer and those it served. She was also missing meetings necessary to conduct the business of the school district.

Dr. Griffen documented the problems in a running memorandum of his discussions with Claimant regarding her work performance. Dr. Griffen removed some of Claimant's duties in January of 2015 because Claimant's failure to meet mandatory deadlines resulted in compliance issues for critical testing. Claimant was also counseled on her failure to respond appropriately to a subordinate challenging her authority. Finally, Claimant was warned to cease gossiping; she was a leader of the employer's organization and it was important to not undermine the authority structure given the nature of the work (education). On January 15, 2015, Claimant was told she would be put on a corrective action plan to bring her into compliance with the ten standards set by the state for administrators like her.

34. Dr. Griffen met with Claimant to finalize her corrective action plan on February 6, 2015 (four days before Claimant reported the November 12, 2014 alleged fall at work). The corrective action plan was signed on February 9, 2015, one day before Claimant filed her report of a November 12, 2014 work injury. In the corrective action plan, Claimant is put on notice that "Failure to meet the corrective actions mentioned above will result in further disciplinary actions that may lead to termination of your contract."

35. Claimant testified that she told Dr. Griffen she could not meet her duties because of her worker's compensation claim. Claimant returned to work following her surgery on March 20, 2015. She testified that she moved slowly as a result of her injuries. It "took [her] a lot longer to do things because [her] memory isn't that good anymore. So it took [her] twice as—probably three times as long to get something done. And [she] was so slow, it was hard." She also testified that she had difficulty remembering things, but later testified that she was never told the meetings she missed were mandatory. Finally she testified that she did not "[fail] to show up for the ACT exam," but instead had informed the principal she had a doctor appointment she "had to go to."

36. Dr. Griffen credibly testified to the repeated failure of Claimant to meet identified goals in the corrective action plan. Furthermore, Claimant violated Employer policies/procedures regarding student discipline by extending a delayed suspension consequence to a student. Claimant suggested that she inadvertently reverted back to how things were done at her previous employer as an explanation for her action concerning the extension of a delayed consequence.

37. Claimant's employment was terminated at the end of the school year in May of 2015.

38. Based upon the evidence presented, the ALJ finds Claimant's suggestion that she was not a fault for her contract not being renewed unpursuasive. The evidence presented, demonstrates that Claimant's employer went to great lengths to work with her in an effort to ensure her continued success at work. The ALJ is persuaded that Dr. Griffen asked what specific duties Claimant could not meet, since claimant had been

working in a modified job approved by her physician, Dr. Baca. Thereafter some of Claimant's work responsibilities were taken from her. Furthermore, the record evidence supports that Claimant was provided with a support person to help her meet her remaining responsibilities. Dr. Griffen reviewed the specific duties Claimant was expected to perform at which point Claimant stated she did not agree to the corrective action plan and would go to her attorney. Claimant left school after the corrective action plan without permission and indicated she was going to see her attorney. The February 6, 2015 meeting is memorialized in Dr. Griffen's memorandum.

39. Based upon the testimony presented, the ALJ finds that Claimant ascribes the problems with her job performance to the effects of a closed head injury. Claimant's testimony that she did not know that the meetings were mandatory is unconvincing. Her suggestion that the effects of a closed head injury explain her failure to attend meetings, complete deadlines in a timely fashion, adequately prepare and attend critical testing and violating district discipline policies is equally unpursuasive given Claimant's position, the inconsistencies in her testimony and length of her employment with the school district..

40. Based upon the evidence presented, the ALJ is persuaded that Claimant exercised a degree of control over her work performance and otherwise committed multiple volitional acts that directly lead to the termination of her employment.

41. As noted above, after the corrective action plan was put into place, Claimant reported her November 12, 2014 fall. Claimant indicated that the fall was witnessed by Jessica Lopez. She also indicated that she notified Dr. Griffen of the injury on November 12, 2014, the date it allegedly occurred. As noted above, Dr. Griffen contradicts Claimant's assertion. At hearing Claimant's amended her statement that Jessica Lopez witnessed the fall testifying that she told her about it. She also testified that she could not remember whether her statement about reporting a November 12, 2014 injury to Griffen was correct.

42. Jessica Lopez testified that she did not witness the fall. Rather, Ms. Lopez testified that Claimant told her about the second fall on the day it happened of the next day. According to MS. Lopez, Claimant reported to her that she fell and everything was alright. In response to Ms. Lopez' inquiry as to whether she needed to report an injury, Claimant replied "no", that she was fine a little bumped and bruised, but nothing more than that. As noted above, no physical indications of injury, such as bruises, contusions or scrapes are documented in either the physical therapy or Dr. Dean's notes from November 13, 2014, the day after the alleged fall.

43. Shannon Lemons testified that when Claimant returned to work after the November 4, 2014 incident, a student came into her office early in the morning (between 8:00 a.m. and 8:30 a.m.) asking for a wheelchair. Ms. Lemons asked the student why he needed the chair and he replied he needed it for Claimant. Ms. Lemons responded with the student to Claimant's location. Ms. Lemons found Claimant in a

doorway hunched over her crutches. Ms. Lemons knew Claimant had trouble with her lungs and Claimant was breathing heavily as she leaned over her crutches[2].

44. Ms. Lemons testified that she had Claimant sit in the wheelchair and that she wheeled Claimant to her (Claimant's) office. Claimant indicates she needed the wheelchair after lunch on the 12th. Ms. Lemons indicated she responded with the wheelchair first thing in the morning as Claimant arrived at work. It was before lunch, according to Ms. Lemons. Ms. Lemons offered to help her the rest of the day. Ms. Lemons testified that Claimant used the wheelchair prior to lunch because Claimant called her and asked to be wheeled out to her vehicle for lunch. When claimant returned from lunch, Claimant then used her cell phone to call Ms. Lemons to meet her at her car so she could be wheeled from the parking lot back into school. Ms. Lemons testified there was no fall in the parking lot at lunch time, as she wheeled Claimant to her car, helped her get into the vehicle and helped her get her seatbelt on. When claimant returned from lunch (the time which Claimant reports she fell in the parking lot), Ms. Lemons met her at her car. According to Ms. Lemons, Claimant was still in her vehicle when she arrived with the wheelchair and rolled her into the building. Ms. Lemons witnessed her arrival after lunch and testified there was no fall in the parking lot after lunch as Claimant asserts.

45. Ms. Lemons was asked whether Claimant reported a fall in the parking lot when she arrived at school, after Ms. Lemons brought her a wheelchair. Ms. Lemons testified Claimant never reported any fall in the parking lot to her. Ms. Lemons, a health worker, testified Claimant was having trouble breathing, that Claimant is an asthmatic and that she helped Claimant with her nebulizer. Ms. Lemons believed Claimant's need for assistance upon arrival to school on or around November 12, 2014 were due to trouble breathing, as there no report or signs of an injury consistent with a fall. At the end of the school day, Ms. Lemons testified she wheeled Claimant out to her car around 3:15

46. After Claimant reported the November 12, 2014 injury to Employer on February 10, 2015, Claimant approached Ms. Lemons and complained about the Insurer's denial of her left shoulder claim. Ms. Lemons responded she was unaware of Claimant hurting her shoulder. Later, Claimant went to Ms. Lemons again about her denied claim. Claimant told Ms. Lemons she had reported a second injury to her. Claimant stated to Lemons, "I hope you don't get in trouble for this." Ms. Lemons was concerned about Claimant's statement, so she reported it to her supervisor, Rebecca Manuszak. Ms. Manuszak was the District Nurse for Employer at the time. Both Ms. Lemons and Ms. Manuszak no longer work for Employer and were not employed by the school district when they testified. Like Ms. Lemons, Ms. Manuszak was present when Claimant was injured on November 4, 2014. She stayed with Claimant until paramedics arrived.

47. Ms. Manuszak was also aware of Claimant returning to work after the November 4, 2014 admitted work injury. Ms. Manuszak was aware that Ms. Lemons provided wheelchair assistance to Claimant when she returned to work. According to Ms.

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[2] The medical records from the office of Claimant's PCP support a conclusion that Claimant was struggling with respiratory conditions and an unspecified exacerbation of her pre-existing asthma.

Manusazak, Ms. Lemons told her that Claimant had a difficult time ambulating on her crutches due to her asthma. Ms. Lemons reported to Manuszak that a student saw Claimant in distress and that Ms. Lemons brought a wheelchair to Claimant and wheeled Claimant around because of Claimant's asthma. Ms. Manuszak saw Claimant later that day. Claimant reported to Ms. Manuszak it was too difficult to use the crutches because of her asthma. Ms. Manuszak believes Ms. Lemons was notified of Claimant's distress by the student as Claimant arrived to work, not after lunch as testified to by Claimant.

48. Ms. Manuszak testified that Ms. Lemons told her about Claimant coming to her office and asking her to support Claimant's allegation that she (Claimant) reported a second injury to Ms. Lemons in November of 2014. Ms. Manuszak characterized Claimant's actions as a threat to Ms. Lemons to "change her story" or "her job would be in jeopardy." Ms. Manuszak testified Ms. Lemons was very upset about Claimant's statements. Ms. Manuszak noted neither she nor Ms. Lemons were aware of any second fall in November of 2014. According to Ms. Manuszak, Claimant did not report any second fall to her and did not report a second fall to Ms. Lemons. Ms. Manuszak testified Ms. Lemons was upset because Claimant suggested that she (Ms. Lemons) would be in trouble because she failed to report Claimant's second injury at the time it allegedly occurred. Ms. Manuszak reported Claimant's statements to Claimant's supervisor's assistant and to the Risk Manager for Employer. She also went to Claimant's supervisor directly and indicated she would not tolerate an employee threatening Ms. Lemons. Ms. Manuszak testified she did not believe there was a second fall; she remembers Claimant coming into the clinic and reporting her shoulder began hurting when she was dressing at home one day. Claimant reported a "dislocation" of the left shoulder while "getting dressed for school" on January 21, 2015 according to records from Integrity. According to Dr. Baca's report from this date, Claimant's report of dislocation was the second time her shoulder had dislocated. Claimant testified she reduced the dislocation herself based on what she had seen on television.

49. Claimant testified that she believed Ms. Lemons knew about her injury in the parking lot when she mentioned to Ms. Lemons that she (Ms. Lemons) may get in trouble for not handling things right away. Based upon the evidence presented, the ALJ finds Claimant's explanation of the exchange between her and Ms. Lemons unconvincing. The totality of the evidence presented concerning this issue persuades the ALJ that Claimant's decision to repeatedly approach Ms. Lemons about the denial of the November 12, 2014 claim coupled with the statement suggesting that Ms. Lemons may be in trouble for failing to report the claim constituted a veiled threat to get Ms. Lemons to report that Claimant had actually fallen in an attempt to bolster the claim.

50. Based upon the evidence presented, the ALJ finds Claimant's allegations surrounding her alleged fall on November 12, 2014 inconsistent. When Claimant finally does report a November 12, 2014 injury on February 10, 2015, she provides details that are inconsistent with the testimony of her co-workers and her own later testimony. At hearing, Claimant reported she fell after getting dizzy while trying to use her crutches to

get from the parking lot to the school. Claimant told Dr. Lindberg she slipped on ice. Clamant told the Division IME, she became dizzy and fell. In her initial report of injury on February 10, 2015, Claimant asserts an employee (Ms. Lopez) witnessed the fall and that she reported the fall to her supervisor (Dr. Griffen) on the date of alleged injury, November 12, 2014. However, these reports are contradicted by both Ms. Lopez and Dr. Griffen.

51. Based upon the totality of the evidence presented, the ALJ finds the reports and testimony of Claimant concerning an alleged fall occurring on November 12, 2014, inconsistent, unreliable and unpursuasive. The evidence presented persuades the ALJ that Claimant has failed to establish by a preponderance of the evidence that she actually fell in Employer's parking lot injuring her left shoulder on or about November 12, 2014.

Dr. Lindberg's Testimony

52. Dr. Lindberg testified that there was no initial injury to the left shoulder from the November 4 fall. He testified further that there was no medical evidence to support a fall on November 12, 2014.

53. Dr. Lindberg testified that Claimant has gout or other crystalline disorder that is unrelated to work. Dr. Lindberg testified that "gout can be caused by the — exacerbated by trauma" He also testified that a gout flare-up can be caused by trauma. He testified that he had no knowledge of any of left shoulder symptoms between Claimant's car accident in the 80s, and her injury in November 2014. Dr. Lindberg's hypothesis as to why Claimant had not previously been prescribed medication for gout (if she in fact did have it) was that "[i]It hadn't reached a crescendo point in any joint."

54. According to Dr. Lindberg, the dislocations, which Claimant reports are more likely the cause of her flare ups of left shoulder pain rather than the November 4, 2014 or alleged November 12, 2014 work injuries. Dr. Lindberg agreed with Dr. Baca, that Claimant's left shoulder condition is unrelated to work and should be cared for under her health insurance. Further, Dr. Lindberg does not believe any of Claimant's continuing complaints/symptoms resulted from any work related condition with the employer.

Dr. Baca's Testimony

55. Dr. Baca testified that his own medical report from the initial visit documents three different mechanisms of injuries for Claimant's injury on November 4, 2014. Dr. Baca's November 5, 2015 report begins by stating that Claimant "hit her head on a door knob and had loc for 10+ seconds." A few lines down, the report indicates that Claimant fell and hit the left side of her head on the door, not the door knob. The final page of Dr. Baca's report states that the Claimant hit the *right* side of her head on the door, fell to the floor, and then hit the left side of her head and right side of body on the floor.

56. Dr. Baca testified that he did not notice any concussive or post-concussive

symptoms when he first examined Claimant. However, he also testified that assessment of her post-concussive or concussive symptoms was difficult due to her "emotional lability, anxiety, and stress." He also testified that if Dr. Tyler was correct, Claimant would require additional evaluation and treatment.

57. As noted, the initial emergency room report notes Claimant was unconscious for around approximately 30 seconds, and she was "amnesic" to the event. While Claimant had no symptoms of concussion on re-evaluation in the ER, the provider noted a concussion as "always possible" for which he recommended monitoring of symptoms and close follow-up with her PCP. Dr. Baca also reported a concussion as a work related medical diagnosis when he examined Claimant on November 5, 2014. As found above, that examination revealed moderate headache and intermittent vision changes as well as an episode of vomiting. The ALJ finds these symptoms consist with concussion.

58. Claimant was still complaining of "intermittent lightheadedness and intermittent headaches" three days after her initial injury on November 4, 2014. She complained of "intermittent dizziness and forgetfulness" on November 13, 2014. Despite these facts, Dr. Baca testified he did not notice any post-concussive symptoms. Dr. Baca's testimony in this regard is not persuasive.

59. Based upon the evidence presented, the ALJ finds that Claimant likely suffered a concussion as a consequence of the November 4, 2014 incident. While the records reveal inconsistencies regarding whether Claimant injured her left shoulder in the incident occurring November 4, 2014, those records repeatedly document that Claimant hit her head, lost consciousness and injured her right ankle requiring use of crutches.

60. Dr. Baca felt that Claimant's left shoulder complaints were not "consistent at all with a gouty arthritis flare."

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim*

Appeals Office, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding her alleged November 12, 2014 fall and the basis for termination of employment are inconsistent, unreliable and substantially contradicted by the more persuasive testimony of Ms. Lemons, Ms. Manuszak and Dr. Griffen. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Compensability of the Left Shoulder Condition

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the

employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of 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. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989). The question for determination here is whether Claimant's left shoulder symptoms and need for treatment arise out of her employment and are sufficiently connected thereto to result in a finding that her alleged injuries/condition is compensable.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges, in part, that she sustained an injury to her left shoulder as a consequence of a fall in Employer's parking lot on or about November 12, 2014. As found above, the ALJ is not convinced that Claimant actually fell as she claims. As the ALJ concludes that Claimant likely did not fall, there is no nexus between Claimant's left shoulder condition and that fall. While the evidence presented does not support a conclusion that Claimant sustained a left shoulder injury as a consequence of a fall on November 12, 2014, the ALJ is persuaded that Claimant's left shoulder condition is nonetheless a compensable consequence of her admitted injuries stemming from November 4, 2014 as her use of crutches likely aggravated pre-existing degenerative changes in the shoulder to produce symptoms.

G. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, where the industrial injury "aggravates, accelerates, or combines with" a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial*

Commission, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). In this case, the totality of the persuasive evidence supports a conclusion that Claimant suffered from asymptomatic pre-existing degenerative changes in the left shoulder prior to November 4, 2014. Following injury to her right ankle when a combative student fell on top of it on November 4, 2014, Claimant was non-weight bearing regarding the right leg and was directed to use crutches 100% of the time according to the provider's notes from Integrity. Within eight days of that directive, Claimant returned to Dr. Dean on a walk-in basis complaining that use of the crutches was hurting her left shoulder that had been injured previously. Consequently, Claimant's left shoulder became symptomatic as a consequence of the November 4, 2014 industrial injury. Simply put, Claimant's use of crutches for her November 4, 2014 work injury aggravated her asymptomatic left shoulder condition resulting in pain and the need for treatment, including the surgeries performed by Dr. Jones. Such injuries are compensable. *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo.App. 1986).

Overcoming Dr. Tyler's DIME Opinion Concerning MMI

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

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

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.

> The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

J. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). The instant case involves complex medico-legal questions concerning the cause of Claimant's left shoulder condition and her need additional treatment associated with her left shoulder and persistent post concussive symptoms. Here the DIME report of Dr. Tyler reflects that he reviewed medical records from the various providers who evaluated and/or treated Claimant. The DIME considered the opinion of Dr. Lindberg and did not change his opinion regarding MMI. To the contrary, Dr. Tyler rather aggressively, outlined his disagreement with the conclusion reached by both Dr. Baca and Dr. Lindberg that Claimant did not suffer a compensable injury to her left shoulder. While Dr. Tyler engages in unnecessary rhetoric, the ALJ finds and concludes that his opinions are supported by the record evidence presented. Claimant did fall and lose consciousness on November 4, 2014 which has seemingly affected her vision. While the ALJ is not convinced that her claimed cognitive symptoms adequately explain her poor work performance, Claimant has emotional lability which may emanate from a closed head injury and which needs to be treated with counseling per Dr. Tyler. She also clearly was directed to use crutches, which as noted above, likely aggravated an underlying preexisting arthritic condition resulting in the need for treatment, including surgery. To the extent that Dr. Tyler opinions concerning MMI diverge from those expressed by Dr. Baca and Dr. Lindberg, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Respondents have failed to prove that Dr. Tyler's opinion regarding MMI was highly probably incorrect as stated in the July 24, 2015 DIME report.

K. To the extent that Dr. Tyler causally relates Claimant's left shoulder condition and need for treatment, including surgery to a alleged fall occurring on or about November 12, 2014, the ALJ concludes that Respondent's have overcome that opinion by clear and convincing evidence for the reasons outlined above.

Medical Benefits

L. Claimant bears the burden of establishing entitlement to medical treatment

See Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

M. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As found, Claimant's need for left shoulder surgery is causally related to her November 4, 2014 admitted claim.

N. "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 at least two physicians from which list the injured employee may select the physician who attends her. In this case, Claimant was referred to Dr. Christopher Jones for evaluation for her left shoulder by Dr. Baca, Claimant's ATP. Dr. Jones is therefore within the chain of referrals. Dr. Baca requested preauthorization for surgery from Respondents and was promptly denied. It was at this time that Claimant proceeded with left shoulder surgery out of necessity. Claimant underwent two separate surgeries on her left shoulder that were covered by herself and her private insurance. Claimant paid $1,000 out of pocket already and there is still an outstanding $800 bill pending with Orthopedic Rehabilitation Associates. As Claimant's left shoulder injury is found to be compensable, Respondents are liable to reimburse Claimant's out-of-pocket expenses of $1,000 and to pay all reasonable and necessary outstanding medical expenses related to treatment of the left shoulder.

Responsibility for Termination

O. Because Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42 103(1)(g), C.R.S. apply. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58

P.3d 1061 (Colo.App. 2002). Simply put, if claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

P. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO April 9, 2008). "Fault" can include poor job performance, but Claimant is not at fault if the termination is due to claimant's physical or mental inability to perform assigned duties, *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999). In this case, Respondents assert that Claimant was terminated for cause at the end of the academic school year in May 2015 for failure to meet her goals set out in her corrective action plan. Claimant counters that she is not responsible for her termination because she was mentally unable to perform her due to the effects of a closed head injury caused by the November 4, 2014 incident occurring at work. As found above, the ALJ is not persuaded by Claimant's assertion. Here, the evidence supports a conclusion that Claimant knew what was required of her to maintain her employment. She was warned, put on a corrective action plan and given all the tools necessary to do her job. Nonetheless, she continued to miss meetings without a reasonable excuse, she failed to perform important functions of her job, again without reasonable explanation and she directly disregarded the policies of the disciplinary policies of the employer by extending to delayed consequence to a student under suspension. In short, Claimant took voluntary acts that caused the termination of her employment. Accordingly, Claimant's claim for TTD benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim from benefits arising out of a fall allegedly occurring on or about November 12, 2014 (W.C. No. 4-974-447-02), is denied and dismissed.

2. Claimant's left shoulder condition and subsequent need for treatment is a

compensable consequence of her November 4, 2014 admitted injury. (W.C. No. 4-967-090-02)

3. Respondents shall pay for all reasonable, necessary and related medical expenses to cure and relieve the Claimant from the effects of her left shoulder condition, including the treatment/surgery provided by Dr. Jones. Respondents shall also reimburse Claimant for out of pocket expenses associated with Dr. Jones' surgeries.

4. Respondents request to set aside the DIME opinion of Dr. Tyler regarding MMI is denied and dismissed.

5. Claimant's request for TTD benefits is denied and dismissed.

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.

DATED: March 30, 2016

/s/ Richard M. Lamphere

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

ISSUES

The issues presented for determination were as follows:

- Whether the Respondents have proven no industrial injury occurred thereby allowing them to withdraw their General Admission of Liability;

- If the Claimant sustained an industrial injury, whether Claimant's current symptoms are causally related to the injury; and

- Whether Claimant is entitled to travel expense reimbursement for travel to medical appointments.

- The Claimant withdrew the issue pertaining to the surgical recommendation and reserved it for future determination.

FINDINGS OF FACT

1. Claimant worked for the Employer for approximately five years as an "auto catcher" which involved handling shingles. On November 5, 2014, Claimant worked the night shift. At around 2:20 a.m., the Claimant bent down on one knee to look at chains and bundles of shingles coming down a conveyor in an effort to troubleshoot some jamming that had been occurring on his shift. As he arose from the kneeling position, he struck the right side of his head on a machine. He testified that he heard a pop and experienced immediate pain.

2. He reported the incident to his supervisor, Alejandro Jimenez, and initially declined treatment, but eventually sought medical treatment at the emergency room later that morning.

3. Jimenez recalled that Claimant appeared to be in pain after the incident. He acknowledged that a forklift driver told him about the Claimant's incident.

4. The emergency room (ER) record from North Suburban documented that Claimant hit his head on a machine at work around 2:30 a.m. The ER physician examined the Claimant and apparently detected no sign of the patient hitting his head, but Claimant did complain of neck pain. The ER physician noted there was tenderness in the left lateral neck but no actual sign of the patient hitting his head. The claimant was given Morphine and Vicodin. An x-ray of his neck was reported as normal. The ER physician diagnosed Claimant with a cervical strain and recommended that he follow up

with the occupational health physician. Claimant was released with prescriptions for Norco and Valium.

5. Claimant testified he was wearing a bump cap when he hit his head which could have alleviated or prevented immediate outward signs of a contusion on his head.

6. Claimant then began receiving treatment primarily at HealthOne Occupational Medicine with Dr. Frederick Scherr beginning on November 6, 2014. Claimant completed a HealthOne questionnaire on November 6, 2014. The questionnaire does not ask a patient about his history of symptoms related to a specific body part other than in generic terms such as "sprains or strains" and Claimant did check the box marked "bone, joint or spine problems" in response to a question about his past medical history.

7. During his initial evaluation of the Claimant on November 6, 2014, Dr. Sherr observed a small contusion on the right side of Claimant's head, which supports Claimant's reported injury. Dr. Scherr diagnosed a post head injury and contusion with cervical strain. Dr. Scherr continued treating Claimant for his injury of November 5, 2014 and referred claimant to Dr. Samuel Chan for treatment.

8. Claimant had a cervical spine MRI on January 13, 2015. The MRI showed no evidence of trauma and no acute abnormalities. Specifically, the radiologist noted as follows: "No evidence of trauma. No acute abnormality." The MRI showed multilevel degenerative changes with a diffuse disc bulge and mild to moderate neural foraminal narrowing on the right and minimal foraminal narrowing on the left.

9. On February 16, 2015, Dr. Chan opined that Claimant's MRI results showed a disc bulge at the right side of C6-7 which is contralateral to the Claimant's clinical presentation of left sided symptoms.

10. On April 20, 2015, Dr. Chan indicated that Claimant has not received relief from any of the treatment (physical therapy, chiropractic, and facet injections) he has received. Dr. Chan opined that due to the lack of response to treatment Claimant's symptoms "were most consistent with myofascial type complaints." Dr. Chan recommended follow up with an active exercise program.

11. On June 27, 2015, Dr. Chan performed an EMG test on Claimant which returned a normal result.

12. On June 30, 2015, Claimant followed up with Dr. Bryan Pereira for a neurosurgical consultation. Dr. Pereira noted that Claimant's MRI showed significant neuroforaminal narrowing at C6-7 which he felt was consistent with Claimant's reported symptoms. Dr. Pereira recommended a C6-7 anterior discectomy and fusion surgery.

13. On July 13, 2015, Dr. Chan opined that Claimant's pain was out of proportion from what one would expect from a relatively mild injury. At that time, Claimant had subjective pain complaints without a significant amount of objective findings. Dr. Chan felt that Claimant's MRI did not reveal any significant findings. Dr.

Chan recommended a psychological evaluation before Claimant undergoes any further invasive procedures such as surgery.

14. The Claimant has had neck symptoms that pre-date the November 5, 2014 work incident. On October 31, 2014, Claimant treated with Dr. William Oligmueller and complained of neck pain on the left side of his head and numbness into his left arm. The record states that Claimant was on short term disability, and unable to work due to the pain (which was apparently inaccurate because Claimant was working full duty and full time). Claimant had completed a recent course of steroids in September 2014. Claimant reported that recent physical therapy visits had increased his neck pain. Dr. Oligmueller reviewed a cervical spine radiology report that was pertinent for foraminal stenosis at the base of Claimant's neck. Dr. Oligmueller recommended a consultation with a neurosurgeon and he prescribed Neurontin for pain.

15. On October 21, 2014 Claimant reported to his physical therapist that he had accidentally hit his head on a hard piece of equipment at work several months earlier. He reported that he felt immediate pain radiating into his neck radiating into his left arm/wrist and shoulder blade.

16. During the hearing, the Claimant testified that following the November 5, 2014 work incident, his pain has intensified and feels different than it did before. He also testified that previously his symptoms would wax and wane whereas now they are more constant. The ALJ finds Claimant's testimony generally credible although the medical records do document some subjective complaints out of proportion with objective findings and Claimant has been a poor historian at times.

17. Claimant has had various treatment including medications, an epidural steroid injection and acupuncture. He has improved somewhat but Dr. Scherr indicated Claimant was not at maximum medical improvement because Claimant's pre-injury state was "pain free." The ALJ acknowledges that Dr. Scherr's characterization of Claimant's pre-injury state is inaccurate, but the ALJ cannot find that Claimant deliberately misled Dr. Scherr into adopting that belief.

18. Dr. Kathy D'Angelo performed an independent medical examination of the Claimant and reviewed his medical records at the request of Respondents. She issued a report wherein she opined that Claimant's ongoing symptoms are long standing, pre-existing, and unrelated to his "alleged 11/5/2014 injury."

19. Dr. D'Angelo testified that Claimant's symptoms were chronic because he had reported neck pain to medical providers in the past. She opined that Claimant's symptoms are a natural progression of his longstanding chronic medical condition, and that he needed no medical treatment as a result of any incident that allegedly occurred at work on November 5, 2014. She also stated that if the Claimant hit his head he could have maybe suffered an exacerbation of his symptoms but that his increased symptoms would have resolved within 6-8 weeks maximum.

20. Claimant obtained an independent medical examination with Dr. Barton Goldman who on October 16, 2015, examined the Claimant in addition to reviewing the medical records. Dr. Goldman opined that when Claimant struck his head at work, Claimant suffered an aggravation of his pre-existing condition, primarily soft tissue and facet problems. Dr. Goldman opined that Claimant suffered a strain and a myofascial pain condition and secondary facet dysfunction. Dr. Goldman explained that the mechanism of injury was minor but that psychosocial factors have now entered the picture causing delayed recovery. Dr. Goldman believes physical therapy, including pool therapy, and a consult with Dr. Carbaugh would be the appropriate next steps. He is against the surgery recommended by Dr. Periera.

21. Dr. Goldman testified that the most current findings upon examination are still consistent with the mechanism of the injury that occurred November 5, 2014. His examination of claimant in October, 2015 led him to conclude that claimant's injury of November 5, 2014 caused the symptoms that he saw upon his examination.

22. Dr. Goldman, however, agreed that Claimant's MRI findings were typical degenerative findings that are seen in more than 50% of human beings over the age of 30 and the findings do not reveal any objective information about the source of Claimant's pain.

23. In January 2015, the Claimant experienced an increase in his neck pain when he cleared snow from the front wheels of his car. The Claimant's pain subsided and returned to its usual level shortly after this incident.

24. Dr. Goldman opined, and the ALJ agrees, that the snow removal incident in January 2015 caused a temporary exacerbation of Claimant's symptoms. This event does not represent a subsequent intervening event sufficient to sever the causal connection between Claimant's injury and his symptoms.

25. The Respondents filed a General Admission of Liability on January 14, 2015, and again on April 22, 2015, both of which include admissions of liability for the treatment Claimant received to his neck.

26. The Respondents have failed to prove that Claimant did not sustain an industrial injury, including an aggravation of his pre-existing neck condition, when he struck his head while in the course and scope his employment. The ALJ finds the opinions of Dr. Goldman more persuasive than those of Dr. D'Angelo.

27. Up until April 2015, Claimant received a ride directly from work to his medical appointments. Claimant lived in Gill, Colorado at that time and his appointments were Thornton, Colorado. Claimant's wife drove from their home in Gill to Thornton to pick Claimant up from his appointments and drive him to their home.

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. Under § 8-43-201, C.R.S., the Respondents bear the burden of proving that Claimant did not sustain a work-related injury on November 5, 2014. Respondents have failed to meet their burden. The credible evidence shows that on November 5, 2014 Claimant hit his head on a motor as he described. The ALJ finds Dr. Goldman's opinions persuasive that Claimant suffered an aggravation of a pre-existing condition and required medical treatment to cure and relieve him of the effects of the injury. Respondents are, therefore, not permitted to withdraw the GAL. The ALJ rejects Dr. D'Angelo's conclusions as they rely heavily on her opinion that Claimant lied concerning his pre-existing neck problems and the injury itself. The ALJ disagrees with Dr. D'Angelo's assessment of Claimant's credibility and with her overall opinions concerning whether Claimant sustained a compensable injury. As found above, Claimant is a poor historian and has had difficulty explaining his symptoms, but his lack of sophistication does not disprove that he hit his head at work on November 5, 2014 and that medical treatment was necessary.

5. As an alternative to withdrawing their General Admission of Liability, the Respondents seek an order finding that Claimant's current condition is not causally related to his work injury. Although not presented as a medical benefits issue, the practical effect of such a finding would be a *de facto* determination of maximum medical improvement (MMI). *See In re Claim of Bruno*, 4-947-316-01 (ICAO July 31, 2015). Respondents' admissions of liability include treatment for Claimant's neck and

temporary disability payments due to work restrictions related to Claimant's neck. In addition, no authorized treating physician has placed the Claimant at MMI. The ALJ cannot now determine that Claimant's ongoing neck complaints are no longer causally related to his injury without implicitly finding that he reached MMI.

6. 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.* The only specific treatment that Respondents have denied is the surgery recommended by Dr. Pereira which Claimant decided not to pursue and not to litigate before this ALJ. As such, the Rule 16 denial stands.

7. Pursuant to WCRP, Rule18-6(E), Claimant is entitled to reasonable and necessary expenses for travel to and from medical appointments at 53 cents per mile. If Claimant has not already complied with Rule 18-6(E) by submitting a request to the Insurer showing the dates on which his wife picked him up from his medical appointments, he shall do so and the Insurer shall reimburse Claimant the travel expense at 53 cents per mile roundtrip from his home in Gill, Colorado to the medical appointments.

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ORDER

It is therefore ordered that:

1. Respondents are not permitted to withdraw their General Admission of Liability. As such, Claimant suffered a work injury on November 5, 2014 when he struck his head and experienced neck pain.

2. Claimant's current condition remains causally related to the injury of November 5, 2014.

3. Respondents are liable for travel expenses as concluded in paragraph 7 above.

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 23, 2016

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the Claimant sustained an injury in the course and scope of his employment on April 14, 2014, and on May 26, 2014.

STIPULATIONS

The parties stipulated that if the claim is compensable, the Claimant's average weekly wage is $1,623.09. Respondents agreed that if claim number WC 4-952-012 is found compensable, Claimant is entitled to temporary total disability benefits from May 29, 2014 to March 17, 2015. The issue of temporary partial disability from March 18, 2015 forward was reserved for the parties to determine after wage records from the subsequent employer are reviewed.

FINDINGS OF FACT

1. Claimant began working for the Employer in 2010. He left his employment for a short time but later returned. The Employer operates an oil well services business which requires working in remote locations. Claimant has held several positions while employed by the Employer.

2. Claimant initially worked as a sandmaster, which involved running a machine that mixed the sand with the fracking liquid. He would be required to run the machine, and also to hook up the hoses or pipe. Those hoses were typically 4" diameter hoses weighing 40-60 pounds, and the pipe was 2" to 4" pipe weighing 100-150 pounds. He stated that he would carry multiple sections of hose, and in all kinds of weather and ground conditions. If it was snowy or muddy, dragging the hoses was very difficult.

3. Claimant then worked on the hydration machine, essentially doing the same type of work on a different machine. He testified he finished his first period of employment with Employer running the chemical trailer. During all of these jobs he also had to help out where needed to pull hoses and hook up pipe. He stated that the operation would have various periods of shutdown when the crew would have to change the pipe or hoses that might be broken or not operating properly. This happened on a weekly basis so part of his time would was spent operating machines and part of the time was spent changing pipes and hoses which was more physically demanding than operating machines.

4. When Claimant returned to the Employer, he worked on the blender, then the data van. Claimant operated each machine, which involved pushing buttons, but

also had to hook up the pipes and hoses, and help out when needed when the machines were not running.

5. On a typical work day before May 2014, Claimant would drive to the job site which was approximately 1-2 hours away from his hotel. Once he arrived at the job site, he set up if necessary otherwise he would prepare equipment such as making sure pressure was good or ensuring no leaks in hoses. Then, the Claimant would run the equipment.

6. In April 2014, Claimant began experiencing some physical problems primarily while driving from Douglas, Wyoming to Platteville, Colorado. His left hand would "fall asleep" as he drove. The Claimant testified that he did not think much of it at that time but once he finished his shift and returned home, his whole shoulder, arm and hand felt numb and he had shooting pain radiating from his neck down to his fingers.

7. Claimant testified that he made the trip from Douglas to Platteville every day for a week. Once he arrived in Platteville, he dropped of empty totes, the bad iron and reloaded full totes and good iron back onto the truck then drive back to Douglas. Claimant stated he had to physically throw the iron up onto the flat bed and it weighed anywhere from 30 to 300 pounds.

8. Claimant did not identify any specific work activity that precipitated the onset of symptoms other than noticing his left hand falling asleep while he drove for the Employer.

9. On April 22, 2014, the Claimant went to the Central Utah Clinic where Dr. Todd Parry[1] evaluated him. The medical record indicates that Claimant has had left shoulder pain for years not associated with any trauma or event which increased over the past month. He reported pain down the arm, with his hand going to sleep, and numbness in the arm as well as aching neck pain. The record indicates Claimant's symptoms increase with sitting and driving. Dr. Parry suggested some treatment options, including an MRI. Claimant decided to obtain an MRI.

10. Claimant disagreed with Dr. Parry's notation concerning the duration of his neck pain. Claimant testified that he did not have neck pain for years nor did he recall reporting that to Dr. Parry.

11. Claimant had the MRI on May 1, 2014. The radiologist's impressions included:

> Cervical spondylotic degenerative change which is most conspicuous at the C6-7 interspace level with a left paracentral and foraminal focal disc protrusion or extrusion which effaces the left foramina at the expected

[1] During his testimony, Claimant repeatedly referred to a Dr. Pierce. The ALJ could find no records in evidence from a Dr. Pierce thus the ALJ infers that Claimant was referring to Dr. Parry when he stated "Dr. Pierce."

course of the left C7 nerve root. Correlate for left C7 radicular complaints. Finding also results in moderate spinal canal narrowing at this level. No abnormal cord signal.

12. Claimant returned to see Dr. Parry on May 6, 2014. The record states that Claimant works in the oil field and that his pain has progressed to the point where it was affecting his work and his activities of daily living. There is nothing in this record suggesting that Claimant specifically relates his symptoms to his work activities. Dr. Parry explained the MRI results to the Claimant and recommended that Claimant see Dr. Kris West for further work-up and to discuss treatment options such as injections or surgery.

13. Claimant understood he had a "pretty bad" herniated disc at C7 based on his conversations with Dr. Parry following the MRI.

14. On May 8, 2014, Claimant went to Southwest Spine and Pain Center where he was evaluated by Dr. Rick Obray. Dr. Obray documented a gradual onset of intermittent neck pain over a six-week period following no specific accident or event. Claimant reported that his pain intensity averaged a 3 out of 10. Claimant also reported weakness, numbness and tingling in his left arm. Dr. Obray recommended an epidural steroid injection (ESI) at C7-T1.

15. Claimant underwent the ESI on May 19, 2014.

16. Claimant testified that he reported his symptoms to the Employer and that he was advised he should pursue treatment under his private health insurance because he had not reported that the injury occurred at work. On cross examination, Claimant admitted that he did not report to the Employer that he believed his symptoms were work related until after the May 1, 2014 MRI.

17. After April 22, 2014, the Claimant did not work for several weeks. He had his usual six days off plus he took two weeks of vacation. After not working for three weeks, Claimant testified that he was feeling better with no aches or pains.

18. The Employer required the Claimant to undergo a fitness for duty evaluation at WorkPartners in Grand Junction before he was permitted to return to work.

19. WorkPartners Physicians' Assistant (PA), Lacie Esser, evaluated the Claimant on May 20, 2014. Claimant reported to PA Esser that he felt 96-97% better after having the ESI the day prior, and that he had actually felt 97% better before the injection but went through with it anyway. Claimant stated he felt completely capable of performing full duty work. PA Esser released the Claimant to return to work without restrictions. PA Esser recommended that Claimant take it easy and ask for help if any activity seems to bother him.

20. The Claimant returned to work full duty until May 26, 2014 when he slipped on some hoses. He testified that he "came down on his left side, and that's when I started getting that pain back again."

21. Claimant reported the incident to his supervisor who was on the jobsite that morning. He then returned to his motel room and called John Downie from human resources at his supervisor's request. Claimant and Downie primarily discussed how Claimant might return home. Claimant was advised to stay in his motel room for the next couple of days and take it easy until he could get a ride home. He was not offered the chance to see a physician at that time.

22. Claimant returned to WorkPartners once he returned to Grand Junction on May 28, 2014. PA Esser examined him again. The medical record states that Claimant tripped and fell over a hose at work on May 26, he reached his left arm out to grab something to prevent his fall, but he missed it and fell landing with the right arm catching him. Claimant reported stabbing pain in the left trapezius, and he considered it intense and constant. His pain was mostly near the left shoulder blade and he did not report much neck pain. Claimant was experiencing electric pain shooting down his left arm and numbness in his left hand. PA Esser noted that Claimant had been feeling good and tolerating work just fine until the tripping incident caused a flare up. PA Esser concluded that Claimant likely exacerbated an underlying pre-existing bulged disc in his neck. PA Esser referred the Claimant back to Dr. Obray, and issued work restrictions of 5 pounds. Esser noted that Claimant was "adamant" he was not able to work in his present condition.

23. Claimant also asked for a work-related driving restriction but PA Esser explained to him that if she restricted his work-related driving, she would need to restrict his personal driving as well. Claimant did not want his personal driving restricted. Claimant also asked to have his medical care transferred to Mesquite, Nevada where he was living.

24. On June 3, 2014, Claimant returned to Southwest Spine and Pain Center where he saw PA Jeffrey Wright. The Claimant reported that his pain level at best is 4 out of 10, at worst is 8 out of 10 and averages 6 out of 10. He stated that the pain impairs his ability to drive, work, bend, twist and lift. The report is silent concerning any work-related tripping incident or the work restrictions imposed by PA Esser. Further, Claimant reported no relief from the May 19, 2014 ESI.

25. Claimant's report to PA Wright that he obtained no relief from the May 19, 2014 ESI is in direct conflict with the May 20, 2014 fitness for duty evaluation report which states that Claimant was feeling 96-97% better after the ESI.

26. Claimant has since had at least one more ESI plus a radiofrequency ablation procedure. He had not been released from medical treatment as of the date of the hearing in this matter.

27. Claimant collected unemployment in September 2014 at $415 per week through February 26, 2015. Claimant returned to work on March 18, 2015 earning $13.50 per hour, and a wage increase to $15.00 per hour at some point. Claimant testified that he was working as a driver within his work restrictions, and earning 38 cents per mile which earns him a total of $850 to $1,000 per week.

28. Dr. D'Angelo performed a review of Claimant's medical records and issued a report dated October 20, 2014. Dr. D' Angelo did not examine the Claimant or talk to him. Dr. D'Angelo concluded that Claimant did not suffer a work-related injury or aggravation of a pre-existing condition. She opined that Claimant's work activities in April 2014 did not causally relate to Claimant's symptomatic spondylosis or osteoarthritis nor did the hose tripping incident on May 26, 2014 aggravate Claimant's pre-existing condition. She stated, and the ALJ agrees, that whether or not Claimant fell on May 26, 2014, Claimant's symptoms and need for treatment would be the same.

29. Based on the foregoing, the Claimant has failed to meet his burden of proof as to both claims. The Claimant's contention that he suffered an injury in April 2014, and again on May 26, 2014 is not supported by the credible and persuasive evidence.

CONCLUSIONS OF LAW

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. A preexisting condition does not disqualify a Claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. Claimant has failed to meet his burden of proof to establish that he sustained either a specific injury or an occupational disease in April 2014 while working for the Employer. There is no credible or persuasive evidence that Claimant's job duties (driving or throwing iron) caused a work injury or exacerbated or aggravated a pre-existing condition. The contemporaneous medical records make no mention of loading or unloading iron as a cause of his symptoms. Claimant simply stated to his medical providers that driving seemed to increase his symptoms. Claimant also testified that his job duties were physically demanding, and while that may be true, Claimant failed to prove that it was the physical demands of his job that caused the MRI findings or produced the need for medical treatment. The ALJ concludes that Claimant merely experienced symptoms while at work, but the evidence does not support Claimant's contention that he suffered a work-related injury or occupational disease in April 2014 while either driving or loading or unloading his truck.

7. Claimant has also failed to meet his burden of proof to establish that he suffered an injury on May 26, 2014 when he tripped on some hoses at work. The ALJ believes that Claimant tripped on the hoses, but there is no credible or persuasive evidence that Claimant sustained any new injuries or an aggravation of a pre-existing condition as a result. The medical records contain many discrepancies and conflicts which the ALJ resolves in favor of the Respondents. The most glaring discrepancy exists in the fitness for duty evaluation report dated May 20, 2014 which states that Claimant had been feeling significantly better even prior to the May 19, 2014 ESI and that he did not believe he needed the ESI but went through with it anyway; and the June 3, 2014 medical record which states that the May 19 ESI provided no relief. Either Claimant misled PA Esser when he reported feeling almost 100% better and ready to return to full duty, or he was not truthful on June 3, 2014 when he reported to PA Wright that he obtained no relief from the ESI. This discrepancy calls into question whether Claimant truly was symptom free prior to tripping on May 26, 2014. The ALJ concludes

that the persuasive medical evidence demonstrates that the tripping incident did not produce any new symptoms or the need for additional medical treatment beyond what Claimant was already undergoing at that time.

8. Because Claimant did not sustain a work-related injury, he is not entitled to medical benefits or temporary disability benefits.

ORDER

It is therefore ordered that Claimant's claims for workers' compensation benefits are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman 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, 2016

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

1. Whether Respondents may withdraw the March 19, 2015 General Admission of Liability in this claim.

2. Whether Claimant sustained a compensable injury in the course and scope of his employment with Employer.

3. Whether the right shoulder surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to a work injury.

FINDINGS OF FACT

1. Claimant has been working for Employer as a subcontractor installing carpet and flooring for approximately 15 years.

2. When working for or at the direction and benefit of Employer, Claimant is covered under Employer's worker's compensation policy. Deductions for worker's compensation insurance are taken out of payments that Employer makes to Claimant for completed jobs.

3. Carpet and flooring subcontractors report to Employer's warehouse between 6 a.m. and 10 a.m. to get work assignments. Employer's warehouse manager and installation supervisor, Silvino Ramirez gets orders and works on the schedule the day prior. Mr. Ramirez is familiar with the subcontractors and knows who is the best worker for the job depending on the type of flooring that needed to be installed. Mr. Ramirez prints out the work orders with the subcontractor's name on them and hands the orders to the subcontractor assigned in the morning when they report.

4. If a subcontractor declines a work order, Mr. Ramirez gets the work order back from the subcontractor and calls a different subcontractor to see if they can do the work. Mr. Ramirez is supposed to then change the name of the subcontractor on the work order.

5. In early October, 2014 Mr. Ramirez called Claimant. Mr. Ramirez advised Claimant that he had a work orders for a project in Keystone that was assigned to Pedro Lopez, but that Pedro Lopez was too busy/behind on other work. Mr. Ramirez asked Claimant if he could perform the job. Claimant went into the office where he was handed the work orders and assignment for the project from Mr. Ramirez.

6. The work orders that were given to Claimant by Mr. Ramirez had Pedro Lopez's name on them. Mr. Ramirez advised Claimant that the orders would be changed in the computer to Claimant's name.

7. The work orders given to Claimant by Mr. Ramirez in early October of 2014 were for various apartment units in Keystone, Colorado and included work for approximately 31 separate units with an installation date of October 6, 2014 listed. *See* Exhibit Y.

8. Between October 1, 2014 and October 6, 2014 Claimant also received work orders from Mr. Ramirez for 6 total units in the Denver metro area. Claimant completed those 6 units and was paid for the work on those units.

9. Between October 6, 2014 and October 23, 2014 Claimant did not receive any other work orders from Employer.

10. Claimant began work on the 31 units in Keystone, Colorado. Claimant did not work for Pedro Lopez, did not receive direction from Pedro Lopez, and did not have any association with Pedro Lopez in performing the work on the 31 units in Keystone. Claimant was not given the job by Pedro Lopez and was given the job by Employer's warehouse manager and installation supervisor, Mr. Ramirez.

11. On October 8, 2014 Claimant purchased supplies for the 31 unit Keystone job from Southland Flooring Supplies. *See* Exhibit 12.

12. Claimant continued to work the 31 unit Keystone job, unit by unit.

13. On October 17, 2014 Claimant was almost finished with the 31 unit job and he returned to the warehouse for payment based on the completed job. Claimant met Mr. Ramirez who gave him a check for the completed work. The check had Pedro Lopez's name on it because Mr. Ramirez never changed the work order to reflect that the 31 unit job was actually given to Claimant and not to Mr. Lopez. The check issued on October 17, 2014 was for work orders for 31 units located in Keystone, Colorado and was for the amount of $3,520.82. The check, although handed to Claimant, had Mr. Lopez's name on it.

14. On October 17, 2014 Claimant went with Mr. Lopez to a bank where Mr. Lopez cashed the check and gave Claimant the full amount of the check. Claimant's testimony was that he believed the amount of payment from the check was around $3,000.00.

15. Mr. Lopez received work orders for 17 units with an installation date of September 29, 2014 for apartments in Keystone and he also received work orders for 20 units with an installation date of October 1, 2014 for apartments in Keystone.

16. Check number 26705 issued to Mr. Lopez on October 10, 2014 paid him for the 17 jobs that had the installation date of September 29, 2014 listed on the work order. It also paid him for the 20 units on the work orders that had an installation date listed of October 1, 2014. The October 10, 2014 check issued to Mr. Lopez had a net pay of $6,836.91.

17. The check issued in Mr. Lopez's name on October 17, 2014 was for the 31 work orders that had an installation date of October 6, 2014 listed on the work order.

18. On October 18, 2014 Claimant returned to Keystone and was loading up carpet/garbage/scraps from the job to finish the project. The weather was cold and sleeting. Claimant was up on the top of the bed of the truck when he slipped and landed on his outstretched right arm while falling to the ground, injuring his right shoulder.

19. Claimant reported the injury to Mr. Ramirez, but refused medical treatment as he did not want to miss out on any future or present job assignment and wanted to see if he could continue to work.

20. On October 23, 2014 Claimant reported to Employer's warehouse and again received a work order from Mr. Ramirez for a job. This work order had Claimant's name on it. While completing this new work order and on October 23, 2014 Claimant was carrying a roll of carpet when he felt severe pain in his right shoulder that prevented him from continuing the job.

21. Claimant decided that he needed to seek medical treatment and went into Employer's office and reported the injury to Mr. Ramirez and Jeff Tostensen. Claimant was sent to Concentra for treatment.

22. On October 24, 2014 Claimant was evaluated at Concentra by Candice Sobanski, M.D. Claimant reported carrying carpet over his right shoulder and that he now had right shoulder pain and forearm/wrist pain. *See* Exhibit 11.

23. On November 11, 2014 Claimant was evaluated by Matthew Miller, M.D. It was recommended that Claimant undergo a right shoulder MRI arthrogram. *See* Exhibit 11.

24. On January 27, 2014 Claimant was evaluated by Craig Davis, M.D. Dr. Davis noted that Claimant was going up a step on October 23, 2014 when he slipped and fell onto his right side and right shoulder but kept working. Claimant reported approximately three days later he was carrying a heavy roll of carpet up some stairs when he again had sudden pain in his back and fell onto his right side injuring his shoulder. Claimant reported soreness diffusely around the right shoulder that radiated down into his hand causing his hand to get numb at times. Dr. Davis performed a subacromial injection and noted that if Claimant continued to be symptomatic it might be worth considering an MRI of the shoulder.

25. On March 10, 2015 Claimant was evaluated by Dr. Davis. Dr. Davis noted Claimant's shoulder got better for about one week after the subacromial injection but that Claimant was now back to baseline with significant pain over the lateral shoulder limiting the use of his arm. Dr. Davis agreed that an MRI should be performed. *See* Exhibit 11.

26. On March 19, 2015 Respondents filed a general admission of liability in this claim. *See* Exhibit S

27. On April 20, 2015 Claimant underwent an MRI of his right shoulder interpreted by Charles Wennogle, M.D. Dr. Wennogle's impression was: glenoid dysplasia; anteroinferior nondisplaced labral tear with small 3 mm paralabral cyst; possible SLAP type I superior labral tear; minimal distal supraspinatus tendinosis; and AC joint osteoarthritis. *See* Exhibit 7

28. On May 18, 2015 Claimant was evaluated by Michael Hewitt, M.D. Dr. Hewitt noted that Claimant was injured on October 23, 2014 when he fell approximately four feet from the side of a truck onto his right shoulder and hip and that Claimant had pain for the next several days and an exacerbation while carrying a large roll of carpet upstairs. Dr. Hewitt noted no prior history of shoulder injury. Dr. Hewitt assessed history of right shoulder injury with clinical examination consistent with impingement and Dr. Hewitt discussed treatment options including continued observation, continued medications, continued therapy, repeat injection, and shoulder arthroscopy. Dr. Hewitt opined that Claimant was a reasonable surgical candidate. *See* Exhibit 11.

29. On May 28, 2015 Claimant was evaluated by Armodios Hatzidakis, M.D. Claimant reported the onset of shoulder problems was on October 23, 2014 when he fell on an outstretched hand on ice and landed directly onto his shoulder. Claimant reported working for two days and two days later while carrying a roll of carpet, he had another fall resulting in increased shoulder pain. Dr. Hatzidakis assessed right shoulder pain and dysfunction with traumatic injury, with glenoid dysplasia. Dr. Hatzidakis noted Claimant would be set up for EMG, and that claimant underwent an injection in his right shoulder. *See* Exhibit 9.

30. On July 6, 2015 Claimant was evaluated by Duane Fenton, PA-C. PA Fenton noted that Claimant received 60% relief for one week from the cortisone injection performed on May 28, 2015. PA Fenton assessed traumatic right shoulder pain and dysfunction with glenoid dysplasia, possible partial-thickness rotator cuff tear, and numbness and tingling into the right upper extremity. PA Fenton noted Claimant had not yet undergone the EMG testing and noted follow up would be after testing. *See* Exhibit 9.

31. On August 27, 2015 Claimant was evaluated by PA Fenton. PA Fenton noted that Claimant received 80% relief for one week from the cortisone injection performed on May 28, 2015. PA Fenton noted the EMG was reviewed and was within

normal limits. PA Fenton assessed: traumatic right shoulder pain following a work related injury with glenoid dysplasia; healed distal clavicle fracture; possible labral tear; and biceps tendinitis. PA Fenton noted that Claimant would be set up with the surgery coordinator to evaluate a time for an arthroscopic debridement, possible labral repair, possible biceps tenodesis; and possible rotator cuff tear. *See* Exhibit 9.

32. On September 1, 2015 Dr. Hatzidakis submitted a request for authorization for right shoulder arthroscopic debridement with possible rotator cuff repair, longhead biceps tenodesis, and labral repair. *See* Exhibit 9.

33. On October 9, 2015 Claimant underwent an independent medical evaluation performed by Barry Ogin, M.D. Claimant reported finishing a job in Keystone when he was loading rolls of carpet into a pickup truck and was standing on the outer rim of the truck on a piece of plastic. Claimant reported it was cold and slippery and that as he was leaning forward he slipped off the truck landing on his right side with his right arm abducted against his side and that the brunt of the fall was against his right lateral shoulder as well as his hip. Claimant reported after having a few days off over the weekend he was on a smaller job and was carrying a large roll of carpet up a small flight of stairs and as he was walking with his arm hyperabducted holding on to the carpet roll behind his head while carrying the carpet upstairs, he felt a sudden increase in pain in his right shoulder. Dr. Ogin reviewed Claimant's medical history and performed an examination.

34. Dr. Ogin gave the impression of: right shoulder strain/contusion following a work injury when Claimant fell off a truck; increased pain when carrying carpet with a hyperabducted shoulder supporting the carpet roll; shoulder MRI confirming rotator cuff tendinopathy with possible labral tear and underlying glenohumeral dysplasia (preexisting); transient relief with shoulder injection x2; and failure to improve with time, medications, and physical therapy. Dr. Ogin noted that Claimant had seen three different orthopedic specialists who all discussed moving on to a right shoulder arthroscopy with a decompression of the rotator cuff and possible labral repair. Dr. Ogin opined that the surgery was reasonable. Dr. Ogin opined that the mechanism of injury falling off the pickup truck in Keystone was a mechanism where Claimant could have developed a rotator cuff strain or partial tear or possibly a labral tear and that a glenoid fracture was also possible. Dr. Ogin noted that Claimant reported the initial injury falling off the truck was either the 18th or 19th and that he thought he reported it the 23rd which was a Monday. However, Dr. Ogin noted that in October the 18th and 19th fell on the weekend and the 23rd fell on a Thursday. Dr. Ogin noted a discrepancy in dates. Dr. Ogin opined that in any case, the first injury was causative of the rotator cuff pathology. Dr. Ogin opined that with an injury during the fall it was reasonable that Claimant would have pain and that the later activity of holding the carpet on his back with shoulders flexed and abducted would have increased Claimant's discomfort. Dr. Ogin opined that the treatment to date was reasonable and medically necessary and directly related to his injuries. *See* Exhibit A.

35. On October 27, 2015 Dr. Yamamoto issued a letter agreeing with Dr. Ogin's report. Dr. Yamamoto agreed that Claimant had exhausted conservative care and opined that the temporary but positive response to the shoulder injection is a good sign that surgery has a reasonable chance of being beneficial. Dr. Yamamoto agreed that the mechanism of injury could cause a rotator cuff strain, partial tear, or possible labral tear and agreed that Claimant injured his shoulder when slipping off the pickup truck. Dr. Yamamoto agreed that this happened around October 18 or 19 and noted there may have been problems with translation when the date of injury was obtained and that the discrepancy in dates he did not find to be a problem. *See* Exhibit 10.

36. On October 30, 2015 Dr. Hatzidakis responded to a letter agreeing with Claimant's history of injury reported by Dr. Ogin, opining that Dr. Ogin obtained a more precise history without error that a language barrier most likely caused, that the mechanism of injury could cause rotator cuff strain, partial tear, or possible labral tear, that Claimant was injured when slipping off a pickup truck and landing on his abducted shoulder, and that carrying a roll of carpet days later exacerbated the prior injury and was not the overt cause. *See* Exhibit 9.

37. Claimant's testimony, overall, is found credible and persuasive. Claimant was working on a 31 unit job in Keystone, Colorado on October 18, 2014 at the direction of Employer when he suffered an injury. Claimant was not working for or at the direction of Mr. Lopez. Although Claimant presented with some confusion surrounding specific dates, his testimony is logically consistent with the evidence in this matter.

38. Mr. Ramirez testified that it was possible that he gave a work order with Mr. Lopez's name on it to Claimant. Mr. Ramirez also testified that it was possible that he gave a check with Mr. Lopez's name on it to Claimant.

CONCLUSIONS OF LAW

Generally

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

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

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability and Withdrawal of General Admission of Liability

Generally, a claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.*; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). As found above in this case Respondents filed a general admission of liability on March 19, 2015. Respondents are now seeking to withdraw the general admission of liability and wish to have a determination that no compensable injury was suffered. A party seeking to modify an issued determined by a general admission shall bear the burden of proof for any such modification. *See* § 8-43-201(1), C.R.S.

Respondents have failed to meet their burden of proof to modify the general admission of liability on the issue of compensability of the claim. Respondents may modify the general admission of liability to reflect the correct date of injury to be October 18, 2014. Here, the evidence and testimony establishes that the injury arose out of and occurred in the course and scope of Claimant's employment with employer. An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

The evidence establishes that Claimant suffered a compensable injury when he slipped off of a pickup truck on October 18, 2014 while working in Keystone, Colorado at the direction of Employer. In early October, 2014 Claimant was provided work orders from Mr. Ramirez for the Keystone project. Mr. Ramirez gave the work orders to Claimant instead of Mr. Lopez (whose name was on the work orders) as Mr. Lopez was

already busy and behind on other projects. This is consistent with the evidence showing Mr. Lopez had recently been assigned a 17 unit project on September 29, 2014 and a 20 unit project on October 1, 2014. Claimant wished to do the job with the October 6, 2014 installation date and accepted the work orders for that job which included a total of 31 units. Mr. Ramirez advised Claimant the name on the work orders would be changed from Mr. Lopez's name to Claimant's name to reflect that Claimant would be doing the work. Although Mr. Ramirez never followed through and never changed the name on the work orders, Claimant performed the work pursuant to Mr. Ramirez's direction. Claimant is credible and persuasive that he did not work for Mr. Lopez at any time. Claimant's testimony is overall consistent with the evidence. Claimant testified he worked on a big job of 32 units in Keystone which is consistent with the 31 units listed in the job with an installation date of October 6, 2014. Claimant testified that he was paid around $3,000.00 for the job which is consistent with the October 17, 2014 paycheck for the 31 unit job which was in the amount of $3,520.82. His testimony is also consistent with the lack of any work orders received by him from Employer between October 6, 2014 and October 23, 2014. During this period of time, Claimant did not receive any new work orders because he was working the 31 unit job in Keystone which had been assigned to him by Mr. Ramirez. On October 18, 2014 Claimant was working this job at Employer's direction when he slipped off his pickup truck and landed on his right side injuring his right shoulder. Claimant was both in the course and scope of employment when he fell off the truck.

Throughout the claim, Claimant has been somewhat inconsistent with reporting specific dates. The ALJ notes these inconsistencies, but overall Claimant has been credible in explaining the mechanism of injury, the later aggravation of injury when working a job on October 23, 2014, and he has been credible in explaining what occurred with the work orders he received, the name listed on the work orders, how he was paid by Mr. Lopez for the work, the number of units he worked on, the date he received the payment for the completed work, and the general amount he was paid for the work. Claimant's testimony, although somewhat inconsistent in reporting dates, is overall credible when compared to the evidence offered. Claimant received the October 6, 2014 work orders instead of Mr. Lopez. Employer gave these work orders to Claimant and directed Claimant to complete the jobs. Claimant did so and was injured while completing the work. Claimant did not work for or at the direction of Mr. Lopez at any time.

Medical Benefits- reasonable and necessary

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found above, Respondents have failed to meet their burden to withdraw the general admission of liability on the issue of compensability. The evidence establishes, more likely than not, that Claimant suffered a compensable injury while in the course

and scope of employment with Employer. Respondents are thus liable for reasonable and necessary medical treatment. Claimant has established that the right shoulder arthroscopy surgery is reasonable and necessary and Respondents are liable for this treatment. As found above, three orthopedic specialists have opined that the surgery is the next step given Claimants' failure to improve with more conservative treatment. Dr. Ogin and Dr. Yamamoto agree with these assessments. The surgery is found both reasonable and necessary to cure and relieve the effects of Claimant's fall from the truck on October 18, 2014.

ORDER

It is therefore ordered that:

1. Respondents may not withdraw the March 19, 2015 General Admission of Liability in this claim other than to modify the date of injury to reflect October 18, 2014.

2. Claimant sustained a compensable injury in the course and scope of his employment with Employer on October 18, 2014.

3. Respondents are liable for right shoulder surgery recommended by Dr. Hatzidakis. The surgery is reasonable, necessary, and related to Claimant's October 18, 2014 work injury.

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 7, 2016 /s/ Michelle E. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-975-033-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 2, 2016 and February 26, 2016 in Denver, Colorado. The hearing was digitally recorded (reference: 2/02/16, Courtroom 4, beginning at 8:30 AM, and ending at 11:13 AM; and, 2/26/16, Courtroom 1, beginning at 8:30 AM, and ending at 10:31 AM).

Claimant's Exhibits 1,2,4-7 were admitted into evidence without objection. The Respondents objected to Claimant's Exhibit 3 and the ALJ reserved ruling on Exhibit 3. Respondent's objections to Exhibits 8 and 9 were overruled and the Exhibits were admitted into evidence. Respondents' Exhibits A through M were admitted into evidence, without objection. After the conclusion of the hearing, the ALJ admitted Claimant's Exhibit 3, despite the Respondents' objection thereto.

At the conclusion of the continuation hearing, the ALJ established a briefing schedule: Respondents' opening brief was filed on February 26, 2016. The Claimant's answer brief was also filed on February 26, 2016. The Respondents' did not file a timely reply brief and the matter was deemed submitted for decision on February 29, 2016, at which time the ALJ deemed the matter submitted for decision..

ISSUES

Since Respondents have already paid temporary total disability (TTD) benefits from February 11, 2016 and continuing; the only issue is the Respondent's affirmative defense of "responsibility for termination." The Respondents filed a Petition to Suspend benefits on June 30, 2015, requesting a suspension of benefits from February 27, 2015, the date that the Claimant was terminated from employment. The Petition to Suspend has been superseded by the Respondents' Application for hearing, designating the issue of "responsibility for termination." By virtue of the fact that the Respondents continued paying the Claimant TTD benefits, pursuant to the general Admission of Liability (GAL), the respondents have made a judicial admission conceding that the Claimant has been temporarily and totally disabled since February 12, 2015, the day after the admitted back injury of February 11, 2015.

The Respondents bear the burden of proof by a preponderance of the evidence of establishing that the Claimant performed a volitional act that he knew would cause his termination from employment.

FINDINGS OF FACT

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

Preliminary Findings

1. On February 24,2015, the Respondents filed a General Admission of Liability(GAL), regarding the Claimant's work-related back injury, admitting for medical benefits; an average weekly wage (AWW) of $857.27 and TTD benefits of $571.51 per week from February 12, 2015 to "undet" (Claimant Exhibit. 2, p.. 2)..

2. The Claimant is still receiving medical and TTD benefits.

The Incident Leading to the Claimant's termination from Employment

3. On February 26, 2015, the Claimant was pulled over and arrested for suspicion of driving under the influence (DUI) and he was issued a court summons. (Respondents' Exhibit D, p. 24). The ALJ infers and finds that the Claimant was driving his personal vehicle at the time.

4. On June 20, 2015, the Respondents filed a Petition to Modify, Terminate, or Suspend Compensation of Claimant's TTD benefits. The stated reason for the motion was "Claimant lost his license after being charged with driving under the influence. Since Claimant is not able to perform his job duties for [Employer] without a valid

driver's license, Claimant's employment was terminated February 26, 2015." The stated reasons were **not** true.

5. The Claimant's driver's license was not revoked or suspended, at any time, on or after February 26, 2015.

6. On July 20, 2015, the Claimant objected to Respondents' Petition to Modify, Terminate or Suspend Compensation, and a hearing was set for October 14, 2015.

7. On August 6, 2015, the Claimant pled guilty to driving while ability impaired (DWAI). As part of the plea agreement, the Claimant did **not** have his license revoked or suspended (Respondents' Exhibit E, pp. 27-30).

8. The Claimant continues to maintain a driver's license in good standing with the State of Colorado.

9. On October 8, 2015, the Respondents filed an Unopposed Motion to Withdraw the Application for Hearing without Prejudice and Vacate the hearing. The motion was granted that day.

Affirmative Defense of Responsibility for Termination

10. The GAL presently in effect establishes TTD from February 12, 2015 and continuing, the prerequisite for the "responsibility for termination" defense.

11. On October 12, 2015, the Respondents filed an Application for Hearing raising the issue that the Claimant was responsible for his own termination, and sought a refund of overpayments, or offsets and credits resulting from Respondents' payment of TTD benefits after the date of the Claimant's termination from employment (Respondents' Exhibit A, p. 1).

12. At the hearing, Franny Sanchez, the Employer's office manager, testified that the Claimant was terminated because it was the Employer's policy to automatically terminate any employee accused of DUI because the Employer's liability insurance would no longer insure the employee. Sanchez said that she spoke with an unnamed individual with the insurance company, who led Sanchez to believe that the Claimant was un-insurable because of his DUI arrest. Sanchez's testimony in this regard was based on unmitigated hearsay, offered to prove the truth of the matter asserted. Indeed, her testimony is contradicted by the assertions in the petition to Modify, Suspend and Terminate Benefits. The ALJ infers that Sanchez changed her version of events, after it was known that the Claimant had retained his drivers' license, to justify the termination. For this reason, the ALJ does **not** find Sanchez's testimony credible.

13. A June 19, 2015 letter generated by Franny Sanchez "To Whom it may Concern" recites that the Claimant was terminated from employment because he "lost his drivers' license and was not (*sic)* longer able to perform the driving duties of his current job…." (Claimant's Exhibit 9 to which the respondents' objected, the objection was overruled and Claimant's exhibit 9 was admitted into evidence). Exhibit 9 contradicts Sanchez's hearing testimony. The ALJ, therefore, finds Sanchez's testimony lacking in credibility.

<u>The Employer's Policy Manual</u>

14. The Employee Policy Manual does not include the company policy to which Franny Sanchez testified --that if an employee is arrested and accused of DUI it will result in automatic termination (Respondents' Exhibit. C, pp. 6-22).

15. In regard to employee driving records, the Employee Policy Manual states that "an employee who may operate a motor vehicle in connection with his/her duties must have and maintain a satisfactory driving record." There is no further clarification as to what is a "satisfactory driving record" (Respondents' Exhibit C, p. 11).

16. The Employee Policy Manual also states that "Should an employee incur multiple moving violations, the [Employer's] liability insurance carrier may refuse to cover the employee." There is no further clarification as to what "multiple moving violations" substantively means. (Respondents Ex. C, p. 11).

17. The Employee Policy Manual further states that "If [an employee] is excluded from liability coverage, he/she must be terminated or reassigned to a different position." (Respondents' Exhibit C, p.11).

18. The Employee Policy Manual given to Claimant states a termination policy that is more ambiguous than the one to which Franny Sanchez testified. Franny Sanchez testified the reason Employer has an automatic termination policy for an employee accused with DUI is because the Employer's liability insurance will no longer insure the accused employee. However, the policy stated in the Manual given to Claimant provides that an employee removed from Employer's liability coverage can continue his/her employment. The Manual states "Should an employee incur multiple moving violations, the [Employer's] liability insurance carrier may refuse to cover the employee. If [an] employee is excluded from liability coverage, he/she must be terminated or reassigned to a different position." (Respondents Exhibit C, p. 11). Thus, the only policy in the Manual given to the Claimant that somewhat reflects the "DUI equals automatic termination policy" to which Franny Sanchez testified, provides that an employee can be insurable after receiving multiple moving violations, and can maintain his/her employment even if found to be uninsurable. However, and more importantly, the Manual contains no language that equates or links being accused of DUI to being uninsurable. Therefore, the Claimant would not reasonably expect that being accused of

DUI would result in the employee being uninsurable. Regarding employee driving records, the Manual states "An employee who may operate a motor vehicle in connection with his/her duties must have and maintain a satisfactory driving record." (Respondents' Exhibit. C, p. 11). There is no further clarification as to what is a "satisfactory driving record." However, the Claimant has, at all times since his work injury, maintained a valid driver's license with the State of Colorado.

19. The Claimant never knew that being accused of DUI would result in his termination. Therefore, he did not engage in a volitional act that he knew would cause his termination. He testified that prior to being accused of DUI he had knowledge of Fred Espinoza (the owner) being charged with DUI and maintaining his employment. Thus. given the totality of the circumstances, the preponderance of the evidence establishes that the Claimant would not reasonably expect that being accused of DUI would result in his termination from employment. Therefore, the evidence establishes that the Claimant was not responsible or at fault for his termination, in that he did not perform a volitional act or otherwise exercise a degree of control over the circumstances resulting in his termination.

Fred Espinosa, Owner of the Employer

20. Without foundation and based upon hearsay upon hearsay, *i.e.,* what the unknown insurance company individual told Franny Sanchez, Espinosa testified that he felt that a DUI arrest constituted an "unsatisfactory driving" record, despite the fact that the Claimant maintained a valid drivers' license at all times. Without foundation, Espinosa would have us believe that he gets to define an "unsatisfactory driving record, after the fact. This approach is reminiscent of the Roman Emperor Caligula, who placed the laws on walls so high that no one could read the laws and only the Emperor knew what the laws commanded and prohibited. Espinosa testified that he did **not** check with his insurance company to find out whether the Claimant was still insurable after his DUI arrest.

21. Fred Espinosa conceded that he had been arrested for DUI, but he explained that it was in his personal vehicle.

22. As found herein above in Finding No. 13, the June 19, 2015 letter generated by Franny Sanchez "To Whom it may Concern" recites that the Claimant was terminated from employment because he "lost his drivers' license and was not (*sic)* longer able to perform the driving duties of his current job…." (Claimant's Exhibit 9 to which the respondents' objected, the objection was overruled and Claimant's exhibit 9 was admitted into evidence). Espinosa attempted to disclaim that Sanchez had any authority to issue such a letter, which further undermines his credibility

23. The Employee Policy Manual does not include a list of driving violations that will result in an Employee's exclusion from the Employer's liability coverage (Respondents' Exhibit. C, pp. 6-22).

The Claimant and his Father

24. According to the Claimant, he was unaware of any Employer policy that being accused of DUI resulted in termination from employment. The Claimant's testimony in this regard is corroborated by the absence of any articulated policy in the Employer's Policy Manual to this effect. The ALJ finds the Claimant's testimony is credible in this regard

25. Dale Iten, the Claimant's father, testified that as the Employer's General Manager, he was unaware of any Employer policy that being accused of DUI resulted in automatic termination from Employer. The ALJ finds that his testimony is corroborated by the absence of any written policies to this effect, and it further fortifies the ALJ's plausible inference and finding that Espinosa's termination of the Claimant was arbitrary and in the unfettered discretion of Fred Espinosa for reasons that the Claimant could not have reasonably known that getting arrested for DUI would lead to his termination.

Ultimate Findings

26. Primarily because of the inconsistent reasons given for the Claimant's termination from employment, first that he had been convicted of DUI and lost his drivers' license, and lastly by the time of the hearing, that the Claimant's arrest rendered him uninsurable (based on unmitigated hearsay), regardless of whether the Claimant maintained a valid drivers' license, compels the ALJ to find that the testimony of Franny Sanchez and Fred Espinosa is lacking in credibility. On the other hand, the ALJ finds the testimony of the Claimant (who presented straight-forwardly) and his father persuasive and credible in supporting the fact that as reasonable persons they did not know that the arrest for DUI would lead to the Claimant's' termination from employment.

27. Based on substantial evidence, the ALJ makes a rational choice between conflicting versions to accept the testimony of the Claimant and his father and to reject the testimony of Franny Sanchez and Fred Espinosa.

28. The Claimant was **not** responsible for his termination by virtue of a volitional act that he reasonably should have known would lead to his termination from employment.

29. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant reasonably should have known that his arrest for DUI, without being convicted thereof, would lead to his termination from employment.

Therefore, the Respondents have failed to prove their affirmative defense of "responsibility for termination."

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See §* 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, primarily because of the inconsistent reasons given for the Claimant's termination from employment, first that he had been convicted of DUI and lost his drivers' license, and lastly by the time of the hearing that the Claimant's arrest rendered him uninsurable (based on unmitigated hearsay), regardless of whether the Claimant maintained a valid drivers' license, compelled the ALJ to find that the testimony of Franny Sanchez and Fred Espinosa was lacking in credibility. On the other hand, the ALJ found the testimony of the Claimant (who presented straight-forwardly) and his father persuasive

and credible in supporting the fact that as reasonable persons they did not know that the arrest for DUI would lead to the Claimant's' termination from employment.

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 without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). So long as the findings of fact are supported by **substantial evidence,** they will be upheld –even if an appellate tribunal would have reached a different conclusion if it had entered findings of fact. *See May D & F v. Indus. Claim Appeals Office,* 752 P.2d 589 (Colo. App. 1988). 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, based on substantial evidence, the ALJ made a rational choice between conflicting versions to accept the testimony of the Claimant and his father and to reject the testimony of Franny Sanchez and Fred Espinosa.

Responsibility for Termination

c. A discharge in accordance to policy does not compel a finding of fault. The mere fact that an employer discharges a claimant in accordance with the employer's policy does not establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *See Gonzales v. Indus. Comm'n,* 740 P.2d 999 (Colo. 1987); *Pace v. Commercial Design Engineering,* W.C. No. 4-451-277 [Indus. Claim Appeals Office (ICAO), May 15, 2001]. § 8-42-105 (4), C.R.S., provides that an employee responsible for his own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002).

d. A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus.*

Claim Appeals Office, 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible for his termination, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788, (ICAO, June 25, 2003). Sections 8-42-103(1)(g), C.R.S. and 8-42-105(4), C.R.S., (collectively the termination statutes), provide that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job- injury." The term "responsible" introduces into the statute the concept of "fault." *See Colorado Springs Disposal v. Indus. Claim Appeals Office, supra.* The question of whether a claimant is "at fault" for his or her termination from employment is one of fact for resolution by the ALJ. *See Gilmore v. Indus. Claim Appeals Office, supra.* A finding of fault requires the ALJ to consider the totality of the circumstances and determine whether the claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), opinion after remand, 908 P.2d 1185 (Colo. App. 1995).

e. An employee is responsible (*i.e.* at fault) if the preponderance of the evidence establishes that the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *See Patcheck v. Colorado Department of Public Safety,* W.C. no. 4-432-301 (ICAO, September 27, 2001). *See Also Reyes v. Swift Beef Co.,* W.C. No. 4-586-550 at *2 (ICAO, February 23, 2007). As found, the Claimant was not "responsible" or "at fault" for his termination because, given the totality of the circumstances, he did not precipitate his termination by committing a volitional action which he would reasonably expect to result in the loss of his employment. Thus, the preponderance of the evidence established that he did not perform some volitional act or otherwise exercise a degree of control over the circumstances resulting in his termination. As found, the Claimant would not reasonably expect to be terminated for being accused of DUI because he was never informed of such policy by his Employer. As further found, the Employee Policy Manual given to Claimant states a termination policy that is more ambiguous than the one to which. Franny Sanchez testified. Franny Sanchiez, as found, testified the reason Employer has an automatic termination policy for an employee accused with DUI is because Employer's liability insurance will no longer insure the accused employee. However, the policy stated in the Manual given to Claimant provides that an employee removed from Employer's liability coverage can continue his/her employment. The Manual states "Should an employee incur multiple moving violations, the [Employer's] liability insurance carrier may refuse to cover the employee. If [an] employee is excluded from liability coverage, he/she must be terminated or reassigned to a different position." (Respondents Exhibit C, p. 11). Thus, the only policy in the Manual given to Claimant that somewhat reflects the "DUI equals automatic termination policy" that Franny Sanchez testified about, provides that an Employee can be insurable after receiving **multiple** moving violations, and can maintain their employment even if found

to be uninsurable. However, and more importantly, the Manual contains no language that equates or links being accused with DUI to being uninsurable. Therefore, as found, the Claimant would not reasonably expect being accused of DUI results in the employee being uninsurable and states an employee that becomes uninsurable may maintain his or her employment with Employer.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "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. As found, the Respondents failed to satisfy their burden of proof on the affirmative defense that the Claimant was responsible for his termination through a volitional act on his part and/or that the Claimant exercised ad degree of control over the circumstances leading to termination.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant was not responsible for his termination from employment and the Respondents' affirmative defense of "responsibility for termination" is hereby denied and dismissed.

B. The General Admission of Liability, dated February 24, 2015 shall remain in full force and effect, and temporary total disability and medical benefits shall be paid in accordance therewith.

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

DATED this_____day of March 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

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

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

_____
Court Clerk

Wc.ord

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Kathy McCranie, M.D. that she sustained an 8% whole person impairment rating as a result of her June 4, 2013 cervical spine injury.

FINDINGS OF FACT

1. On June 4, 2013 Claimant suffered an industrial injury to her cervical spine during the course and scope of her employment with Employer. She injured her cervical spine during a work-related motor vehicle accident.

2. Claimant subsequently received authorized medical treatment through Arbor Occupational Medicine. On June 6, 2013 Claimant was evaluated by Richard Shouse, PA-C. He noted that Claimant had suffered mild whiplash and a headache as a result of her June 4, 2013 motor vehicle accident. Both of the injuries had resolved. Upon examination, PA-C Shouse remarked that Claimant had "full range of motion of the neck and shoulders." He assessed Claimant with a trapezius strain and released her to regular duty.

3. On July 1, 2013 Claimant returned to Arbor Occupational Medicine and was examined by PA-C Springer. He observed "good" range of motion of Claimant's neck.

4. By August 2, 2013 PA-C Shouse commented that Claimant exhibited full range of motion. He noted that Claimant continued to work full duty and was approaching Maximum Medical Improvement (MMI).

5. On August 14, 2013 Claimant returned to Arbor Occupational Medicine and was evaluated by David Kistler, M.D. He remarked that Claimant exhibited full range of motion in her cervical spine. Dr. Kistler placed Claimant at MMI without any restrictions or impairment.

6. Because of continued symptoms, Claimant visited Lloyd Thurston, D.O. at Arbor Occupational Medicine on April 14, 2014. Dr. Thurston reviewed diagnostic imaging that revealed degenerative disc changes. He explained that the degenerative disc changes likely existed prior to Claimant's June 4, 2013 motor vehicle accident. He observed normal cervical range of motion.

7. On December 9, 2014 Claimant visited Alisa M. Koval, M.D. at Arbor Occupational Medicine. After examining Claimant she noted "very good range of motion of the neck."

8. Between October 7, 2014 and January 9, 2015 Claimant visited Mountain Range Chiropractic, LLC a total of 14 times. At each visit Claimant's cervical range of motion was "abnormal" in the planes of "cervical rotation and lateral flexion, left greater than right."

9. On February 17, 2015 Authorized Treating Physician (ATP) David Orgel, M.D. determined that Claimant had reached MMI. He assigned Claimant an 18% whole person impairment rating for her cervical spine injury. Specifically, Dr. Orgel assigned Claimant a 6% whole person impairment for "Table 53 2C" and 13% for range of motion deficits in the cervical spine.

10. Respondents challenged Dr. Orgel's determinations and sought a Division Independent Medical Examination (DIME). On July 1, 2015 Claimant underwent a DIME with Kathy McCranie, M.D. Dr. McCranie agreed with Dr. Orgel's determination that Claimant reached MMI on February 17, 2015. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* she also agreed with Dr. Orgel that Claimant warranted a 6% whole person impairment based on her cervical spine condition pursuant to Table 53 C.II.

11. Dr. McCranie agreed with all of Dr. Orgel's opinions with the exception of range of motion measurements. Dr. Orgel had assigned Claimant a 13% impairment for range of motion deficits, but Dr. McCranie assigned Claimant a 2% rating for range of motion deficits in the cervical spine. Combining a 6% impairment pursuant to Table 53 C.II. with a 2% rating for range of motion loss, Dr. McCranie concluded that Claimant warranted an 8% whole person impairment rating.

12. Section 1.2 of the *AMA Guides* outlines the structure and use of the publication. The section specifies, in pertinent part:

> This information gathering and analysis serves as the foundation upon which the evaluation of permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the Guides. Once this task is accomplished, the evaluator's findings may be compared with the clinical information already available about the individual. If the current findings are consistent with the results of previous clinical evaluations, they may be compared with the appropriate tables of the Guides to determine the percentage of impairment. If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity.

13. Section 1.2 of the *AMA Guides* thus provides that impairment ratings should only be prepared when the "current findings are consistent with the results of previous clinical evaluations." The section also states that an impairment rating "should not be carried out until communication between the involved physicians or further

clinical investigation resolves the disparity." Claimant asserts Dr. McCranie failed to address her range of motion disparity with the measurements of Dr. Orgel. She thus contends that she has overcome Dr. McCranie's July 1, 2015 DIME by clear and convincing evidence.

14. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. McCranie that she sustained an 8% whole person impairment rating as a result of her June 4, 2013 cervical spine injury. After considering voluminous medical records, diagnostic results, the opinions of multiple physicians and performing a physical examination, Dr. McCranie concluded that Claimant reached MMI on February 17, 2015 with an 8% whole person impairment. Initially, Claimant's chiropractic visits between October 7, 2014 and January 9, 2015 revealed that her cervical range of motion was "abnormal" in the planes of cervical rotation and lateral flexion. However, the records reveal that five treating providers, including Dr. Thurston, Dr. Koval, Dr. Kistler, PA-C Shouse, and PA-C Springer documented that Claimant had full, normal or good cervical range of motion. Because Dr. McCranie's opinion was consistent with numerous treatment providers, she had little reason to question her range of motion findings or contact Dr. Orgel to address the disparity. Dr. Orgel's determination simply constitutes a difference of opinion with Dr. McCranie's range of motion measurements. Finally, even if Dr. McCranie deviated from Section 1.2 of the *AMA Guides*, a technical deviation does not render her opinion clearly erroneous. She properly applied the *AMA Guides,* conducted valid range of motion testing and determined that Claimant warranted a 2% whole person impairment rating for range of motion deficits. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. McCranie's impairment determination was incorrect.

CONCLUSIONS OF LAW

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

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

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

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 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).

. 6. 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).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. McCranie that she sustained an 8% whole person impairment rating as a result of her June 4, 2013 cervical spine injury. After considering voluminous medical records, diagnostic results, the opinions of multiple physicians and performing a physical examination, Dr. McCranie concluded that Claimant reached MMI on February 17, 2015 with an 8% whole person impairment. Initially, Claimant's chiropractic visits between October 7, 2014 and January 9, 2015 revealed that her cervical range of motion was "abnormal" in the planes of cervical rotation and lateral flexion. However, the records reveal that five treating providers, including Dr. Thurston,

Dr. Koval, Dr. Kistler, PA-C Shouse, and PA-C Springer documented that Claimant had full, normal or good cervical range of motion. Because Dr. McCranie's opinion was consistent with numerous treatment providers, she had little reason to question her range of motion findings or contact Dr. Orgel to address the disparity. Dr. Orgel's determination simply constitutes a difference of opinion with Dr. McCranie's range of motion measurements. Finally, even if Dr. McCranie deviated from Section 1.2 of the *AMA Guides*, a technical deviation does not render her opinion clearly erroneous. She properly applied the *AMA Guides,* conducted valid range of motion testing and determined that Claimant warranted a 2% whole person impairment rating for range of motion deficits. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. McCranie's impairment determination was incorrect. *Compare In Re Lafont*, W.C. No. 4-914-378 (ICAP, June 25, 2015) (concluding that the claimant had overcome the DIME determination because the DIME physician had failed to perform an adequate examination and comply with *AMA Guides* based on an expert physician's opinion).

ORDER

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

1. Claimant has failed to overcome the DIME opinion of Dr. McCranie. She reached MMI on February 17, 2015 with an 8% whole person impairment rating.

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 2, 2016.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

The issues presented involve compensability and Claimant's entitlement to medical benefits. The questions to be answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his right knee; and if so,

II. Whether he established, by a preponderance of the evidence, that he is entitled to an award of reasonable, necessary and related medical treatment, including treatment recommended by Dr. Duffy.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. Davis and Duffy, the ALJ enters the following findings of fact:

1. Claimant works as a correctional officer for Employer. As part of his employment, Claimant must participate in and pass annual training involving simulated altercation situations between officers and offenders wherein the officers practice restraint techniques to assure personal safety. Claimant referred to this as "PPC" training.

2. Claimant testified that on February 25, 2015, he was participating in PPC training demonstrating an "iron wrist" takedown maneuver on a fellow officer when he injured his right knee. According to Claimant, he was in the process of taking his practice partner to the ground when he felt his right knee "pop" after which Claimant testified he experienced "excruciating" pain.

3. Claimant has a long and complicated medical history concerning his right knee. He has been diagnosed with and treated for end stage osteoarthritis and gout. Claimant testified at hearing that he has suffered from gout for at least the past eight years.

4. Medical records admitted into evidence reveal the following:

- Claimant treated with his personal care physician (PCP) at Kaiser for right knee pain associated with gout on October 30, 2013. As of this date, Claimant was having 2-3 flares in his right knee per week and his uric acid level was high as demonstrated by laboratory work-up on this date. *R.Ex.A, pp.3-6*.

- The Claimant sought a refill for his gout medication on March 21, 2014. *R.Ex.A, p.7.*

- On May 21, 2014, the Claimant was "just walking" at work when his left foot "just cracked" and he twisted his right knee. *R.Ex.B, pp.69-71*; *R.Ex.B,p.83*.

- A four-view x-ray of the right knee on May 22, 2014 indicated "advanced tricompartmental degenerative change" and other "chronic" findings. *R.Ex.B, p.74.*

- Medication adjustments were made to address Claimant's ongoing gout diagnosis on May 27, 2014 as Claimant was seeking treatment that would be "preventative" in nature. *R.Ex.A, p.15.*

- On May 27, 2014, Claimant's blood was drawn for uric acid testing. A reported value of 8.1mg/dl was revealed on May 28, 20914. The goal of treatment for gout patients is a uric acid level below 6.0 mg/dl. Claimant was diagnosed with right knee joint pain. *R.Ex.A, p.18*.

- On June 2, 2014, Daniel Olson, M.D. evaluated Claimant in connection with his left foot and right knee conditions stemming from the May 21, 2014 incident where he was walking at work. Dr. Olson documented that Claimant's right knee appeared "somewhat arthritic." He diagnosis Claimant with a "closed fracture of metatarsal bone(s)" and opined that the "cause of this problem does not appear related to work activities." *R.Ex.B, p.76.*

- On June 3, 2014, the Claimant was diagnosed with end stage osteoarthritis in his right knee by orthopedist Matthew Simonich, M.D. Also on this date, a total knee replacement was discussed in response to the Claimant's arthritic pain. *R.Ex.B, pp.78-82.*

- On August 27, 2014, the Claimant saw orthopedic expert Dr. Hendrick Arnold for an independent medical examination (IME) for his right knee in connection with a worker's compensation claim Claimant filed stemming from the May 21, 2014 incident occurring at work. Dr. Arnold took a history from Claimant, conducted a physical examination and reviewed available records. He then prepared a written report outlining his findings and opinions.

- In his report, Dr. Arnold noted that Claimant had trouble climbing stairs and ladders because of his right knee. He told Dr. Arnold that his right knee gave him problems even while walking on level surfaces ("flat land"), as his right knee felt like it was going to "give out." He told Dr. Arnold that his right knee hurt when he is just sitting still and that the pain increases when he bends it. The Claimant told Dr. Arnold on this date that his right knee pain is global. *R.Ex.C, p.92*. Dr. Arnold indicated that x-ray studies taken shortly after the May 21, 2014 incident

demonstrated degenerative changes in the right knee that had occurred over considerable time. *R.Ex.C, p.99*. Dr. Arnold determined that Claimant's history of obesity and gout were the cause of his numerous joint symptoms of pain and inflammation throughout the years, and these same factors accelerated and increased his chances of degenerative joint disease. *R.Ex.C, p.99*.

5. The parties took Dr. Arnold's deposition on October 9, 2014, at which time Dr. Arnold testified that Claimant was not initially forthcoming in relating exactly where his preexisting gout flared. He eventually admitted to Dr. Arnold that his gout flares normally extended to his knees. *R.Ex.D, pp.128-129*.

6. Prior to beginning his deposition testimony, Dr. Arnold had the opportunity to review records from Claimant's PCP at Kaiser for the first time. Dr. Arnold determined that these records demonstrated that the Claimant's preexisting gout was more severe a problem in the time leading up to May 21, 2014 than the Claimant reported during the IME. *R.Ex.D, pp.120-121*.

7. Dr. Arnold explained that gout causes rapidly accelerated degeneration of cartilage and bone. *R.Ex.D, pp.142-143*.

8. Dr. Arnold opined that the degenerative changes evident in the Claimant's right knee are likely related to uric acid deposits. *R.Ex.D, p.24*.

9. In sum, Dr. Arnold noted that gout has a considerable effect on bones and joints, and the most commonly affected areas are the feet and knees. *R.Ex.D, p.144*.

10. Claimant testified that following the May 21, 2014 incident occurring at work, he was returned to full duty work on October 6, 2014. Claimant was assigned to the tool crib upon his return. Claimant testified that his right knee "hurt" when he returned to work in October. Sometime prior to February 25, 2015, Claimant assisted in replacing flooring around the facility. This job required substantial squatting and kneeling and lasted approximately 6 weeks according to Claimant.

11. Claimant testified that his knee continued to hurt following this flooring job. Per Claimant, his right knee "hurts all the time." Regardless, Claimant testified that he could perform the essential functions of his work prior to February 25, 2015. Following the February 25, 2015 "popping" during PPC training, Claimant testified that he could not work secondary to increased pain and swelling in the right knee. According to Claimant, he could not kneel following this incident and had to have his CPR training modified. Claimant testified that he continues to work in the tool crib but with difficulty. He takes Ibuprofen for pain "just so he can walk around."

12. Concerning his gout and treatment for the same, Claimant's testified at his gout is under control, having last had a flare up 1 ½ years ago. Claimant testified that his gout affects his right big toe and causes "aching" pain. Claimant's medical records establish that he was taking 200 mg of gout medication "daily" and actively treating for

"frequent" (weekly) gout attacks extending into his right knee as of Nov. 13, 2014. *R.Ex.A, p.51-54*. Claimant testified that he had suffered only one past gout attack on his right knee. He did not remember treating for his gout in November 2014. Claimant's medical records also establish that he pursued an injection into the right knee on Dec. 19, 2014, *R.Ex.A, p.55,* and he requested a gout medication refill on Feb. 2, 2015. His PCP raised Claimant's gout medication dosage to 300 mg. on this date. *R.Ex.A, p.56-57*. The ALJ finds Claimant's testimony partially inconsistent with the content of his medical records.

13. As noted above, Claimant testified at hearing that he suffered a new injury to his right knee on February 25, 2015, when he felt a "pop" during training. However, an e-mail message generated by Claimant on February 27, 2015, demonstrates that Claimant reported to his employer that he had actually suffered an injury to his *left* knee during the training. *R.Ex.G, p.205*. Claimant also completed paperwork upon his first visit to a physician for his alleged knee injury during which time Claimant reported that his injury occurred on February 26, 2015. *R.Ex.H, p.211*. Further, a report from Dr. Nanes dated August 5, 2015 reflects in the history of present illness section of the report, that Claimant's "right knee gave out on him at work about 2 weeks ago and he did fill out a report, however he advised his staff that he has an appointment with me in 2 weeks." The ALJ finds inconsistencies in Claimant's testimony and the records documenting the body part he alleged to have injured and the date the injury occurred.

14. Claimant testified that he suffered "excruciating" right knee pain following the incident on Feb. 25, 2015. Nonetheless, Claimant testified at hearing that he did not seek medical treatment for his right knee until March 4, 2015, and did so only then because he was already going to see the doctor for an admitted workers' compensation claim involving his shoulder. Claimant saw Dr. Richard Nanes at Centura Centers for Occupational Medicine (CCOM) on March 4, 2015, for right knee pain at which time Dr. Nanes ordered x-rays and an MRI of the right knee. Outside of indicating that he had suffered an injury during "PPCT training", Claimant did not provide a mechanism of injury in the Patient Health and Injury History completed at CCOM on March 4, 2015. *R.Ex.G, p. 211.*

15. There were no acute findings visualized on the three-view right knee x-rays taken March 4, 2015, as ordered by Dr. Nanes. *R.Ex.A., p.59*.

16. Claimant saw orthopedist James Duffey, M.D. on April 7, 2015, complaining of osteoarthritis in the right knee. Claimant told Dr. Duffey on this date that he had never had any right knee problems prior to May 21, 2014 and that his right knee was "completely asymptomatic" prior to May 21, 2014. *R.Ex.I, p.236*.

17. After examining Claimant and reviewing diagnostic studies of the right knee, Dr. Duffey diagnosed Claimant with advanced end-stage osteoarthritis of the right knee. *R.Ex.I, p.236.* Based upon the history provided, Dr. Duffey opined that Claimant had suffered a "significant exacerbation" of his preexisting right knee osteoarthritis on Feb. 25, 2015. *R.Ex.I, p.236.*

18. Dr. Duffey recommended an injection to the right knee and possibly a total knee replacement. *R.Ex.I, p.237*.

19. On September 14, 2015, the Claimant saw orthopedist I. Stephen Davis for an independent medical examination at the Respondent's request. *R.Ex.J, p.238.*

20. Dr. Davis reviewed the actual films from the Claimant's March 27, 2015 MRI scan of the right knee. *R.Ex.J, p.238.*

21. Claimant described the mechanism of his alleged Feb. 25, 2015 injury as a twisting of the right knee resulting in a "blow out" with the onset of severe pain. *R.Ex.J, p.238.*

22. After a full review of relevant medical history, including review of actual MRI films, Dr. Davis opined that there is no objective evidence of additional injury to the right knee on either May 21, 2014 or Feb. 25, 2015. *R.Ex.J, p.242.* Dr. Davis diagnosed Claimant with severe end-stage osteoarthritis of the right knee. *R.Ex.J, p.242.*

23. Dr. Davis agreed that the Claimant was a candidate for a total right knee replacement but that the need was not work-related. *R.Ex.J, p.242.*

24. Dr. Davis testified by deposition on October 27, 2015. Dr. Davis was qualified as a Level II accredited expert in orthopedic medicine who has been treating knee problems since the 1960's. *Davis Deposition, pp.3-5*.

25. During his deposition, Dr. Davis reiterated his opinion that there was no objective medical record evidence of Claimant having suffered an acute injury on February 25, 2015. *Davis Deposition, p.7*.

26. Dr. Davis testified that the Claimant's complaints of right knee pain, difficulty straightening and bending the right knee, and catching and locking of the right knee are all consistent with the Claimant's advanced arthritis. *Davis Deposition, pp.7-8*.

27. Dr. Davis testified that there is no evidence that the Claimant's advanced right knee arthritis was worse the day after the alleged injury of February 25, 2015 than it was the day before. *Davis Deposition, p.12*.

28. Dr. Davis testified that the symptoms reported by Claimant following the incident from Feb. 25, 2015 could have equally manifested after walking down the street or getting up from the dinner table. According to Dr. Davis, any number of activities of daily living could have led to the same complaints. Consequently, Dr. Davis testified: "There's no anatomic change, it's just an expected occurrence when you have arthritis." *Davis Deposition, pp.14-15*.

29. Dr. Davis explained that arthritis causes knee bones to grind, grate, stick and

"give out." These results of arthritis cause swelling and pain without any acute, anatomic change in the knee. *Davis Deposition, p.15*.

30. Dr. Davis testified that much like osteoarthritis, gout can cause anatomic destruction in the knee. *Davis Deposition, p.19*.

31. Dr. Davis testified that gout alone can cause pain in the knee along with erosions and lesions in the knee. *Davis Deposition, p.20*.

32. Dr. Davis testified that gout can have the same effect as osteoarthritis in the knee, namely destruction of articular cartilage causing pain, swelling, deformity, limited motion, giving out and instability. *Davis Deposition, p.20*.

33. Dr. Davis explicitly disagreed with the Claimant's counsel that the Claimant could have asymptomatic days regarding his right knee considering the severity of the osteoarthritis present on imaging study. *Davis Deposition, pp.25-26*. Based upon Claimant's medical records outlining the severity of his gout coupled with the reported findings of the MRI and Claimant's testimony that his knee hurts all the time, the ALJ finds it improbable that Claimant's right knee was asymptomatic leading up to the February 25, 2015 incident.

34. Dr. Davis testified that a total right knee replacement would in no way be aimed at treating the effects of the February 25, 2015 incident. *Davis Deposition, pp.33-34*.

35. The ALJ infers from Dr. Davis' testimony that Claimant's right knee symptoms, i.e. pain, popping, swelling and reduced/painful range of motion are the consequence of the natural and probable progression of his pre-existing degenerative joint disease in the knee.

36. The parties took the deposition of Dr. Duffey on January 26, 2016.

37. Dr. Duffey testified that he is not Level II accredited and has not had any formal training with regard to causation issues. *Duffey Deposition, p.21.*

38. Dr. Duffey testified that he had not reviewed any medical records from 2014 for the Claimant prior to his deposition. *Duffey Deposition, p.22.*

39. Dr. Duffey testified that prior to his deposition he was not aware that the Claimant had been evaluated by any other orthopedist for his right knee. *Duffey Deposition, pp.31-32.*

40. Dr. Duffey testified that prior to his deposition he had no knowledge that the Claimant suffered from gout. *Duffey Deposition, p.8.*

41. Dr. Duffey testified that he has personally viewed gout crystals deposited in

knees, and that gout could "definitely be confounding factor in [the Claimant's] symptoms." *Duffey Deposition, p.8.*

42. Dr. Duffey testified that the Claimant wouldn't be able to distinguish between pain in the right knee caused by gout, osteoarthritis or an acute injury as suggested by Claimant during his testimony. *Duffey Deposition, pp.9,46.*

43. Per Dr. Duffey's testimony, he understood the mechanism of injury (MOI) to be an abrupt transfer of weight onto the right leg through the knee which caused pain. Regarding this MOI, Dr. Duffey testified that sudden loading of Claimant's abnormal joint may have led to pain caused by bone bruising which could be seen on MRI. During cross examination, Dr. Duffey admitted that the March 27, 2015 MRI study showed no evidence of bone bruising. *Duffey Deposition, p.18.* Dr. Duffey's understanding of the MOI in this case is substantially inconsistent with Claimant's reported MOI to Dr. Davis. As noted above, Claimant's MOI as reported to Dr. Davis was severe pain associated with a twisting and "blow out" of the knee.

44. Dr. Duffey testified that Claimant had a "relatively functional arthritic knee that was not terribly symptomatic over a period of time, had not been to see people for symptoms; than he has these two episodes, and his symptoms are worse and now continue to be worse. So I think that his injuries have sped up the process to where we are today; you know, maybe not caused, but have exacerbated a problem, and sped up the process." *Duffey Deposition, p.14.* The ALJ infers from Dr. Duffey's testimony that Dr. Duffey believes that February 25, 2015 incident resulted in an acceleration of the degenerative process pre-existing in Claimant's right knee.

45. Dr. Duffey testified that evidence of Claimant seeking a knee injection in December 2014 would change his initial opinion on relatedness that was based in an asymptomatic knee leading up to Feb. 25, 2015. *Duffey Deposition, p.22.*

46. Dr. Duffey testified that evidence the Claimant was treating for right knee pain in October 2013 would change his initial opinion on relatedness much in the same way as would knowledge of the Claimant seeking an injection in December 2014. *Duffey Deposition, p.23.*

47. Dr. Duffey testified that evidence of prior gout treatment would make him think that gout was playing a greater role in the Claimant's right knee problems than he originally thought. *Duffey Deposition, p.23.*

48. Dr. Duffey testified that it is not uncommon for gout to spread to the knee, and that gout can deteriorate a joint. *Duffey Deposition, pp.24-25.*

49. Dr. Duffey testified that after viewing the PCP notes from Kaiser from December 2014 regarding a knee injection changed his initial opinion that the incident on Feb. 25, 2015 altered the degenerative process in the right knee. *Duffey Deposition, p.27.* In this regard, Dr. Duffey testified as follows:

Q: Does that change your testimony with regard to the February, 2015, incident speeding up any process in the knee?

A: It does. It, again, makes it apparent that he was having an issue. And this note suggests that there's some urgency, because they were trying to work him in to a cancellation, to get this done relatively sooner. So I would say that, yes, it tells me that he was not doing fine from October until February that, in fact, he was having some issues and some fairly acute symptoms in December of 2014."

50. When asked if there was evidence of an acute exacerbation (acceleration) of the right knee condition in February 2015, Dr. Duffey admitted: "The only evidence I have is the patient's complaint that something happened, and that he experienced increased pain." *Duffey Deposition, p.27.*

51. Dr. Duffey testified at two separate times during his deposition that an atraumatic osteoarthritic flare could present very similarly to the Claimant's complaints on Feb. 25, 2015. *Duffey Deposition, pp.28, 31.*

52. Dr. Duffey testified there is no objective measure that the Claimant's complaints after the incident on February 25, 2015 were related to the alleged work incident as opposed to his osteoarthritis. *Duffey Deposition, p.31.*

53. Dr. Duffey testified that medial pain, swelling, difficulty straightening and bending the knee, grating of the knee, catching of the knee, locking of the knee and restricted range of motion are all expected symptoms of osteoarthritis independent of any trauma. *Duffey Deposition, pp.18,34-35.*

54. Dr. Duffey testified that the treatment he recommends for the Claimant is the same treatment he would recommend for a patient with osteoarthritis and no trauma. *Duffey Deposition, p.45.*

55. Based upon the totality of the evidence presented, the ALJ finds the opinions expressed by Dr. Davis credible and more persuasive than the contrary opinions of Dr. Duffey.

56. Claimant has failed to establish, by a preponderance of the evidence, that he sustained a compensable injury or exacerbation (acceleration) of his pre-existing osteoarthritis as a consequence of the February 25, 2015 incident occurring during PPC training. Rather, the totality of the evidence presented persuades the ALJ that, more probably than not, Claimant's worsening right knee symptoms are a direct consequence of the natural progression of Claimant's underlying pre-existing degenerative right knee arthritis. Based upon the evidence presented, the ALJ is convinced that Claimant's degenerative osteoarthritis progressed naturally, with likely contribution from his non work-related gout but specifically without contribution from his participation in PPC training on February 25, 2015.

57. Consequently, Claimant has failed to prove that his need for right knee treatment, including additional injection therapy and/or surgical intervention in the form of a total knee arthroplasty (TKA) are proximately related to the February 25, 2015 incident occurring during PPC training. Accordingly, Respondent's are not obligated to provide this treatment

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. 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). As noted in this case, the expert medical opinions of Dr. Davis are more persuasive than the opinions of Dr. Duffey. Based upon the evidence presented, the ALJ is convinced that Dr. Duffey did not have a full understanding of the extent of Claimant's pre-existing right knee condition, including the extend of treatment for his gout. It is also evident that Dr. Duffey was working from a different

understanding of the MOI which contradicted Claimant's reported MOI to Dr. Davis. Accordingly, the ALJ finds the opinions of Dr. Davis more persuasive than those of Dr. Duffey.

C. 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).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's right knee symptoms and need for treatment arise out of his employment and are therefore sufficiently connected thereto to result in a finding that his alleged injuries/condition is compensable.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of 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. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges, based primarily on the testimony of Dr Duffey, that he suffered a compensable exacerbation, i.e. acceleration of his right knee osteoarthritis as a consequence of taking his training partner to the mat while engaging in PPC training.

G. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the totality of the evidence presented persuades the ALJ that Claimant's worsening right knee symptoms, more probably than not, arose from the natural progression of his pre-existing degenerative osteoarthritis with likely contribution from his gout, rather than the incident occurring during PPC training as he testified. Based upon the evidence presented, the ALJ concurs with Respondents assertion that when he arrived at work on February 25, 2015, Claimant's right knee was besieged by end-stage osteoarthritis and gout and that his current symptoms are the continued manifestation of the natural progression of these conditions. In support of this conclusion, the ALJ relies upon the following record evidence:

- Claimant's own testimony that his knee hurt upon his return to work on in October 2014 and that it hurt all the time.

- The record evidence that in the weeks prior to the alleged work related MOI Claimant was seeking a knee injection on an ostensibly emergent basis on December 19, 2014 and a refill of his gout medications. Claimant's testimony of ongoing symptoms coupled with the timeline of active treatment in the weeks prior to the alleged work related exacerbation belies Claimant's assertion that his right knee was feeling good prior to the date of alleged injury.

- The record evidence establishing that Claimant's complaints from February 25, 2015 are identical to those associated with his preexisting end-stage osteoarthritis and his preexisting gout.

- The record evidence indicating that there was no objective medical evidence to establish that Claimant sustained an acute injury.

- The inconsistencies in Claimant's reported MOI, the knee involved in the alleged injury and the date the alleged injury occurred. Here, Claimant initially withheld the extent of his right knee history from essentially every medical provider involved in this case. He testified at hearing that he had one prior gout attack in his right knee while the medical record overtly contradicts this assertion. He reported a left knee injury as opposed to a right knee injury and completed paperwork alleging a date of injury different than he testified to at hearing.

ORDER

It is therefore ordered that:

1. Claimant's February 25, 2015 claim for work related injuries to his right knee is denied and dismissed.

2. Claimant's claim for medieval benefits associated with alleged injuries occurring February 25, 2015, including injection therapy and surgical intervention 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 28, 2016

/s/ Richard M. Lamphere

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

ISSUE

1. Whether Claimant has established by a preponderance of the evidence that treatment of his lumbar spine is related to his admitted February 27, 2015 work injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a garbage truck driver for over 15 years.

2. On February 27, 2015 Claimant suffered an admitted work injury when he slipped on ice while climbing out of his truck, causing him to land on his outstretched left arm and left side of his body.

3. On March 1, 2015 Claimant was evaluated at Concentra by Kathy Okamatsu, NP. Claimant reported left side arm, shoulder, neck, and back pain from a fall. Claimant reported that while picking up trash at an apartment he slipped on black ice at ground level and fell backwards and onto his left side possibly landing on his back, left palm, left elbow, and left shoulder. Claimant reported that he worked the remainder of his shift without problem but that the pain became worse the next day. NP Okamatsu assessed left shoulder pain, left elbow pain, left wrist pain, strain of left trapezius muscle, left shoulder strain, left elbow fracture, and left wrist sprain. NP Okamatsu provided Claimant with a sling, and referred Claimant to a hand specialist. *See* Exhibit M.

4. On March 6, 2015 Claimant was evaluated by Nancy Strain, D.O. Dr. Strain noted that Claimant was in for a recheck of his left elbow, wrist, and shoulder and that he also complained of neck and back pain. Claimant reported the pain was radiating into his left leg and that his left knee was sore. Dr. Strain noted that Claimant was in a cast for a distal radius fracture and a sling for a radial head fracture. Claimant reported his back pain was in his lower back bilaterally. Dr. Strain assessed cervical strain, lumbar strain, left knee pain, left elbow fracture, and left wrist fracture. *See* Exhibit 6.

5. On March 16, 2015 Claimant was evaluated by Chelsea Rasis, PA-C. It was noted that Claimant presented for several problems after suffering a fall at work onto his left arm. PA Rasis noted a left shoulder sprain with continued dull ache in the anterior shoulder, left elbow x-rays suggesting minimally displaced radial head/neck fracture, left wrist x-rays suggesting non-displaced radius fracture, and lumbar sprain with reports that the pain radiates from the left lower back into the left knee. *See* Exhibit 7.

6. On March 31, 2015 Claimant was evaluated by Stephen Danahey, M.D. Dr. Danahey assessed cervical strain, knee pain left, left elbow fracture, left shoulder strain, left wrist sprain, and lumbar strain. Dr. Danahey noted a slip and fall injury onto Claimant's left side. Dr. Danahey noted Claimant would be undergoing an MRI of the lower back and ordered an MRI of the left shoulder and left knee. *See* Exhibit 7.

7. On April 1, 2015 Claimant underwent an MRI of his lumbar spine interpreted by Charles Wennogle, M.D. Dr. Wennogle provided an impression of: L3-L4 disc degeneration with broad-based disc bulge and mild bilateral facet arthropathy; L4-L5 disc degeneration and left foraminal annular tear, mild to moderate bilateral facet arthropathy, mild bilateral lateral recess stenosis without nerve root deformity; L5-S1 disc degeneration and mild bilateral facet arthropathy, mild right lateral recess and foraminal stenosis without nerve root deformity, and type 2 fatty modic discogenic endplate changes. *See* Exhibit 2.

8. On April 15, 2015 Claimant was evaluated by Dr. Danahey. Dr. Danahey noted Claimant's continued pain complaints and referred Claimant for orthopedic evaluation for his left shoulder and left knee and noted that Claimant was scheduled to see Dr. Zimmerman for his cervical and low back area. Dr. Danahey also noted that Claimant would be referred for a delayed recovery evaluation and treatment as well as psychological treatment and help with pain management. *See* Exhibit 7.

9. On May 15, 2015 Claimant was evaluated by Melanie Heto, Psy.D. Dr. Heto noted that Claimant felt betrayed and severely devalued by his supervisor's lack of a more deliberate attempt to help him after the accident, especially given his long history of employment and as such Claimant psychologically globalized this devaluation resulting in social isolation and disengagement from his usual enjoyments, and that Claimant turned his negative feelings inward on himself and saw himself as worthless and impotent. Dr. Heto opined that Claimant's feelings of worthlessness, frustration with his employer and medical team, and generalized hopelessness and worry may contribute to a worsening of his experience of pain, his perceived progress in recovery, and was likely to continue to undermine Claimant's recovery. Dr. Heto opined that Claimant was very likely to exhibit a delayed physical recovery from his injuries. She noted that Claimant's current level of passivity and resignation appeared to be quite uncharacteristic of him. *See* Exhibit 4.

10. On June 11, 2015 Claimant was evaluated by Rafer Leach, M.D. Claimant reported slipping on black ice when stepping out of a garbage truck he drove for work. Claimant reported falling on his left side with primary impact on his left shoulder, upper back, and neck. On examination Dr. Leach noted loss of lumbar lordosis in the lumbar spine, lumbar midline tenderness at L2-L3 and again at L4-S1. Dr. Leach noted positive lumbar facet guarding with extension, left lateral bending, and rotation in the lower lumbar segments with radiating pain into the left gluteal region. Dr. Leach referred Claimant to physical therapy and also referred Claimant for ultrasound-guided left patellafemoral and femorotibial steroid injection. *See* Exhibit K.

11. On July 30, 2015 Claimant was evaluated by James Benoist, M.D. Dr. Benoist noted that Claimant had an ultrasound-guided drainage of the prepatellar bursa effusion with steroid injection on June 24, 2015 and that the swelling had resolved and pain was markedly improved in Claimant's knee. Dr. Benoist also noted that on July 8, 2015 Claimant had left sacroiliac sulcus/ligament and left piriformis muscle injection for both diagnostic and therapeutic purposes with no anesthetic phase benefit and no therapeutic phase benefit. Dr. Benoist referred Claimant for bilateral L5-S1 transforaminal epidural steroid injections. *See* Exhibit 8.

12. On August 26, 2015 Claimant was evaluated by Dr. Benoist. Dr. Benoist included in the diagnosis traumatic spondylopathy, lumbago, thoracic or lumbosacral neuritis or radiculitis, lesion of sciatic nerve, and sacroilitis. Dr. Benoist noted that Claimant had clinical findings which could be suggestive of S1 radiculitis but could also be consistent with sacroilitis and piriformis syndrome. Dr. Benoist noted that given Claimant's MRI findings and lack of benefits with injection, the persistent low back pain and left lower extremity discomfort was most likely related to the L5-S1 disc and radiculitis. He also opined that it was possible that the descending S1 nerve root was being irritated at the L4-5 level where there was a left paracentral disc protrusion. Dr. Benoist listed the work related medical diagnoses to include lumbago and traumatic arthropathy. *See* Exhibit 8.

13. On September 17, 2015 Claimant underwent an independent medical examination performed by Allison Fall, M.D. Claimant reported to Dr. Fall that on February 27, 2015 while working he fell on the ice, his feet went up in the air, and as he landed he put his right hand on the back of his head and injured his left shoulder, elbow, wrist, and that his low back and left knee also hurt. Claimant reported that his wrist has improved a little but that nothing else had gotten better. Claimant reported no prior shoulder, back, or knee injuries. Dr. Fall opined that the work related injuries were to the left shoulder, elbow, wrist, and left knee. She opined that the lumbar spine epidurals were not medically reasonable, necessary, or appropriate and were not work related. She noted that Claimant had delayed recovery and psychological overlay. *See* Exhibit J.

14. On October 21, 2015 Claimant was evaluated by Mitchel Robinson, M.D. Dr. Robinson noted that Claimant was involved in a work related accident 10 months prior and that Claimant had two shoulder MRIs that showed partial thickness tearing of the rotator cuff and a small portion of a full thickness tear in the shoulder. Dr. Robinson noted that although there was concern on the MRI, Claimant had severely diminished range of motion in his shoulder, elbow and wrist and was not a candidate for any type of surgery of the shoulder until Claimant regained range of motion. Dr. Robinson noted he was unable to fully assess Claimant's shoulder due to Claimant's limitations. *See* Exhibit L.

15. On November 11, 2015 Claimant was evaluated by Rafer Leach, M.D. Dr. Leach noted that Claimant's complaints were the same since his last visit. On

examination, Dr. Leach noted that Claimant had paraspinal tenderness in the left cervical and left lumbar region. *See* Exhibit 8.

16. On December 9, 2015 Claimant was evaluated by Dr. Leach. Dr. Leach noted that Claimant was involved in a work related injury when he fell stepping out of the garbage truck he was driving and slipped on black ice, and fell to the left side. Claimant reported mild back pain, frequent left knee pain, lower back pain, and left arm pain interfering with his daily activities. Claimant denied having significant previous medical history. Dr. Leach noted no apparent preexisting spinal injury for which Claimant required any treatment prior to the date of injury. Dr. Leach noted that the MRI of the lumbar spine showed at L2-L3 mild left facet arthropathy; at L3-L4 disc degeneration with broad-based disc bulge and mild bilateral facet arthropathy with small bilateral facet articulation effusions; and at L4-L5 broad-based disc bulge and left foraminal annular tear, mild to moderate bilateral facet arthropathy and ligamentum flavium hypertrophy with small bilateral facet articulation effusions, and mild bilateral lateral recess stenosis without nerve root deformity; and at L5-S1 disc degeneration with broad-based disc bulge and predominantly right foraminal broad-based bulge, mild bilateral facet arthropathy, and mild right lateral recess and foraminal stenosis. On examination Dr. Leach noted lumbosacral lordosis decreased with midline tenderness in the L4-S1 region with a positive bilateral lumbar facet exam, bilateral muscle spasms in the lumbar region left greater than right, and bilateral SI joint tenderness. *See* Exhibit 8.

17. Dr. Leach noted on spinal examination that Claimant had decreased cervical lordosis with midline tenderness in the C4-7 region. Dr. Leach also noted a positive cervical facet exam on the left. Dr. Leach noted bilateral muscle spasms, left greater than right. Dr. Leach noted lumbosacral lordosis was decreased with midline tenderness in the L4-S1 region. Dr. Leach noted a positive bilateral lumber facet exam with bilateral muscle spasms in the lumbar region, left greater than right. *See* Exhibit 8.

18. Dr. Fall testified at hearing. She opined that Claimant did not suffer a lumbar spine injury in the fall at work. She opined that he did not suffer a great fall from a height, but rather that the fall was from standing position to the ground, and she opined that the MRI and x-rays combined with the mechanism of injury did not support an acute injury to the lumbar spine. She also opined that Claimant has somataform disorder that can affect the reliability of Claimant's reports of his symptoms. She opined that the lumbar MRI was benign and showed nothing to indicate a traumatic injury to the spine.

19. Dr. Leach also testified at hearing. He opined that Claimant had guarding and limited range of motion in the spine with lumbar tenderness, pain with facet testing, and loss of lumbar lordosis. Dr. Leach opined that Claimant had positive facet guarding. Dr. Leach noted that both he and Dr. Zimmerman were concerned with a facet condition based on examination. He disagreed with Dr. Fall and noted that the MRI of Claimant's lumbar spine showed a tear at L4 and facet injury and that both of those conditions could be the result of a traumatic injury and could be acute. He noted that Claimant had low back complaints and increased muscle activation in the lumbar

spine immediately after the fall. He opined that the lumbar spine condition is related to the fall Claimant suffered based on the lack of pre-existing lower back pain, the first evaluation and lumbar diagnosis, the lumbar MRI findings, and the physical examination that was consistent with a lumbar spine diagnosis. Dr. Leach opined that Claimant suffered a traumatic injury to the lumbar spine.

20. The testimony of Dr. Leach is found credible and persuasive and supported by the great weight of the medical evidence. Claimant had no pre-existing lumbar spine problems, the conditions noted by MRI are found to be consistent with an acute traumatic injury, and Claimant had immediate lumbar spine complaints following the injury.

21. The testimony of Dr. Fall is not credited. Although Claimant fell from ground level, Claimant's fall was significant enough to cause two fractures. Although Dr. Fall opined that the MRI showed nothing that could be due to an acute injury, the opinion of Dr. Leach that the MRI showed problems that could have been from an acute fall is found more persuasive. The MRI combined with the mechanism of injury and lack of prior pain complaints or treatment to the lumbar spine supports the overall opinion of Dr. Leach that Claimant suffered an acute injury to the lumbar spine.

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).

Relatedness of lumbar spine

The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition, by a preponderance of the evidence. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993).

Claimant has met his burden to establish that treatment for his lumbar spine is causally related to his February 27, 2015 work injury. The records establish that Claimant suffered an acute traumatic fall that caused injury to several body parts. At his first appointment following the fall, Claimant reported back pain. Claimant continued to report lumbar back pain at subsequent appointments. Claimant had no prior back complaints or limitations related to his lumbar spine and prior to the injury Claimant was able to work full duty as a garbage truck driver without limitations. The MRI of Claimant's lumbar spine showed changes that could be due to either degeneration or to acute injury. The testimony of Dr. Leach is found credible and persuasive that the MRI combined with the mechanism of injury, Claimant's immediate report of back pain following the injury, and the lack of prior back pain complaints/treatment all support an acute injury in this case.

Dr. Fall's opinions have been considered and rejected. Dr. Fall noted that Claimant's initial injury was confined to the upper left extremity and that the initial weeks

of treatment were directed to Claimant's upper extremity. Although the initial treatment was directed at the left upper extremity due to acute fractures that Claimant suffered, the initial injury reported by Claimant included from the beginning a complaint of lower back pain. The injury was significant and included both a left elbow and wrist fracture and it is understandable that the initial treatment focused on both fractures. However, Claimant's pain complaints in his lower back began immediately and continued during the course of the claim. Claimant did not have similar pain complaints prior to the injury. Claimant's pain complaints in the back did not come on over time as argued by Respondents, but were present immediately and were reported at his initial evaluation. Also, Claimant's pain complaints are supported by an MRI that has acute indications and are also supported by Claimant's physical examinations. The opinions of Dr. Leach that the findings on MRI combined with Claimant's complaints and the mechanism of injury show consistency and support the conclusion that the fall at work on ice caused a lumbar spine injury is found credible and persuasive.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that treatment of his lumbar spine is related to his admitted February 27, 2015 work injury. Respondents are liable for treatment of the lumbar spine provided to date and for ongoing treatment reasonable and necessary to treat Claimant's lumbar spine.

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

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

DATED: February 29, 2016 /s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

CERTIFICATE OF MAILING OR SERVICE

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

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Division of Workers' Compensation
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Date: **3/3/2016** **Gabriela Chavez**
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-954-01

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant prove by a preponderance of the evidence that he suffered an injury in the course and scope of his employment for Employer; and

2. Whether Claimant was disabled from his usual employment by the work related injury and therefore entitled to an order awarding temporary total disability benefits (TTD).

FINDINGS OF FACT

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

1. Claimant is 58 years old and began work for Employer on February 1, 2010, as local delivery route driver. Employer is in the business of supplying businesses with janitorial supplies. Prior to working for Employer, Claimant was employed by Longmont Packing doing similar work except he delivered meat products.

2. When Claimant arrived at work each morning his truck was loaded with pre-

packaged pallets for his route to be delivered. Claimant's truck was generally loaded with 12 pallets which had products that needed to be delivered to 20 or 25 stops depending on the route.

3. The pallets were generally loaded with products that were 6 to 7 feet high and the individual items generally weighed between 25 to 50 pounds apiece, with some paper products weighing less and some products weighing up to 100 lbs or more, for instance, drums of detergent.

4. Claimant's delivery route included two types of delivery stops, dock deliveries and non-dock deliveries. The non-dock deliveries require Claimant to deliver directly to office buildings, businesses or hotels.

5. Claimant credibly testified that 70 percent of his normal route required hand unloading and 30 percent were dock deliveries. Claimant was provided with a hand truck or dolly to unload and deliver the products. Each truck also had a hand-held pallet jack for dock deliveries.

6. Claimant testified that for dock deliveries he would put the pallet jack underneath the pallet, hand pump the pallet jack to lift the pallet up and wheel the pallet onto the dock area to wherever they wanted the items placed. Claimant testified that these were not always at the dock area and could sometimes be half a block away from the dock. He described having to roll the pallet around corners.

7. Claimant testified that most of his dock stops required him to bring the whole pallet to the door or inside the store or business if there was a receiving area. Claimant testified that when he was making a dock delivery he usually had to assemble or re-assemble the items on the pallet to make the delivery because the pallets would generally be loaded with the products for more than one stop. Claimant would have to separate the products for each stop.

8. Claimant testified that it was his obligation as the delivery driver to assure that the items that he was delivering were meant for that delivery location. He would have the business sign the manifest that they received the right products. This would require him to separate and confirm the proper orders. He would have to separate the orders from the prepackaged pallets which required Claimant to reach up and take items off one pallet and either put it on another pallet or on the floor of the truck. Claimant testified that he spent the whole day reaching up, bending over, stooping and picking it up, putting it on the floor or wherever there was space. He also pushed and pulled the loads that were dock deliveries.

9. Claimant testified he worked 8 hours a day, 5 days a week and earned $14.00 an hour, and generally had 20 stops per day. If he was lucky he would have one dock stop that would be loaded right that he would not have to re-do the pallet. Claimant testified that the truck was equipped with a lift gate, so after he separated the order to be delivered he would use the lift gate and load the delivery items on a two-wheeler, go

back down the lift gate, and deliver it usually to a janitorial closet, storage room or the laundry room in motels. He would unload them where the customer wanted them placed. He would do this several times until the ordered product had been delivered. Claimant's truck when fully loaded carried up to 15,000 pounds of product. He testified that he delivered 7,000 to 15,000 pounds of product each day. Claimant was considered to be one of the Employer's most productive drivers.

10. Claimant began noticing problems with his low back and leg that were minor in his mind about 2 1-2 to 3 years after he started working for Employer. Claimant first noticed problems which he thought were in his hip, because his hip was hurting really bad, and then his leg started hurting. He went to his family doctor who told him that it was probably arthritis in the hip. The doctor gave Claimant some pills that didn't help with the problem. Claimant also testified that there were a number of times that he slipped and fell on the job when delivering product in the winter. He indicated that slip and falls were a hazard of the job. He also testified that he did tell his supervisor when he had significant enough falls that he thought he should report the injury. At those times, his supervisor offered to send him to the doctor but he usually felt like he could work through the problems.

11. Claimant credibly testified, and it is found, that Claimant suffered a slip and fall at the jail; the jail was one of Claimant's delivery locations. He described that at the jail his delivery truck sits somewhat higher than the dock plate and there is a dock plate at a 45-degree angle going up to the back of the truck. On this day it was the first stop of the morning. It was a little rainy and wet. He tried to pull the pallet over the dock plate and the pallet stuck. Claimant pushed the pallet so he could get a better run at it. When he pulled up, he slipped and fell on his back. The pallet came over the dock plate and started rolling towards the Claimant who put his feet up in order to stop it from running over him. The pallet carried him across the dock and stopped when he hit the wall with his low back.

12. Claimant testified he reported the accident to his supervisor Danny Hemans and Tim Clanton, who offered to send him to the doctor. He testified he told them he thought he could work through it, and did not go to the company doctor.

13. Claimant testified that from that point forward, his back continued to deteriorate and get worse. Claimant asked his supervisor about changing routes to an easier route, because it was hard for him to make it through the day because of the pain in his leg and back.

14. On January 21, 2015, Claimant requested FMLA from his employer. Claimant testified that when he asked for FMLA he told Holly Nugent in HR that he was in a lot of pain and that he did not know if he could do the job right now because of his back. He asked Holly if there was any kind of workers' compensation, temporary workers' compensation or anything that he could apply for until he got better. Claimant said that Holly told him the only thing that the company offered was FMLA.

15. On January 21, 2015, Claimant was evaluated by Dr. Gale, his family doctor. He complained of right lower extremity pain difficult to localize when it radiates up into his lumbar back and down into calf and mid foot associated with numbness, pain, and dysfunction. Claimant has right hip pain that really involves the whole leg, worse in the right thigh in front pocket distribution. Claimant indicated it was hard to work, hard to walk, hurts with all exercise. Activity makes it worse. Claimant has moderate to severe pain and sometimes cannot stand.

16. Claimant's physical examination on that date showed antalgic gait, mildly decreased sensation to the right foot. Dr. Gale diagnosed Claimant with radicular syndrome right leg, right leg pain. Severe right side pain starts in lumbar and radiates down the leg, some claudication type symptoms were present, but not typical. An MRI was ordered. Claimant was disabled from his usual employment commencing on January 21, 2015.

17. Dr. Gale completed the FMLA forms on February 3, 2015. Dr. Gale indicated that Claimant was unable to perform job duties of lifting, getting into and out of vehicles frequently. Condition was exacerbated over the past 4 months. Dr. Gale described symptoms as severe debilitating pain that limits Claimant's ability to walk > ½ block, pain shooting down the right lower extremity and gets worse with activity, better with rest. Dr. Gale reported that work up is in progress.

18. Claimant testified that when he took FMLA, it was his intent to get better and to return to work. But his back condition did not get better.

19. Claimant testified that currently he always has back pain. He has trouble walking more than 20 feet. Claimant has pain in his right hip and tingling in the back of his leg. The pain goes to the bottom of his foot.

20. Claimant is currently taking medication prescribed by his family doctor, Dr. Gale. He is currently taking gabapentin for the burning, and Percocet for the pain. Dr. Gale ordered an MRI and referred Claimant for a surgical consult at the Colorado Spine Institute. Surgery has been recommended.

21. Claimant was evaluated by Dr. Kevin Schmidt at Colorado Comprehensive Spine Institute on July 27, 2015, for evaluation and treatment of chronic low back and right lower extremity pain. Claimant described 1.5 years of low back and right lower extremity pain along with aching, stabbing, with numbness and pins and needles right posterior and lateral thigh, calf, and lateral foot. Claimant's pain is worse with walking. Walking tolerance poor but improves with a walking stick and pushing a cart. Claimant advised that he benefits from gabapentin, Percocet, and rest. Has not done formal physical therapy but Claimant says swimming improves his symptoms. Pain worse with sitting, standing, rising, walking, bending, twisting, reaching, lying down, sneezing, coughing, lifting, or driving.

22. On examination, Claimant had painful lumbar range of motion. Sensory testing is focally abnormal in right S1 distribution. Ankle jerks absent bilaterally. Tandem gait mildly impaired. MRI findings are consistent with symptoms. Claimant was diagnosed with lumbar stenosis, degenerative disc disease, spondylosis, moderate- severe foraminal narrowing L5-S1, neurogenic claudication. Claimant was urged to stop smoking. Claimant reported that he wanted to continue rehabilitative efforts, but has a fear of injections.

23. Claimant was evaluated by Dr. Hugh Macaulay on June 4, 2015. Claimant told Dr. Macaulay that he believes his right leg and low back pain are caused by his work at the Employer. He advised that he has fallen a few times. He told Dr. Macaulay that 12 months earlier he fell pulling a 2000 pound pallet off the truck, the pallet got stuck on dock plate. This fall was reported to the supervisor.

24. The history provided to Dr. Macaulay was that Claimant's problem began about 2 years earlier with pain in the right lower extremity which was initially diagnosed by Claimant's primary care physician as plantar fasciitis, and later arthritis in the hip. Claimant provided a history of a fall in April 2014 when unloading a full pallet and fell onto the dock. The event was reported but no incident report was filed. The back discomfort stopped but over the subsequent several weeks numbness in the foot was noticed and initially there was pain in the bottom of the right foot. This progressed to involve entire right lower extremity.

25. Dr. Macaulay opined, within a reasonable degree of medical probability, that the nature of Claimant's work, when compared with the criteria set out in the Low Back Pain Medical Treatment Guidelines, were compatible with an industrial illness. Dr. Macaulay also opined that a significant event occurred in April of 2014 causing an intensification of low back and right leg pain, and caused progression of low back and right leg dysfunction, aggravation of the neural compression secondary to the moderate to severe bilateral foraminal stenosis at L5-S1 and medically probable acceleration of the neural compromise to atrophy of the right thigh. According to Dr. Macaulay, the bilateral L5-S1 foraminal stenosis, central congenital stenosis at L4-S1, low back pain, L5-S1 neuritis, and the fall were all work related.

26. Dr. Macaulay diagnosed Claimant with work related low back pain with sciatica – cumulative trauma, severe lumbar spinal foraminal stenosis at L5-S1, S1 radiculopathy secondary to above, right SI joint hypomobility. He opined Claimant was not at MMI. Claimant needed alternative to narcotic medication, a neurosurgical consultation; possible surgical intervention, and electrodiagnostic studies. Dr. Macaulay advised that Claimant would be unable to return to his previous work and was restricted to sedentary/sub sedentary activities with need to change positions for comfort and no torqueing of the lumbar spine. He would need to continue to use the cane.

27. Dr. Macaulay testified at hearing that the medical treatment guidelines contain evidence based medicine regarding the cumulative effect of work risk factors in the development of low back pain, and based on the medical treatment guidelines and the

parameters that they have defined as being reasonably probable, associated with causation of low back pain, Claimant met those criteria.

28. Dr. Macaulay testified that the development of pain and the acceleration of symptom manifestation of structural changes can occur if you are performing heavy manual labor. He indicated that the most recent medical treatment guidelines (MTG) have put a cumulative trauma component into the guidelines. Not only do the MTG address the cumulative component, they have incorporated some very specific information as to what are the reasonable parameters that one would use for defining cumulative trauma as a cause for low back pain and an inability to perform the usual functions associated with your job.

29. Dr. Macaulay disagreed with Dr. Burris's opinion that Claimant's back pain was not related to the two slip and fall incidents at work because of the significant delay in treatment and Claimant's failure to timely report the accident.

30. Dr. Macaulay explained that he disagreed with this opinion by Dr. Burris because Dr. Macaulay opined that Claimant is not an "entitled individual", and doesn't run to the doctor, and just "sucks it up" as he goes along, until he finally gets to a point where there is a problem. He explained that some people think and say everything is work related when it is not, Dr. Macaulay was of the opinion that Claimant was not that type of person.

31. Dr. Macaulay opined that Claimant's delay in reporting the injury only meant that Claimant was stoic. He indicated that his opinion is supported by Claimant's personal medical records. He noted that Claimant did not have numerous doctors' visits and only had his blood checked every two years, even though he is diabetic.

32. Dr. Macaulay also testified that his opinion regarding causation was based on Claimant's cumulative trauma issue in his back. He indicated the falls were certainly aggravating and although they may have contributed they were not defining.

33. Dr. Macaulay testified that the job description provided by Employer was not helpful. There was nothing in the job description that defined the functional, mechanistic portion of the job duties.

34. Danny Hemans, Claimant's supervisor for the last 6 months prior to his hearing, testified confirming Claimant's description of his job duties. Mr. Hemans did not recall being told about a slip and fall incident at the jail involving Claimant.

35. Mr. Hemans agreed that Claimant told him that his leg was hurting. Mr. Hemans said he offered to send Claimant to a doctor but Claimant did not want to go. He left work soon after he reported having leg problems.

36. Mr. Hemans testified that Claimant took FMLA and when the supervisor called Claimant, Claimant reported he might have a bulged disc in his back pinching a nerve

and numbness in his leg caused by all the years Claimant drove a truck. Mr. Hemans did not refer Claimant for medical care or provide information regarding a claim for workers' compensation. Mr. Hemans acknowledged that he was aware low back injuries were common complaints among truck drivers.

37. Dr. Burris testified that Claimant's job duties did not fall within the MTG parameters. Dr. Burris opined therefore that Claimant did not have a cumulative trauma injury. Dr. Burris opined that Claimant's condition was not related to acute injuries from slip and falls because there was no contemporaneous medical record documenting the injury. Dr. Burris agreed with Dr. Macaulay's diagnosis, and agreed that if the Claimant's back condition is work related Claimant is not at maximum medical improvement, needs further workup, and is not able to perform his job duties with Employer.

38. Dr. Burris also agreed that as part of the Level 2 accreditation program that the physicians are taught that just because there is the presence of degenerative findings, that alone does not justify an argument that the low back pain was inevitable and not due to work-related exposures.

CONCLUSIONS OF LAW

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

1.The purpose of the Workers' Compensation Act of Colorado (Act), 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, C.R.S. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2.In this case, Drs. Macaulay and Burris's opinions are in conflict. Dr. Macaulay believes that Claimant's condition is worked related and Dr. Burris does not believe that it is work related. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

COMPENSABILITY OF CUMULATIVE TRAUMA INJURY AND SLIP AND FALL INJURY

3.More weight should be given the opinions of Dr. Macaulay than Respondent's IME Dr. Burris. Physicians in workers compensation cases that are Level II accredited are trained to assess and determine causation. In order to provide these opinions, the physician is to discuss the relationship between the patient's diagnosis and the work-related exposure. Dr. Burris never provided a diagnosis of Claimant's condition, but did agree with Dr. Macaulay's diagnosis. The doctor is to assess the risk of developing the suspected diagnosis as a result of the actual exposure of the individual patient and provide an opinion whether the patient's diagnosis and physical findings are related to the work-related exposure. Dr. Macaulay performed this analysis and concluded that Claimant's job duties caused his work injury.

4.Dr. Macaulay credibly testified that the cumulative risk factors associated with Claimant's work caused the current need for medical care although the slip and falls aggravated it. The MTG supports the conclusion that heavier lifting, 25 kilograms or 50-

55 pounds and higher, may be considered a risk factor for cumulative low back pain, when combined with flexion and performed 10-15 times per day over cumulative years of exposure. The totality of the credible and persuasive evidence established that Claimant's job duties required that he perform heavy lifting with flexion performed more than 10 to 15 times per day. Claimant and Mr. Hemans credibly testified regarding Claimant's routine work activities loading and unloading pallets of janitorial supplies from a truck at loading docks and transporting the supplies to customer storage areas.

TTD

5. As found, commencing January 21, 2015, Claimant was unable to return to his usual job due to the effects of the work injury. Consequently, Claimant is "disabled" within the meaning of Section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). 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. TTD benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

ORDER

It is therefore ordered that:

1. Respondents shall be liable to Claimant for TTD benefits from January 21, 2015, and continuing until terminated by law.

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

All matters not determined herein are reserved for future determination.

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

DATED: March 1, 2016__

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

The issues for determination are:

1. Whether the Claimant proved, by a preponderance of the evidence, that she suffered a compensable injury in the course and scope of her employment on November 18, 2014.

2. If the Claimant proves he suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to medical benefits reasonably necessary to cure and relieve the Claimant of the effects of her November 18, 2014 injury.

3. If the Claimant proves she suffered a compensable injury, whether the Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability indemnity benefits.

4. If the Claimant proves she suffered a compensable injury, whether the Respondents proved, by a preponderance of the evidence, that the Claimant is responsible for her termination of employment and resulting wage loss.

FINDINGS OF FACT

1. The Claimant worked for the Employer for approximately 2 ½ years at the time of an incident on November 18, 2014. The Claimant was a customer care representative / project manager for the Employer.

2. Prior to November 18, 2014, the Claimant had previous sustained previous injuries. The Claimant testified that she was in three motor vehicle accidents, one in 2012, one in March of 2014 and one in September of 2014. The Claimant testified that after each accident, she went in to see doctors at the ER just to get checked to make sure there were no serious injuries. However, she testified that after this initial visit, she did not follow up with any doctor visits.

3. On April 7, 2012, the Claimant was seen in the emergency department by Dr. Sally A. Coates and RN Brett Davis following a motor vehicle collision in which the car she was driving was rear-ended. The Claimant complained of a headache and a little bit of rib pain on the right. There was slight lateral tenderness on the left side of the neck with good range of motion and no thoracic or lumbar spine or paraspinal tenderness. The primary diagnosis was "minor chest contusion." The Claimant was released to self care and advised she might have some increasing muscle discomfort

and headache. She was told to see her physician if she was not back to normal in 3 days (Respondents' Exhibit G).

4. On April 17, 2013, the Claimant was seen by NP Melody Zwakenberg at the Denver Health Medical Center for a cervical strain. The Claimant reported that she was coughing and she pulled something. She reported that she had been having neck pain "for a while" and had seen her PCP the previous Monday. The note indicates, "there is no evidence of a fracture" and "no injury to the spinal cord or nerve roots was detected." The Claimant was advised that her pain would likely gradually resolve and for her condition complete healing typically takes about 2-3 weeks. The Claimant was provided with an anti-inflammatory medication and she was discharged (Respondents' Exhibit H).

5. On February 26, 2014, the Claimant was seen at the Denver Health Medical Center Emergency Department after her car was side swiped earlier that day. The Claimant reported that she went to work but started to have neck pain and back pain through the day. The Claimant was assessed with neck strain and back strain. The Claimant was later discharged with a muscle strain. Radiology reports of cervical and lumbar spine imaging showed no acute fracture or subluxation or subluxation (Respondents' Exhibit H).

6. On September 16, 2014, the Claimant was seen at St. Anthony Hospital Emergency Department for an MVA that occurred when her car was rear ended at a stop. She complained of neck and back pain and a headache (Respondents' Exhibit I). The Claimant underwent a CT of the cervical spine that was "unremarkable" and showed "no fracture, no prevertebral soft tissue swelling. Normal alignment and mineralization. No gross soft tissue abnormality." An imaging report of three views of the Claimant's lumbar spine also taken on September 16, 2014 also showed "no evidence of fracture or listhesis. The intervertebral disc spaces are maintained" (Respondents' Exhibit E, pp. 290-291). The Emergency Department assessment was that "the patient has no signs of serious injury but has some probable neck and back strain and will be treated symptomatically (Respondents' Exhibit I). The Claimant returned to the ED on September 18, 2014 stating she was still uncomfortable, but had no new complaints. The Claimant returned to request pain medication that was prescribed at the prior visit, but she forgot to take with her (which was confirmed with nursing staff). The Claimant was provided with Oxycodone/Acetaminophen (Respondents' Exhibit I).

7. With respect to the current claim, the Claimant testified that on November 18, 2014, she was taking the stairs back down from the upstairs restroom. As she was coming down the last flight of stairs, she slipped on some ice melt and came down on her bottom over six steps until she was all the way down. The Claimant testified that, at the same time, she had been holding on to the rail with her right arm and, as she fell, it twisted her arm back. The fall was not observed by any other witness. The Claimant testified that as she walked out of the stairwell towards her desk, a manager named Derek Peterson saw the Claimant and asked her what was wrong. The Claimant testified that she was still a little shaken up and she told him that she had just fallen

down the stairs. The Claimant testified that Mr. Peterson directed the Claimant to go to HR immediately, which the Claimant did. The Claimant's testimony regarding her mechanism of injury on November 18, 2014 is consistent with the Employer's First Report of Injury completed on November 20, 2014 and with the initial medical and physical therapy evaluations notes dated November 19, 2014 and is found as fact.

8. On November 19, 2014, the Claimant was seen by Dr. Theodore Villavicencio at Concentra. The Claimant reported that she "slipped on the stairs at work and injured lower back, neck and right and left side of the body." The Claimant reported that she took a pill to help with the pain but does not know what she took. On examination, Dr. Villavicencio noted, "joint pain, muscle pain, back pain, neck pain, joint swelling and muscle weakness." He also specifically noted a left hip contusion and cervical area strain. Dr. Villavicencio indicated that the Claimant reported a past history of cervical strain around March of 2014 that had resolved. He noted that the Claimant's prior medical history was "non-contributory based on review with patient and/or comprehensive questionnaire except as detailed in the clinical documentation." He opined that the Claimant's current injury was "the result of slip and fall on ice melt. Occurred while at work." Dr. Villavicencio diagnosed the Claimant with lumbar strain, cervical strain and left elbow contusion. He referred the Claimant to physical therapy and prescribed medications. The Claimant was not provided with any work restrictions and permitted to return to work full time/full duty (Claimant's Exhibit 3).

9. The Claimant also underwent an X-ray of the lumbar spine on November 19, 2014 and the impression was reported as "nothing acute. Mild degenerative change" (Respondents' Exhibit E, p. 289).

10. Also on November 19, 2014, the Claimant saw the physical therapist at Concentra for an initial evaluation. PT Jessica Hejde noted the Claimant reported her mechanism of injury as follows, "Pt reports that she was going down the stairs at work and slipped and fell on her butt down several steps with her arms out to catch her. Has some numbness and tingling down her bilateral legs along the anterior and posterior surfaces all the way to her foot." PT Hejde noted the Claimant's chief complaint was low back pain, with radiation and tingling (Respondents' Exhibit D, pp. 283-286).

11. On November 20, 2014, Donna Gunter, HR specialist for the Employer, completed Employer's First Report of Injury noting that the Claimant was injured at approximately 2:15 PM on November 18, 2014 and notified the Employer that same day. The report indicated the Claimant injured multiple body parts when "she was walking down the stairs in the stairwell and slipped on ice melt. She twisted her body and sustained a lower back, left arm and right rib cage injury." Ms. Gunter noted that Derek Peterson was notified on behalf of the Employer and that the Claimant treated with Concentra (Claimant's Exhibit 4; also Respondents' Exhibit 1 (4), p. 26).).

12. On November 25, 2014, the Claimant continued to report right SI pain at a 6/10 level and CTJ pain at an 8/10 level to PT Chris Traut (Respondents' Exhibit D, pp. 280-282).

13. On November 26, 2014, the Claimant was seen by PA-C Casey McKinney at Concentra for evaluation. The Claimant continued to complain of back pain but was working regular duty. PA-C McKinney noted the Claimant's cervical spine was tender to palpation and that the bilateral paraspinals and sciatic notches were tender in the lumbosacral spine. There was no tenderness noted at the Claimant's left elbow (Respondents' Exhibit D, pp. 277-278).

14. The Claimant continued to attend physical therapy sessions at Concentra. In addition to the above-referenced sessions, she had physical therapy sessions on 11/26/2014, 12/02/2014, 12/04/2014, 12/11/2014, 12/12/2014, 12/16/2014, 12/19/2014. 12/22/2014, 12/24/2014 and 12/29/2014. As of the end of December 2014, the Claimant was reporting little to no change in her condition with continued pain in her low back and SI region (Respondents' Exhibit D, pp. 246-286). Nevertheless, the Claimant continued to attend regular physical therapy sessions. The Claimant attended additional physical therapy sessions on 01/05/2015, 01/07/2015, 01/13/2015, 01/15/2015, and 01/20/2015 (Respondents' Exhibit D, pp. 230-245).

15. On January 5, 2015, there was work correspondence that the Claimant was recertified for 480 hours of FML leave related to her medical condition of 11/19.2014. The FML leave was for 2 three hour appointments each week and flare-ups (allowing for a day off up to 2 times per month) per the Claimant's doctor. The Claimant was notified that she must follow company policy regarding calling in or scheduling ahead for any FML leave she intended to take (Respondents' Exhibit 1, p. 4). Also on January 5, 2015 the Claimant's supervisor Jamie Schott e-mailed the Claimant requesting that she communicate her FML appointment absences by e-mail with the time she would be leaving and the time she returned to work (Respondents' Exhibit 1, p. 3).

16. On January 15, 2015, the Claimant's supervisor Jamie Schott sent the Claimant an e-mail indicating that it was not acceptable for the Claimant to provide only verbal notification regarding when she was leaving the office. Rather, e-mail notification was require to communicate when the Claimant would be leaving the office for medical appointments or flare-ups in her condition and when the Claimant would be returning and if she wanted to use paid sick, personal or vacation time to cover the leave (Respondents' Exhibit 1, p. 2). The Claimant responded by e-mail that she verbally communicated that she was leaving on January 15, 2015 and she intended to e-mail the communication later when she could clear up a scheduling issue with her appointments. The Claimant also stated that she assumed that Donna was e-mailing Ms. Schott with the appointment later when she turned in the documentation (Respondents' Exhibit 1, pp. 1-2). The Claimant's manager Jamie Schott responded to this e-mail that, "going forward, I do need you to communicate with my [sic] via e-mail for these situations as we have discussed before" (Respondents' Exhibit 1, p. 1).

17. On January 20, 2015, there was correspondence between the Claimant's supervisor Jamie Schott and Donna Gunter in HR regarding an issue related to the

timing of her physical therapy appointment that day. The paperwork received by Donna Gunter indicated that the Claimant's appointment was at 3:00 pm that day. The Claimant sent her supervisor an e-mail stating that her physical therapy was at 2:00 pm and that she would be clocking out at 1:45 pm (Respondents' Exhibit 1, pp. 30-32).

18. On January 21, 2015, there is paperwork indicating that the Claimant's employment was terminated for "gross misconduct" (Respondents' Exhibit 1, p. 27). The Employer's company handbook does identify "excessive offline times; ACW, Personal, Lunches and Breaks," "Recurring discrepancies when clocking into PC Time clock," and "Not communicating with management or command center regarding calling out, leaving early, or other issues that may affect your scheduled shifts" as Rules Violations. The handbook does provide that, "actions deemed as violations of company and/or role expectations will result in point penalties and/or appropriate actions including termination for gross misconduct violations" (Respondents' Exhibit 1, p. 59). The specific gross misconduct attributed to the Claimant is identified in an undated memo noting that the Claimant had discrepancies on her timecard which caused her to be paid for 11 hours of time she did not work. This was identified through an audit and the Claimant was unable to provide a satisfactory explanation of what she was doing during the times listed to her supervisors (Respondents' Exhibit 1, p. 40 and pp. 55-57). The Claimant's supervisors have previously communicated the importance of the Employer's attendance, timekeeping and communication policies on multiple occasions. The Claimant has also specifically been placed on Performance Enhancement Plans in the past for attendance issues on September 17, 2013 and December 10, 2014 (Respondents' Exhibit 1, pp. 98-123).

19. The Claimant testified that her last date of employment with the Employer was January 22, 2015. The Claimant admitted that her employment was terminated due to violation of policy (Respondents' Exhibit K, response to interrogatory 4). She testified that she is currently employed as a restaurant server with a different employer.

20. The Claimant continued to attend physical therapy sessions at Concentra following her termination of employment with Employer. She attended physical therapy sessions on 01/23/2015, 01/27/2015 and 01/29/2015. As of the January 23, 2015 appointment, the Claimant reported that "her low back and mid back are the same. She does not feel like therapy is helping. She feels good at the end of treatment but wakes up in just as much pain the next day" (Respondents' Exhibit D, pp. 227). By January 29, 2015, the Claimant reported that she had stopped working the prior Thursday and "has felt better since not sitting at a desk for prolonged periods" (Respondents' Exhibit D, p. 221).

21. The Claimant underwent an MRI of the lumbar spine, without contrast on January 26, 2015. The report signed by Dr. Craig Stewart noted, "mild degenerative changes at L4-L5 and L5-S1" with "no significant focal disc herniation, central canal stenosis or significant nerve impingement within the lumbar spine" (Claimant's Exhibit 2; Respondents' Exhibit E, p. 288).

22. The Claimant continued to attend physical therapy sessions at Concentra through February of 2015 with appointments on 02/03/2015, 02/05/2015, 02/09/2015 and 02/23/2015 (Respondents' Exhibit D, pp. 209-220).

23. On February 10, 2015, the Claimant was evaluated by physiatrist, Dr. Samuel Chan. On examination, Dr. Chan noted that the Claimant's cervical range of motion was within functional limits. He found no tenderness or signs of impingement at the bilateral shoulders. He also noted no tenderness to palpation at the lumbar spine. Dr. Chan noted that the Claimant's complaints were consistent with myofascial complaints to the cervical spine area and there were physical findings of sacroiliac joint dysfunction of the lumbar area. Dr. Chan noted a normal MRI and an essentially normal neurologic examination. He recommended the Claimant continue with a proper exercise program and, if she continued to be symptomatic, that a sacroiliac joint injection be considered (Respondents' Exhibit J, pp. 367-368).

24. On March 11, 2015, Dr. Chan performed bilateral sacroiliac joint steroid injections (Respondent's Exhibit J, pp. 364-365). At the hearing, during rebuttal testimony, the Claimant testified that her symptoms improved after the injection and things were getting better.

25. On March 24, 2015, the Claimant underwent x-rays of the lumbar spine which showed no fracture or subluxation. Disc spaces and heights of the vertebral bodies were preserved and the normal lordotic curvature was maintained. Facet joints and pedicles appeared normal. The overall impression was that this was an "unremarkable exam of the lumbar spine" (Respondents' Exhibit E, p. 287).

26. The Claimant did not attend physical therapy sessions in March of 2015, but resumed again in April of 2015, with physical therapy sessions on 04/09/2015, 04/13/2015, 04/17/201504/22/2015, 04/23/2015, 04/27/2015 and 04/29/2015 (Respondents' Exhibit D, pp. 182-208).

27. The Claimant saw PA-C Christine O'Neal at Concentra on April 27, 2015 for a recheck. The Claimant reported her symptoms are about the same as her last visit. The Claimant reported the pain is under control with medications but is frustrated that the pain does not continue to improve. The Claimant continues to see Dr. Chan and Dr. Mobus. On examination, the Claimant was tender at the thoracic spine and tender with pain bilateral with right-sided muscle spasms on palpation at the paraspinals and sciatic notch (Respondents' Exhibit D, pp. 186-188).

28. On April 28, 2015, the Claimant saw Dr. Chan for reevaluation of her cervical spine pain, interscapular pain and low back pain. Dr. Chan noted a positive diagnostic and therapeutic response to the bilateral sacroiliac joint injections. Dr. Chan opined that due to the positive response, it would be reasonable for the Claimant to have a follow up of the injections (Claimant's Exhibit 1).

29. On June 4, 2015, the Claimant saw Dr. Villavicencio for follow up for her lumbar and cervical strain conditions with persistent pain in her mid-lumbar and bilateral paraspinous muscles. Dr. Villavicencio noted the Claimant had benefit from bilateral SI injections administered by Dr. Chan, but that repeat injections were not approved. The Claimant reported negative side effects from some of her medications. Dr. Villavicencio noted tenderness without spasms at the bilateral paraspinals at the cervical, thoracic and lumbosacral regions but no tenderness at the spine (Respondents' Exhibit D, pp. 179-181).

30. The Claimant saw Dr. Chan for follow up on July 21, 2015. She reported that the SI injection recommended on April 28, 2015 was denied by the Insurer, as was a muscle stimulator. She continued to see Dr. Mobus for chiropractic care. Due to residual pain reported, Dr. Chan again recommended a repeat SI joint injection and opined that "the use of a muscle stimulator will also be beneficial for pain management…" (Respondents' Exhibit J, p. 362-363).

31. On August 10, 2015, the Claimant presented for a re-check with Dr. Villavicencio as a walk-in due to a self-reported re-injury on August 7, 2015. Dr. Villavicencio noted that this is not related to her November 18, 2014 work injury and would be considered a new injury and a claim would need to be opened through the usual process. The Claimant reported that she slipped on a wet floor at work with her current employer, but did not fall as she caught herself. She reported that the process aggravated her back injury. Dr. Villavicencio noted tenderness at the bilateral lumbosacral paraspinals and left-sided muscle spasms. Flexion, extension and side bending was painful (Respondent's Exhibit D, pp. 174-177).

32. The Claimant underwent an independent medical examination with Dr. F. Mark Paz, who prepared a written report dated August 31, 2015 (Respondents' Exhibit C). The Claimant described her mechanism of injury to Dr. Paz consistent with her testimony at the hearing in this case and to her treating physicians (Respondents' Exhibit C, p. 156). Dr. Paz noted that the Claimant denied a prior history of low back injury or symptoms or hip injury, but that she did have a remote history of upper back pain (Respondents' Exhibit C, p. 156). The Claimant reported to Dr. Paz that she currently works for a different employer as a waitress. She reported that she can only work 4-hour shifts and not a "double" 8-hour shift recently due to the increase in her symptom intensity (Respondents' Exhibit C, p. 157). The Claimant reported three motor vehicle accidents that pre-dated her November 18, 2014 work injury. The Claimant denied experiencing any back symptoms, but did experience some neck symptoms for which she was treated in the ER for the September 2014 MVA (Respondents' Exhibit C, p. 157). On physical examination, Dr. Paz noted full range of cervical motion with no tenderness or paraspinous muscle spasm (Respondents' Exhibit C, p. 158). Dr. Paz also noted no tenderness at the thoracic spine and good range of motion. He noted diffuse tenderness from midline to the right flank and to the left flank at the lumbar spine and no localizing tenderness over the sacroiliac joints bilaterally. He found the Claimant's range of motion effort to be "poor" and range of motion measurements invalid (Respondents' Exhibit C, p. 159). As part of his IME, Dr. Paz also provided a

medical record summary of the ER records from the Claimant's February and September 2014 MVAs and summary of select records from after the November 18, 2014 fall on the stairs (Respondents' Exhibit C, pp. 160-161). Dr. Paz opined that the Claimant did not provide an accurate history of low back symptoms associated with her prior motor vehicle accidents (Respondents' Exhibit C, p. 161). Based on the physical examination, history and review of the medical records, Dr. Paz opined that the Claimant "reached maximum medical improvement for the buttock contusion on or about March 11, 2015, following the response to the bilateral sacroiliac joint injection completed by Dr. Chan. Subsequent to that treatment, the back symptoms remained stable despite additional treatment." Dr. Paz found that the Claimant has no impairment rating for her lumbar spine and requires no medical maintenance treatment (Respondents' Exhibit C, p. 162).

33. Dr. Paz testified at the hearing as an expert witness in the area internal medicine and as to Level II accreditation matters. Dr. Paz testified that the Claimant's radiology imaging reports do not reflect an acute injury, but only degenerative changes. Dr. Paz further opined that the Claimant's diagnosis related to her work injury is "buttock contusion." He testified that because the Claimant did not improve as a result of the injections provided by Dr. Chan on March 11, 2015, her diagnosis is not sacroiliac joint dysfunction, but rather, simply buttock contusion. He testified that this condition should have resolved without treatment after 3-4 weeks. Thus, he finds that an MMI date of March 11, 2015 would be generous given the original date of injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1), The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

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

Compensability

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

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 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).

There is sufficient evidence in the record that the Claimant suffered an injury to her lower back, neck, buttocks, hip and elbow on November 18, 2014 and the Claimant's testimony regarding her mechanism of injury was credible and no persuasive evidence was presented to contradict her testimony. In fact, the Claimant's testimony was consistent with the Employer's First Report of Injury completed by an HR representative for Employer on November 20, 2014 and with the initial medical and physical therapy evaluation notes. There were no independent witnesses to the Claimant's slip and fall down the stairs, but the incident was reported immediately and the clinical presentation of the Claimant's medical condition after the incident was consistent with the injury reported. Although Respondents have argued that the condition was somehow related to the Claimant's prior motor vehicle accidents, the medical reports in evidence do not support this theory. Dr. Villavicencio, the Claimant's authorized treating provider found that the Claimant's prior medical history was noncontributory and this is more persuasive than the opinion of the Respondents' IME doctor, Dr. Paz, on this issue.

There is also evidence to establish that the Claimant continues to have symptoms resulting from the fall at work that occurred on November 18, 2014. The Claimant has not been placed at MMI by her treating physicians and this is more persuasive than the opinion of Dr. Paz that the Claimant likely reached MMI as of March 11, 2015. Based on the foregoing, the ALJ determines that the Claimant has proven by a preponderance of the evidence that her work activities on November 18, 2014 caused or permanently aggravated, accelerated or combined with a preexisting condition producing the need for medical treatment. Thus, the Claimant suffered a compensable injury on that date.

Medical Benefits – Authorized, Reasonable and Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). 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).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. The employer's duty to provide designated medical providers is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

Here the Claimant began treating with Dr. Villavicencio and Dr. Chan and was also referred to Dr. Mobus for chiropractic care. Although Respondents have denied authorization for certain treatment and the Claimant did not receive a recommended follow-up injection or a muscle stimulator medication, her treating physicians continued to recommend these treatments. The Claimant was not placed at MMI by any treating physician. Rather, her treating physicians continued to offer treatment recommendations.

As set forth above, there is evidence to establish that the Claimant continues to have symptoms resulting from injury she suffered on November 18, 2014. Although, it is unclear whether or not there are new or increased symptoms related to a slip and fall that occurred on August 7, 2015 while working for a new employer, it is clear that, as of that date, the Claimant was still actively treating for the November 18, 2014 work injury. Thus, the conditions related to the initial injury are still present and may require treatment.

Therefore, the Respondents shall be liable for the continued medical treatment recommended by Drs. Villavicenio and Chan and their authorized referrals that is reasonably necessary to cure and relieve the Claimant from the effects of her November 18, 2014 work injury.

Temporary Disability Benefits

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of*

Colorado Springs v. Industrial Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

In this case, the Claimant established that she suffered a compensable work injury on November 18, 2014, but she failed to prove that she suffered a wage loss as a result of that injury prior to the termination of her employment. The Claimant was working full duty with no restrictions until January 21, 2015. It is only as of December 22, 2015 that the Claimant suffered any wage loss.

Therefore, it is necessary to address Respondents' contention that the Claimant is precluded from receiving temporary indemnity benefits because the Claimant is responsible for her termination on January 21, 2015.

Responsible for Termination

A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of "fault" as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Yet, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly.

Gilmore v. Industrial Claim Appeals Office, supra. However, in any event, the word "responsible" does not refer to an employee's injury or injury-producing activity since that would defeat the Act's major purpose of compensating work-related injuries regardless of fault and would dramatically alter the mutual renunciation of common law rights and defenses by employers and employees alike under the Act. Hence, the termination statutes are inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *Colorado Springs Disposal v. Industrial Claim Appeals Office of State of Colorado,* 58 P.3d 1061 (Colo. App. 2002).

The evidence in the record shows that On January 5, 2015 and January 15, 2015, the Claimant's supervisors communicated with her the requirement that she communicate her medical appointment absences by e-mail with the time she would be leaving and the time she returned to work. Then, on January 20, 2015, there was correspondence between the Claimant's supervisor Jamie Schott and Donna Gunter in HR regarding an issue related to the timing of her physical therapy appointment that day. The paperwork received by Donna Gunter indicated that the Claimant's appointment was at 3:00 pm that day. The Claimant sent her supervisor an e-mail stating that her physical therapy was at 2:00 pm and that she would be clocking out at 1:45 pm. On January 21, 2015, there is paperwork indicating that the Claimant's employment was terminated for "gross misconduct."

The Employer's company handbook does identify "excessive offline times; ACW, Personal, Lunches and Breaks," "Recurring discrepancies when clocking into PC Time clock," and "Not communicating with management or command center regarding calling out, leaving early, or other issues that may affect your scheduled shifts" as Rules Violations. The handbook does provide that, "actions deemed as violations of company and/or role expectations will result in point penalties and/or appropriate actions including termination for gross misconduct violations."

The specific gross misconduct attributed to the Claimant is identified in an undated memo noting that the Claimant had discrepancies on her timecard which caused her to be paid for 11 hours of time she did not work. This was identified through an audit and the Claimant was unable to provide to her supervisors a satisfactory explanation of what she was doing during the times listed. Moreover, the Claimant's supervisors had previously communicated the importance of the Employer's attendance, timekeeping and communication policies on multiple occasions. The Claimant was specifically placed on Performance Enhancement Plans in the past for attendance issues on September 17, 2013 and December 10, 2014.

Thus, the Claimant was placed on notice, both before and after her work injury of November 18, 2014, that she was required to strictly comply with Employer's attendance policies. The Claimant was further placed on notice that she was required to provide written e-mail notice to supervisors regarding when she would be leaving the workplace and when (if) she would be returning. The ALJ finds that the Claimant was aware of what her Employer required from her in terms of attendance and attendance

documentation. She was also aware that failure to comply with the requirements could result in termination. The Claimant testified that her last date of employment with the Employer was January 22, 2015 and the Claimant admitted that her employment was terminated due to violation of policy.

While the Claimant's counsel argued that the Claimant's attendance issues were related to her injury-producing activity, the weight of the evidence establishes that with respect to the Claimant's termination from employment with Employer, the Claimant violated known and well-communicated attendance and communication policies. The Claimant's employment was terminated as a result of these violations and she is not entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. The Claimant suffered a compensable industrial injury during the scope and course of his employment with Employer on November 18, 2014.

2. The Respondents are liable for medical treatment recommended by Dr. Villavicencio or another physician at the Concentra facility, by Dr. Chan, or by their referrals, that is reasonably necessary to cure and relieve the Claimant from the effects of her November 18, 2014 work injury.

3. The Claimant is responsible for termination and the Claimant's claim for total temporary disability benefits 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 2, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-987-724, 4-986-776

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable inguinal hernia while in the course and scope of her employment for Employer on May 29, 2015.

- If compensable, Claimant requests temporary disability benefits from September 12, 2015 and ongoing. She requests an average weekly wage (AWW) of $904.21. If compensable, Respondents contend Claimant's AWW is $569.12, and request penalties for Claimant's failure to report the May 29, 2015 injury until June 26, 2015.

FINDINGS OF FACT

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

1. On April 9, 2015, Employer hired Claimant to work as a furniture salesperson at its Thornton store. As part of her job duties, at the end of her shift Claimant dusted, vacuumed, and organized a portion of the showroom.

2. Claimant testified that on May 29, 2015, at approximately 9:45 p.m., she was vacuuming her work area. She stated that when she picked up the vacuum to get it over a shag rug, she had immediate pain in her right groin which went down her lower back. She stated that the pain was very severe but that after a short time, her pain lessened.

3. Claimant worked the rest of her shift and did not report any injury. She sought no medical care and she lost no time from work.

4. Claimant testified that on June 22, 2015, at about 9:15 p.m., she was walking at work while carrying a spray bottle and cloth when she experienced severe pain. She did not tell her manager that she had a work injury. She told her manager that she did not know what the problem was.

5. At hearing, Claimant testified that her pain on June 22, 2015 was the "same pain" that she previously had on May 29, 2015. Claimant testified that she was not injured on June 22, 2015, but instead experienced pain that day, which she stated was caused by the event on May 29, 2015 when she lifted the vacuum.

6. On June 23, 2015, Claimant went to the Emergency Room at St. Anthony's North. Those records state that Claimant started to have pain in her right lower back on the previous day, with no specific trauma or injury. Claimant was

diagnosed with right leg pain and probable sciatica. The record states that Claimant "had a similar incident one month ago that resolved on its own without any difficulty."

7. At hearing, Claimant testified that this medical record was incorrect because she did not tell the E.R. staff that her pain from the previous month (i.e., on or about May 29, 2015) had resolved.

8. The June 23, 2015 Emergency Room records contain no reference to Claimant's condition being work-related. At hearing, Claimant testified that she told the E.R. staff that her injury was work-related, and that the failure to reflect that fact was an error in the medical records.

9. On June 25, 2015, Claimant saw her personal physician, Dr. Karen Ratner, whose records reflect that Claimant had right back and right leg pain, which had a sudden onset three days ago "pushing heavy furniture at work" (quotation marks in original).

10. At hearing, Claimant testified that this medical record was incorrect, and that she did not tell Dr. Ratner that her pain was due to pushing heavy furniture at work.

11. On June 26, 2015, Claimant met with her store manager, Steve Williams. She testified that this was the first time that she reported an injury to her Employer. Claimant and Mr. Williams filled out an "Incident Report" together; he asked her questions, she answered, and he wrote down the answers. The Incident Report consists of two pages, both of which Claimant signed. It lists Claimant's injury as "sciatic nerve" and the body part as "lower back." It states that Claimant was injured while "reaching into an overhead cabinet to get some cleaning rags." It further notes that Claimant thinks "she may have injured herself vacuuming about a month prior at the Thornton store."

12. Steve Williams testified that he is Employer's store manager and Claimant's supervisor. Claimant called him on June 25, 2015, and asked to meet with him. He met with Claimant on June 26, 2015 to fill out an Incident Report and workers' compensation paperwork. He testified that prior to June 26, 2015, he had no knowledge that Claimant had any work-related injury, or that she had pain between late May and June 26, 2015.

13. Mr. Williams asked the Claimant various questions about her claimed work injury and he wrote down what she told him. On the Incident Report, he wrote "she tweaked her lower back while reaching into an overhead cabinet. This is what [Claimant] explained happened." He also wrote that Claimant "thinks she may have injured herself vacuuming about a month prior at the Thornton store." He stated that Claimant did not tell him that she lifted a vacuum.

14. Mr. Williams testified that Claimant continued to work for Employer through September 4, 2015, and then she stopped coming to work. He stated that

Employer was aware of Claimant's work restrictions and had accommodated them, and that no one at the store told Claimant that she should not come back to work. He stated that if she had continued to show up for work, she would still be working there, and that he did not know why she stopped showing up for work.

15. After meeting with Mr. Williams, Claimant went to see Dr. Michael Striplin. His records dated June 26, 2015 state that Claimant was pushing a vacuum on carpet a month ago and that she said she had some mild symptoms that persisted until June 22, 2015, when she noted the sudden onset of right hip and groin pain with no known injury. He noted she was diagnosed with sciatica at St. Anthony's North Emergency Room. He determined Claimant's pain complaints were not work-related and recommended that she follow-up with her personal care physician.

16. Contained in Dr. Striplin's records is Claimant's handwritten statement which reads, "I was vacuuming one day, I felt the pain while pushing the vacuum but I walked it off, a month later I was walking at work and the pain started again, but this time I could not walk, I went to the E.R."

17. Claimant testified that although her handwritten statement makes no reference to her pain being associated with lifting the vacuum, that she did lift it. She also stated that although she wrote that she had "walked off" the pain associated with vacuuming; her written statement was incorrect, and wrongly phrased.

18. Claimant stopped working for Employer on September 4, 2015. She said this was because she could not walk due to pain. She testified that no one told her she could not come back to work. She provided no documentation, including any medical record, to corroborate her statement that she was not able to continue working.

19. Employer's records show Claimant's last day at work was September 4, 2015, and that Claimant called in sick on September 5, 2015, and did not return.

20. On September 5, 2015, Claimant went to Kaiser and saw Dr. Jennifer Kuhl. Those records state that Claimant's "pain increased two weeks ago while playing with children and her son pulled her arm." At hearing, Claimant testified that her pain had increased the day before she saw Dr. Kuhl, not two weeks before.

21. On July 7, 2015, Claimant went to the North Suburban Medical Center Emergency Room for abdominal pain. This record reflects that Claimant reported "a tearing sensation in her right groin several weeks ago, progressively worse since that time occurred while lifting heavy objects at work at [Employer]." An ultrasound showed that Claimant had a "small defect" within the fascia, which measured 6.1 mm. The defect was referenced as a "small, fat-containing right-sided inguinal hernia."

22. On July 10, 2015, Claimant was seen by Edward Medina, M.D., who noted that he could not palpate Claimant's hernia. His note states that Claimant "lifted up a

vacuum when she felt pain in her right groin." This is the first reference in the medical records which associates Claimant's pain with having lifted a vacuum at work.

23. Medical records from Dr. Karen Ratner show that Claimant was diagnosed with chronic low back pain and arthropathy of multiple sites on three occasions prior to her May 2015 alleged injury. However, in her recorded statement, taken on July 8, 2015, Claimant denied having prior medical treatment to her low back.

24. A Kaiser record dated August 18, 2015 reflects that Claimant asked for a letter "to take to her work" and that her Kaiser physician, Dr. James Hutchings, responded that he had no documentation that Claimant truly had a hernia, and that he could not state that it was work-related. He stated that he could document only that Claimant reported that she had a work-related injury.

25. A Kaiser record from Dr. Karen Black dated November 20, 2015 reflects that Claimant called Dr. Black that day in order to obtain documentation regarding the causes of hernia. These records contain an email from Claimant to Dr. Black dated November 23, 2015 stating "I have never experienced this groin pain until I lifted a vacuum over a shag rug, can you please explain on your note if you think that vacuum could cause or aggravate a hernia." In response, Dr. Black wrote Claimant a letter dated November 25, 2015. This letter contains data on various factors that are associated with hernias. Dr. Black wrote, inter alia, that "the relationship between inguinal hernias and intermittent straining or heavy lifting is not clear; some studies suggest that the incidence of hernia is no higher in professions performing heavy manual labor than in sedentary professions, while others have come to the opposite conclusion." Dr. Black did not state that Claimant's having lifted a vacuum probably caused or aggravated her hernia.

26. At hearing, Claimant testified that no one had told her that there was a relationship between the pain which she felt on or about May 29, 2015 and the pain which she felt on June 22, 2015. Claimant submitted no medical record or report which: a) concluded there was any relationship between her pain on the two dates; b) found that her pain on May 29, 2015 was likely caused by lifting a vacuum at work; or c) found that lifting the vacuum probably caused her hernia.

27. Dr. Lesnak performed an IME for Respondents and testified at hearing. He testified that Claimant's complaints were primarily groin pain, and that while a hernia can cause groin pain, there are other causes, including hip pathology, muscle or nerve pathology, and unknown causes. He stated that an increase in abdominal pressure can cause a hernia and/or hernia pain. He noted that Claimant stated that she had pain while walking, including at work on June 22, 2015. He stated that walking does not cause an increase in intra-abdominal pressure, and that it is not probable that Claimant's pain complaints on June 22, 2015 were related to a hernia.

28. Dr. Lesnak testified that although an ultrasound detected a hernia, it was so small that he could not feel it. He characterized her hernia as a small, fat-filled

defect, which was not likely a pain generator. While Claimant had stated that walking, twisting, sitting, or having her child pull on her arm caused her symptoms, Dr. Lesnak testified that these activities do not cause an increase in abdominal pressure, and would not cause a hernia to become painful. He stated that any pain related to these activities would probably be related to Claimant's preexisting chronic multi-site arthralgia, i.e., joint pain, and was not work-related.

29. Dr. Lesnak stated that it was not medically probable that lifting a vacuum on or about May 29, 2015 caused Claimant's hernia, because lifting in the way Claimant described would not cause an increase in abdominal pressure. Dr. Lesnak testified that it is more probable than not that Claimant's pain on or about May 29, 2015 was due to her preexisting chronic back and joint pain.

30. Dr. Lesnak noted that the record shows multiple histories of how Claimant's purported injury occurred, and that it was not until July 10, 2015 that the records reflect that Claimant said she injured herself by lifting a vacuum at work. He commented that although Claimant testified she did not tell the E.R. personnel on June 23, 2015 that her prior pain from May 2015 had "resolved on its own without difficulty", that the E.R. note is more reliable. He stated that E.R. personnel would be unlikely to concoct such a note.

CONCLUSIONS OF LAW

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

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence 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).

Claimant carries the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. *See City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

Claimant alleges that she sustained a work-related hernia on May 29, 2015 while pushing and then lifting a vacuum cleaner over a shag rug at work. She did not report this incident, sought no medical treatment, and lost no time from work. She alleges that her pain from this incident recurred on June 22, 2015 while she was walking at work. She does not contend that she was injured on June 22, 2015. Rather, she states that she felt pain on that day, which she believes was due to a hernia from lifting a vacuum on May 29, 2015. Claimant alleges she was misdiagnosed with sciatica.

When Claimant first sought treatment on June 23, 2015, those records state that while Claimant had pain from a similar incident a month earlier, her pain "resolved on its own and without difficulty." Although Claimant states she did not make this statement, it is improbable that the E.R. staff entered this note into the record without Claimant having made the statement. Claimant's testimony that several of her medical records contain errors or misstatements is not credible.

Prior to her claimed injury of May 29, 2015, Claimant had been diagnosed with chronic back and joint pain. While she may have had a flare of back pain on May 29, 2015 associated with vacuuming, there is no evidence that she sustained a compensable injury that day. She sought no treatment and lost no time from work. Instead, she stated that her pain lessened after a few minutes. The medical records show that this pain resolved on its own. While Claimant had another flare of pain while walking at work on June 22, 2015, she admitted that she was not injured at work on that day.

The evidence shows that Claimant's inguinal hernia is probably not the cause of her pain complaints. It is more probable that her pain complaints are due to her preexisting condition.

The record contains no documentation from any physician indicating that Claimant's pain, whether on May 29 or June 22, 2015, was probably related to her hernia. Claimant has failed to prove the existence of a compensable injury by a preponderance of the evidence.

ORDER

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

1. Claimant's claim for compensation is denied and dismissed.

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

DATED: March 9, 2016

/s/ Kimberly Turnbow
Kimberly B. Turnbow
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 suffered a compensable injury on February 22, 2015.

2. Whether Claimant has established by a preponderance of the evidence that medical treatment he received from Dr. Smith, the surgery he underwent performed by Dr. Pazik, and the physical therapy he underwent were reasonable, necessary, and related medical treatments for his February 22, 2015 injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 29, 2015 through January 5, 2016.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary partial disability benefits from February 23, 2015 through March 28, 2015.

STIPULATIONS

1. Claimant's average weekly wage is $1,136.45

2. The exact amounts of any temporary partial disability benefits due to Claimant for the period of February 23, 2015 through March 28, 2015 are reserved for future determination.

FINDINGS OF FACT

1. Claimant has been employed by Employer since November, 2013 as a driver, working hand, and stabber. Claimant worked on drilling rigs and his job duties included handling the drilling pipe and regularly involved bending, stooping, kneeling, squatting, and pulling slips that weighed up to 150 pounds.

2. On February 22, 2015 Claimant was so employed. Claimant was walking around the back of the rig when he slipped on ice and fell with his right leg bent backward. Claimant heard a pop in his right knee. Claimant's knee turned red and began swelling so he went to the truck to elevate his leg and he called dispatch to report the injury.

3. On February 22, 2015 a third party incident report was filled out. The report indicates that Claimant was coming from out house to his truck staged on off driller side of rig and as he walked on flat ground and on about 2-3 inches of wet snow,

he fell onto his right leg. The report indicated Claimant reported pain and discomfort in his right knee and that Claimant was able to walk without help with a slight limp. *See* Exhibit 22.

4. On February 22, 2015 email communications indicated that Claimant had reported the slip and fall, was icing his knee, and would let Employer know if it got worse. The emails note that Claimant wanted to continue working. The emails note that Claimant's knee had "swelled up." *See* Exhibit 23.

5. On February 23, 2015 an email from Employer's HSE Director indicated that Claimant's knee was observed to be swollen and causing him discomfort and that Claimant was able to walk with only a slight limp. *See* Exhibit 23.

6. Claimant stayed home from work on February 23, 2015 but returned to work on February 24, 2015. On the 24th, Claimant attempted to work in the shop but had trouble with bending and lifting. Claimant requested medical treatment and went home from work.

7. On February 25, 2015 Claimant was evaluated by Cathy Smith, M.D. Claimant reported walking around the drilling rig when he slipped on ice and snow and fell backwards onto a partially bent right knee with his right leg under him. Claimant reported feeling a popping sensation in his right knee and that he had immediate swelling. Claimant reported he was able to get up and limp to his truck and then went home to ice and elevate his knee. Claimant reported trying to return to work the day prior, but that he had increased swelling and discomfort in his knee. Claimant reported a prior history of a right knee injury from 2011 when playing football with his children and that he had surgery with Dr. Pazik. Claimant reported he had a brace that he used after his prior surgery and that he had been wearing the brace for added comfort since his February 22, 2015 incident. Dr. Smith noted that Claimant had no swelling at the right knee at the evaluation but that Claimant had slight discomfort with palpation over the medial retinaculum and the medial collateral ligament as well as with manipulation of the medial meniscus. Dr. Smith provided the impression of work related fall resulting in sprain to the right knee. Dr. Smith discussed with Claimant that his injury was soft tissue in nature and could involve partial displacement of the patella during the fall, as well as straining to the medical collateral ligament, the medial retinaculum, and a possible contusion to the medial meniscus. Dr. Smith advised Claimant he could continue using his soft brace as needed, that he should continue to ice and elevate the knee, and she indicated that Claimant could return to full duty work status but discussed how to work safely to protect his knee. *See* Exhibit H.

8. On February 26, 2015 an email from Employer's HR & Payroll Manager indicated that Employer was not questioning the claim as Claimant was working and walking fine prior to the incident. *See* Exhibit 23.

9. On March 5, 2015 Claimant was evaluated by Ken Frisbie, PA-C. Claimant reported continued pain in his right knee, improved swelling, but a lot of painful

popping in the medial aspect. Claimant reported a lot of pain going up and down stairs as well as when applying pressure on the gas pedal while driving. PA Frisbie noted Claimant's gait was antalgic with a perceivable limp on the right side. Claimant reported sit stand transfers were painful. PA Frisbie diagnosed right knee strain and opined that the objective findings were consistent with the history of a work related etiology. PA Frisbie noted Claimant could continue on regular duty work status with activities as tolerated working ergonomically. PA Frisbie referred Claimant for physical therapy evaluation and treatment. *See* Exhibit H.

10. On March 16, 2015 Claimant was evaluated by Dr. Smith. Claimant reported the pain overall was somewhat better and that the swelling had decreased but that he continued to have sharp pain in the medial knee with twisting and pivoting. Claimant reported he had two physical therapy visits. Claimant reported he had not been working regular hours. Dr. Smith noted that Claimant ambulated with a minimal limp. Dr. Smith noted pain complaints with palpation in the MCL and medial retinaculum. Dr. Smith continued to diagnose right knee strain. Dr. Smith placed claimant on restricted duty work status with no crawling, kneeling, squatting, climbing, running, or jumping. Dr. Smith recommended an MRI of the right knee, and noted that Claimant may need an orthopedic evaluation depending on the MRI results and recommended that Claimant continue physical therapy. *See* Exhibit H.

11. On March 20, 2015 Claimant underwent an MRI of his right knee interpreted by Richard Desruisseau, M.D. Dr. Desruisseau provided the impression of: grossly stable signal abnormality with the posterior horn of the medial meniscus which may reflect chronic tear; likely area of scarring/fibrosis within Hoffas fat that could be related to recent surgical intervention and if anterior knee pain a component of impingement could be considered; patellofemoral joint degenerative changes and associated chondromalacia most prominent about the lateral patellar facet; and small joint effusion. Claimant was referred to Dr. Pazik for evaluation. *See* Exhibit F.

12. From the date of injury until March 29, 2015 Claimant continued to work for Employer. Claimant worked within the restrictions given to him on March 16, 2015 and during this period of time, although working, Claimant did not work the same number of hours as he worked prior to the injury. During the period of time between February 22, 2015 and March 29, 2015 Claimant worked approximately 15-20 hours per week. On March 29, 2015 Claimant left work to go on short term disability and Claimant has not worked for Employer since March 29, 2015.

13. On March 31, 2015 Claimant was evaluated by Thomas Pazik, M.D. Dr. Pazik noted a fall at work on February 22, 2015 and that Claimant had right knee pain. Dr. Pazik noted that the MRI showed PHMM signal abnormality likely reflecting prior surgery; small effusion and PF degenerative changes/CMP with marrow edema LPF. Dr. Pazik performed an injection in Claimant's right knee. Dr. Pazik assessed chondromalacia patellae of the right knee and noted that Claimant had been improving with non-op measures and noted that a scope could be considered if there was no improvement. *See* Exhibit G.

14. On April 9, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith noted that Claimant underwent the MRI which showed a chronic tear of the posterior medial meniscus, scarring, fibrosis, Hoffa's pad, patellar chondromalacia. Claimant reported 100 percent relief for several hours following an injection performed on April 2, 2015. Dr. Smith provided an impression of work related fall resulting in sprain to the right knee. She recommended continuing the restricted duty work status, continuing physical therapy, and following up with Dr. Pazik. *See* Exhibit H.

15. On April 21, 2015 Claimant was evaluated by Dr. Pazik. Dr. Pazik noted that Claimant had persistent medial joint line and anterior pain and that Claimant wanted to proceed with a scope as he was not improving with non-op measures. Dr. Pazik recommended a right knee arthroscopy with partial medial meniscectomy and debridement. *See* Exhibit G.

16. On April 28, 2015 James Lindberg, M.D. provided a document recommending denying surgery under workers' compensation. Dr. Lindberg noted he had reviewed Claimant's records and that Claimant was requesting a right knee partial medial meniscectomy and debridement. Dr. Lindberg noted that the MRI performed on March 20, 2015 showed a grossly stable single abnormality within the posterior horn of the medial meniscus, which may reflect a chronic tear and that the MRI was unchanged from the prior study. Dr. Lindberg noted that Claimant had a previous medial meniscectomy and the MRI stated that it was unchanged from the prior study and therefore there was no acute chondromalacia. Dr. Lindberg opined that the mechanism of injury was not consistent with causing either a meniscal tear or a chondromalacia aggravation of his knee. *See* Exhibit E.

17. On April 29, 2015 Respondent filed a notice of contest contesting/denying the claim for further investigation into the injury/illness not being work related. *See* Exhibit B.

18. On April 29, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith continued the diagnosis of right knee strain and continued the restricted duty work status. Dr. Smith advised Claimant that he would be discharged as the claim was denied by the insurance company. *See* Exhibit H.

19. On June 2, 2015 Claimant was evaluated by Dr. Pazik. Dr. Pazik noted that Claimant's knee was unchanged from the prior evaluation on April 21, 2015. Dr. Pazik noted that the recommended knee arthroscopy was denied by workers' compensation. Dr. Pazik continued to recommend a scope for diagnostic/therapeutic benefit. *See* Exhibit G.

20. On July 15, 2015 Claimant underwent right knee arthroscopy performed by Dr. Pazik. The operative report notes that the operative procedure was: arthroscopy of the right knee with partial medial meniscectomy; partial lateral meniscectomy;

extensive anterior scar debridement; and debridement grade 3 chondromalacia patella and grade 2 condromalacia, proximal central femoral trochlea. *See* Exhibit 6.

21. On July 28, 2015 Claimant was evaluated by Dr. Pazik. Dr. Pazik noted that Claimant was status post surgery, had been attending physical therapy, and had a primary complaint of knee stiffness and weakness. Dr. Pazik recommended continued supervised physical therapy, limiting activities per physical therapy instructions, using a neoprene knee sleeve with patellar cutout to help control swelling, avoiding slippery or uneven surfaces or crowded conditions, and ice and elevate as helpful. *See* Exhibit G.

22. On December 10, 2015 Dr. Smith responded to an inquiry from Claimant. Dr. Smith noted that she agreed with Dr. Pazik that the reported mechanism of injury in the fall with the knee twisted under Claimant would correlate with the medial meniscal tear found at the time of surgery. However, Dr. Smith also noted that the PCL and chondromalacia were pre-existing and not caused or aggravated by the work incident. Dr. Smith opined that in all medical probability the medial meniscus was degenerative from Claimant's previous surgery but the mechanism of injury would correlated with a medial meniscal injury and would/could cause further injury to the meniscus. *See* Exhibit H.

23. On January 5, 2016 Claimant was evaluated by Dr. Smith. Dr. Smith provided the impression of work related fall resulting in sprain to the right knee. Dr. Smith noted that due to findings at surgery in addition to the fact that this was a repeat injury to the right knee she recommended permanent activity restrictions of no kneeling, crawling, squatting, or climbing. May partially squat but not to full squat, may climb steps but not ladders, and recommended avoiding high impact activities such as running or jumping. Dr. Smith discharged Claimant at maximum medical improvement with impairment. Dr. Smith noted that in discussing the case with Dr. Pazik and in reviewing the mechanism of injury, the only specific disorder related to the work injury of February 22, 2015 was the medial meniscus tear. She opined that the lateral meniscus tear, the chondromalacia patella, and the PCL insufficiency would be adjusted out of Claimant's overall impairment. Dr. Smith opined that for the work injury, Claimant had a 9% lower extremity impairment that could be converted to a 4% whole person impairment. *See* Exhibit H.

24. On January 10, 2016 Dr. Lindberg performed a record review. Dr. Lindberg noted Claimant's initial injury was in November of 2011 while playing with his children and that Claimant's first surgery followed in February of 2012. Dr. Lindberg noted that Claimant then had a re-injury on May 20, 2012 when he slipped on water in light rain and was seen in the emergency room in Greeley. Dr. Lindberg noted that another MRI was done on May 25, 2012 that showed scarring of the ACL and PCL, scarring of the medial collateral ligament, and an unchanged small under surface tear of the medial meniscus maybe partially healed and fraying of the posterior lateral meniscus. Dr. Lindberg noted that Claimant was then re-evaluated by Dr. Pazik on May 29, 2012 and recommendations provided to wear the playmaker brace, avoid significant pivoting, climbing, or similar activities. Dr. Lindberg noted that with the alleged work

injury Claimant had another MRI in March of 2015 that was compared to the MRI done in May of 2012. Dr. Lindberg noted that the medial meniscus appeared unchanged between MRIs. Dr. Lindberg provided an impression that Claimant had chronic instability in his knee secondary to his first injury playing with his kids and his second injury due to a slip and fall. Dr. Lindberg opined that the second injury and the MRI that was performed in 2012 show the same changes that we now see on the MRI done in 2015 following the alleged work injury. Dr. Lindberg opined that the operative note from July of 2015 basically substantiates chronic instability and a chronic medial meniscal tear. Dr. Lindberg opined that the MRIs between 2012 and 2015 were not significantly different and that the findings at arthroscopy in July of 2015 do not substantiate any acute injury. Dr. Lindberg opined that Claimant's fall was most likely caused by his instability and was a manifestation of chronic instability not a particular significant hazard at work. Dr. Lindberg opined that there was no new injury caused by the slip and fall on February 22, 2015. Dr. Lindberg opined that Claimant had chronic instability in his knee which would cause the knee to give way and slip and fall with minimal or no cause. Dr. Lindberg recommended denying any further treatment under workers' compensation. *See* Exhibit E.

Prior injuries/treatment to right knee

25. Prior to the alleged work injury, Claimant had two separate injuries to his right knee, surgery on his right knee, and two MRIs on his right knee that occurred in late 2011 and 2012.

26. On November 13, 2011 Claimant was evaluated at the emergency department of North Colorado Medical Center. Claimant reported right knee pain in the medial aspect of the knee after playing with his son.

27. On November 15, 2011 Claimant was evaluated by Dr. Pazik. Dr. Pazik diagnosed right knee internal derangement of the knee, moderate MCL sprain, possible MMT, and possible torn ACL. *See* Exhibit G.

28. On November 21, 2011 Claimant underwent an MRI of his right knee that was interpreted by Eric Handley, M.D. Dr. Handley provided the impression of extensive edema and distortion throughout the PCL with a possible component of chronic degeneration and high grade distal tearing suggested, full thickness grade 3 proximal medial collateral ligament tear, subtle inferior surfacing oblique tear of the medial meniscal posterior horn, and small to moderate knee effusion with synovitis.

29. On November 22, 2011 Claimant was evaluated by Dr. Pazik. Dr. Pazik diagnosed right knee torn PCL, grade 3 proximal MCL tear, and medial meniscus tear. Dr. Pazik recommended surgery for PCL reconstruction, medial meniscus repair, and partial medial meniscectomy. Dr. Pazik recommended in the mean time that Claimant continue with the playmaker brace and recommended using crutches. *See* Exhibit G.

30. On January 16, 2012 Claimant was evaluated by Dr. Pazik. Claimant reported that while chasing his son he twisted his knee in an external rotation mechanism and felt the knee slide out of place and had immediate discomfort and swelling. Claimant reported being evaluated in the ER and being discharged with a knee immobilizer. Dr. Pazik noted the MRI findings from November 21, 2011 showed torn PCL distally, full thickness grade 3 proximal MCL tear, medial meniscus tear, and moderate effusion with synovitis. Dr. Pazik discussed surgical and non surgical options. Dr. Pazik recommended surgery for PCL reconstruction, medial meniscus repair, and partial medial meniscectomy. Dr. Pazik noted that Claimant seemed to understand that his knee would never be completely normal. *See* Exhibit J.

31. On February 6, 2012 Claimant underwent surgery performed by Dr. Pazik. Dr. Pazik performed right knee arthroscopy with medial meniscus repair, and arthroscopic patellar chondral debridement. *See* Exhibit J.

32. On April 17, 2012 Claimant was evaluated by Dr. Pazik. Dr. Pazik released Claimant to full duty work and noted that Claimant was doing well. Dr. Pazik recommended that Claimant avoid squatting and kneeling activities until June. Dr. Pazik cautioned Claimant against squatting and kneeling generally and demonstrated to Claimant with a model how such activities place the meniscus under significant stress. Dr. Pazik noted that Claimant seemed to understand, but Dr. Pazik really did not think that Claimant was going to modify his activities. *See* Exhibit G.

33. On May 20, 2012 Claimant suffered a slip and fall outside of a casino in Black Hawk. Claimant went back to Dr. Pazik for an evaluation and underwent an additional MRI.

34. On May 25, 2012 Claimant underwent an MRI of his right knee interpreted by Kelly Lindauer, M.D. Dr. Lindauer gave the impression of: new moderate scarring along the deep margin of Hoffa's fat pad which is along the spectrum of artrofibrosis and could be a source of impingement. Moderate knee joint effusion with synovitis; unchanged chronic undersurface tear of the medial meniscus at the junction between the body and posterior horn segments intermediate in signal and that may be healed with granulation tissue; unchanged mild chondromalacia involving the patellofemoral compartment; interval development of mucinous degeneration and/or scarring of the posterior cruciate ligament with healing of the previously seen tear. Mucinous degeneration of the ACL as well; interval development of scarring in the medial collateral ligament with healing of the previously seen sprain. *See* Exhibit F.

35. On May 29, 2014 Claimant was evaluated by Brittany Downing, DC. Claimant reported hurting his knee pulling some pipes at work. Dr. Downing noted that Claimant's right knee was tender to touch but noted no swelling. *See* Exhibit I.

Testimony at hearing

36. Dr. Lindberg testified at hearing consistent with his reports. Dr. Lindberg opined that the mechanism of injury described in the slip and fall on February 22, 2015 was not a mechanism that would cause a meniscus injury. Dr. Lindberg opined that Claimant did not sustain any injury to his knee in the February 22, 2015 incident based on both the MRI results and the surgical results. Dr. Lindberg noted that after Claimant's first injury in late 2011, Claimant tore the medial meniscus. Claimant then had surgery where Dr. Pazik attempted a medial meniscal tear repair and stapled part of the meniscus together. Dr. Lindberg opined that the medial meniscus never completely healed after the attempt to repair it in the 2012 surgery. Dr. Lindberg noted that after Claimant had a slip and fall at a casino in 2012, Claimant had a new MRI that showed fraying of the lateral meniscus and only partial healing of the medial meniscus repair. He opined that although surgically repaired, the second MRI in May of 2012 shows that the medial meniscus never exhibited complete healing after Claimant's first surgery.

37. Dr. Lindberg opined that when Dr. Pazik performed the second surgery in July of 2015, Dr. Pazik removed what had not worked the first time, the medial meniscus tear repair and that the rest of the surgery was to clean up the progressive degenerative fraying of cartilage and ligament secondary to PCL and ACL instability from the initial injury in late 2011. Dr. Lindberg opined that naturally a PCL injury becomes progressively more unstable and noted that PCL repair is very difficult and most surgeons do not repair unless there is significant rotational instability. Dr. Lindberg opined that the naturally progressive PCL instability can cause meniscal tears over time from the rotational instability. Dr. Lindberg also noted that nothing in Dr. Pazik's report indicated that he believed Claimant had sustained any new or acute injury as a direct result of the February 22, 2015 incident. Dr. Lindberg also opined that the medial meniscus looked slightly better on the 2015 MRI than it looked on the May 2012 MRI and that nothing reflected any additional injury or aggravation to the prior medial meniscus tear.

38. The opinions of Dr. Lindberg are found credible and persuasive. They correlate with the MRIs performed in this matter which do not show any worsening or acute aggravation of a pre-existing medial meniscus tear.

39. Neither Dr. Smith nor Dr. Pazik have provided a persuasive opinion that the February 22, 2015 incident caused the medial meniscus tear or caused an aggravation or further injury to the medial meniscus. The medial meniscus tear was pre-existing. It also was not shown to be worse or aggravated by the February 22, 2015 fall and the MRIs, when compared, show no new injury or aggravation to the meniscus. Although Dr. Smith noted that in all probability the medial meniscus was degenerative from the previous surgery, she noted that the mechanism of injury in the fall could have caused further injury to the meniscus. Although the fall could have caused further injury to the medial meniscus, Claimant has failed to establish that the fall in fact caused any further injury to the meniscus or any aggravation to the meniscus.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167

(Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on February 22, 2015. Although Claimant slipped and fell on snow/ice on that date, the fall did not result in any physical injury or trauma. Claimant has no findings of an acute injury to his medial meniscus and Claimant's knee condition and pathology shown on the March 2015 MRI was unchanged from the prior MRI Claimant underwent in May of 2012. There was no new physical injury shown by the MRI comparisons. Rather, they show that Claimant continued in 2015 to have the same injuries to his right knee as he had in 2012. Although Dr. Smith opined that the mechanism of injury could have caused further injury to Claimant's meniscus, the overall medical evidence and MRIs do not support that further injury to the meniscus actually occurred. Although Claimant suffered an accident on February 22, 2015 when he slipped and fell, Claimant has not established that he suffered a new injury or that he aggravated a pre-existing injury.

The prior medical treatment shows that Claimant had instability and pain in his right knee following his 2011 injury and 2012 surgery. This included a similar slip and fall in May of 2012 as well as a report of hurting his right knee and being tender in the right knee in May of 2014. Following his 2012 surgery, Dr. Pazik warned Claimant about the stress on the meniscus by certain activities and explained that Claimant's knee would never be normal. Claimant has failed to establish that the incident on February 22, 2015 caused any addition injury or any aggravation to a pre-existing condition. Rather, his knee is in a same or similar condition as it was in May of 2012. The opinion of Dr. Lindberg in this regard is credible and persuasive. Further, the mere occurrence of symptoms of instability in his knee do not require a conclusion that the duties of employment caused Claimant's symptoms or that his employment aggravated or accelerated his pre-existing condition. Here, although Claimant may have had symptoms of instability at work that caused him to fall, this is just as likely representative of the natural progression of the pre-existing conditions in Claimant's right knee that are unrelated to his employment. Claimant has failed to meet his burden to establish a causal connection between his right knee condition and his employment.

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101 (1)(a), C.R.S. (2014);

Snyder v. Industrial Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S.

Claimant has failed to establish a causal relationship between his current symptoms and diagnoses and any work related injury. As he has failed to establish that he suffered from a work related injury, the Respondents are not liable for medical treatment or medical benefits sought by Claimant.

Temporary disability benefits

To obtain temporary disability benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. *See* § 8-42-103(1)(a), C.R.S. As found above, Claimant has failed to establish that he suffered a work related injury. Therefore, any wage loss is not causally related to a work injury and Claimant has failed to establish an entitlement to any temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden of proof to establish that he suffered a compensable injury on February 22, 2015.

2. Claimant is not entitled to medical treatment and is not entitled to any temporary disability benefits.

3. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

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

DATED: March 22, 2016 /s/ Michelle E. Jones

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-981-534-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 25, 2015 and February 29, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 11/25/15, Courtroom 3, beginning at 1:30 PM, and ending at 3:50 PM; and, 2/29/16, Courtroom 3, beginning at 8:40 AM, and ending at 9:00 AM).

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection. Respondents' Exhibit K was admitted into evidence over the Claimant's objection. The evidentiary deposition of Michael Rauzzino, M.D., was admitted into evidence without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief to be filed within 5 calendar days of the last session of the hearing. Instead, the Claimant filed proposed findings of fact on March 7, 2016, which the ALJ hereby considers as an opening brief. Respondents' answer brief was filed on March 11, 2016; and, the Claimant's rebuttal brief was filed on March 14, 2016. The matter was deemed submitted for decision on March 15, 2016.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable industrial injury, or compensable aggravation of a preexisting condition on April 27, 2015; whether the cervical surgery proposed by Michael Rauzzino, M.D., is causally related to the incident of April 27, 2015 and reasonably necessary to cure and/or relieve the effects of the April 27, 2015 alleged industrial injury; the Claimant's average weekly wage (AWW); and temporary total disability (TTD) benefits from April 28, 2015 through September 18, 2015, and from November 13, 2015 and continuing.

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

FINDINGS OF FACT

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

Procedural Findings

1. At the commencement of the first session of the hearing, the parties stipulated that, if the claim was found compensable, the Claimant's AWW is $827.58, and the ALJ so finds.

2. The parties also stipulated that if temporary indemnity benefits were awarded, the periods of entitlement would be April 28, 2015 through September 18, 2015 and November 13, 2015 ongoing, and the ALJH so finds.

3. The parties further stipulated that, if compensable, the Claimant's authorized treating physicians (ATPs) included HealthOne and Dr. Rauzzino.

Preliminary Findings (Pre-Incident)

4. On September 16, 2014, the Claimant went to his personal chiropractor, noting a new injury to his right shoulder while working out at the gym. The Claimant's complaints on that date included sharp and aching pain rated at a 5/10 and getting worse (Respondents' Exhibit. E, BS.40).

5. On September 29, 2014, the Claimant returned to his chiropractor noting that his pain was getting worse and that "the pain first started in his neck, and now has radiated down his right arm. He also is feeling some numbness in two of his fingers."

The Claimant reported that the pain was rated at 6/10 and getting worse (Respondents' Exhibit. E, BS 38).

6. Dr. Rauzzino, a surgeon, testified in his evidentiary deposition on January 12, 2016, that these reported symptoms from September 2014 are consistent with a cervical radiculopathy similar to those symptoms the Claimant presented with in his July visit with Dr. Rauzzino (Rauzzino Depo., p. 6, ln. 7-17).

7. John Burris, M.D., who performed a medical records review, concurred with Dr. Rauzzino, noting that the Claimant's symptoms of cervical radiculopathy are documented at least as far back as September 2014(Respondents' Exhibit. K).

8. In his rebuttal brief, the Claimant notes that he had not missed any time from work prior to the alleged compensable event of April 27, 2015

9. On April 16, 2015, the Claimant was evaluated by Jonathan Scott, M.D., of Blue Sky Neurosciences. Dr. Scott is a neurologist. This evaluation was eleven days prior to the alleged work injury of April 27, 2015 (Respondents' Exhibit D, BS 26-29).

10. In the" New Patient History" form filled out by the Claimant on April 16, 2015, the Claimant indicated that he had sought out an evaluation by a neurologist due to right arm weakness, neck pain, back pain, numbness in his fingertips, tingling/burning sensation, and involuntary movements. The Claimant testified that he had sought out treatment with Dr. Scott because he was experiencing numbness and tingling that was unlike any of his prior symptoms and that his condition was different than anything else he had experienced. Because of this the Claimant stated that he did not want to see his regular personal chiropractor, but rather seek treatment with a neurologist (Respondents' Exhibit D, BS 28; 11/25/15 Hearing Tr., p. 45, ln. 15-25).

11. Dr. Scott recorded that the Claimant reported injuring his right trapezius in November of 2014 and then, after going for a run and performing some push-ups, he had "sharp neck pain and couldn't move his neck." In his physical examination, Dr. Scott recorded that the Claimant had the following complaints:

- Weakness in the chest muscle;
- Weakness in the right triceps and pectoralis muscle, which did not allow him to lift as heavy weights as he was previously able to do; and
- Numbness in the pinky and ring finger with pain into his right elbow.

Dr. Scott recorded that the Claimant had sought treatment out with his chiropractor previously for this condition and received dry needling and electrical stimulation as a result (Respondents' Exhibit. D, BS 26).

12. Dr. Scott's physical examination on April 16, 2015 established that the Claimant had reduced bulk of the right triceps compared to the left (Respondents' Exhibit D, BS 26)

13. On April 16, 2015, eleven days before the alleged compensable injury, Dr. Scott diagnosed the Claimant with "Radiculitis, Cervical Disc Herniated" and noted that he suspected a right C7 or C8 radiculopathy with neck pain, numbness in the right pinky and ring finger, and weakness in the right triceps muscle. Dr. Scott recommended that the Claimant undergo a cervical MRI (magnetic resonance imaging) and an EMG of the right upper extremity (RUE) to confirm his diagnosis (Respondents' Exhibit D, BS 27).

14. The Claimant testified that he believed that the condition evaluated by Dr. Scott on April 16, 2015 was not related to work but rather "everyday-type – you know – wear and tear." He also testified that he sought treatment with Dr. Scott at the suggestion of his girlfriend and that the pain he was experiencing prior to his appointment with Dr. Scott was different that anything he had experienced before. (11/25/15 Hearing. Tr. p. 28, ln. 7-10; p. 48, ln. 5-21).

15. According to the Claimant, he kept the EMG and MRI appointments requested by Dr. Scott despite the alleged intervening work injury and he underwent these appointments under his own health insurance (11/25/15 Hearing Tr. p. 27, ln. 6-14).

<u>After the Alleged Compensable Event of April 27, 2015</u>

16. The cervical MRI was performed on April 30, 2015. The study established a disc bulge a both the C6-C7 level and C5-C6 level. R. Matthew Lugliani, M.D., one of the Claimant's ATPs, who evaluated the Claimant after the alleged work injury, was of the opinion that the disc bulge seen on the MRI is "likely long-standing" (Respondents' Exhibit H, BS 77-78).

17. The RUE EMG was performed on May 1, 2015 by Adam Graham, M.D. The study established that the Claimant had moderately severe right C7 radiculopathy as predicted by Dr. Scott on April 16, 2015 (Respondents' Exhibit D, BS 23, 27).

<u>The Alleged Compensable Aggravation of the Claimant's Preexisting Condition</u>

18. The Claimant alleges that on April 27, 2015, he sustained an injury to his neck while performing work for the Employer. He first sought treatment for this alleged work-related injury on April 28, 2015 at HealthOne, where he was evaluated by Dr. Lugliani.

19. The Claimant complained of the following symptoms at the April 28, 2015 appointment:

- Neck pain described as "dull and achy" with radiating symptoms into his bilateral trapezial area;
- Right arm weakness;
- Numbness and tingling involving elbow and third, fourth, and fifth digits of his right hand; and
- Muscle wasting involving right triceps with an inability to perform as many push-ups as previously able to do.

(Respondents' Exhibit. B, BS 9).

20. Dr. Lugliani's physical examination on April 28, 2015 established that "inspection of the right shoulder/arm reveals muscle wasting involving his right triceps." This is a similar physical finding as that found by Dr. Scott two weeks prior (Respondents' Exhibits. B, BS10; and. D, BS 26).

21. Dr. Lugliani stated that he had a high suspicion for C5, C6, or C7 nerve injury consistent with RUE radiculopathy. Like Dr. Scott, Dr. Lugliani made this diagnosis without the benefit of either a MRI or EMG (Respondents' Exhibit B, BS 10-11).

22. After having reviewed the MRI on May 7, 2015, Dr. Lugliani was of the opinion that the disc bulge was chronic and he questioned whether the Claimant's current presentation was related to an April 27, 2015 incident or was long-standing (Respondents' Exhibit B, BS 8).

Independent Medical Records Review by John Burris, M.D.

23. Dr. Burris is of the opinion that the Claimant's reported symptoms of significant neck pain, right arm weakness, and decreased muscle bulk of the triceps had been present for at least five months prior to the alleged April 27, 2015 injury. The ALJ finds this opinion highly persuasive and credible against a backdrop of the Claimant's medical history pre-dating April 27, 2015. Dr. Burris also is of the opinion that the documented symptoms and physical examination at the April 28, 2015 appointment with Dr. Lugliani were "essentially the same" as those documented by Dr. Scott on April 16,

2015 (Respondents' Exhibit K). Dr. Burris' opinions do **not** preclude a work-related aggravation and acceleration of the Claimant's underlying condition, regardless of how slight the aggravation may be.

24. Dr. Burris, in his February 9, 2016 report, was of the opinion that the clinical findings, specifically the decreased muscle bulk of the triceps and right arm weakness, had been present five months before the April 27, 2015 alleged injury and thus could not have been caused or aggravated by any event on April 27, 2015 (Respondents' Exhibit. K).

Michael J. Rauzzino, M.D.

25. Dr. Rauzzino is of the opinion that the Claimant's symptom complex prior to the alleged injury was the same documented after the alleged injury and that the symptoms of a C7 radiculopathy were documented in the medical records as early as September 2014 (Rauzzino Depo. Tr., p. 17, ln. 20-24; p. 23-24). Nonetheless, the ALJ finds that Dr. Rauzzino's ultimate opinion is that the Claimant sustained a work-related aggravation and acceleration of his underlying condition at work on April 27, 2015.

26. Dr. Lugliani's physical examination revealed muscle wasting of the Claimant's right triceps two weeks before the alleged injury (Respondents' Exhibit B, BS10).

27. Dr. Rauzzino testified that muscle wasting "is loss of bulk of muscle" that is either caused by a problem within the muscle itself, or with the nerve root that supplies the muscle. Dr. Rauzzino testified that "a C7 radiculopathy due to a herniated disc at C6-C7 could lead to injury of the C7 nerve root, which could lead to muscle wasting of the triceps, which is the muscle that the C7 nerve root supplies" (Rauzzino Depo. Tr., p. 15, ln. 17-23; p. 16, ln. 3-9).

28. Dr. Rauzzino further testified that the muscle wasting seen in the April 28, 2015 report from Dr. Lugliani could not have developed in the 24 hours after the alleged injury of April 27, 2015 (Rauzzino Depo. Tr., p. 16, ln. 10-15).

29. Dr. Rauzzino further testified that he could not testify with medical **certainty** (although the wrong standard, the ALJ finds that Dr. Rauzzino subsequently rendered an opinion supporting compensability, to a reasonable degree of medical **probability**) that the Claimant herniated the cervical disc on April 27, 2015 (Rauzzino Depo. Tr., p. 18, ln. 1-6).

Inconsistent Histories Given by the Claimant

30. On April 16, 2015, the Claimant was evaluated by Dr. Scott for right arm weakness. He informed Dr. Scott that this pain began in November 2014 while working

and then made significantly worse thereafter while working out (Respondents' Exhibit D, BS 26).

31. Two weeks later, on April 28, 2015, the Claimant reported to ATP Dr. Lugliani that he had experienced a shoulder injury about a year ago and a neck injury while working two months prior to April 28, 2015, which would have been February 2015. The Claimant reported a foot injury at the April 27, 2015 appointment, occurring in February 2015, but no neck injury was reported (Respondents' Exhibit. B, BS 9; Exhibit I, BS 81).

32. In his signed intake sheet, filled out on April 28, 2015, the Claimant denied that he had sought treatment for his neck previously and he specifically denied any musculoskeletal problems occurring in the last month (Respondents'. Exhibit B, BS 13, 14; 11/25/15 Hearing Tr., p. 39, ln. 1-12).

33. On May 12, 2015, the Claimant informed his physical therapist that he had "the same injury a couple months ago in which he reported but didn't see a MD" (Respondents' Exhibit C, BS 16).

34. On July 6, 2015, the Claimant informed Dr. Rauzzino about the April 27, 2015 alleged injury but noted that he had "no history of prior neck injury or work-related spinal injury." Dr. Rauzzino confirmed that the Claimant did not report to him any related cervical history of pain or injury (Respondents' Exhibit A, BS 2; Rauzzino Depo. Tr., p. 11, ln. 4-13).

35. According to the Claimant, these were "miscommunications." The Claimant testified that did not have a neck or related injury in November 2014 or February 2015 (11/25/15 Hearing. Tr., p. 15; p. 40, ln. 14-22; p. 55, ln. 3-20). The ALJ finds the Claimant's characterization of "miscommunications" lacking in credibility, based on the weight of previous medical histories the Claimant gave to medical providers.

36. The Claimant reported that the September 26, 2014 was an injury only to his shoulder, not to his cervical spine. The Claimant also clarified that he sought treatment after the September alleged incident with his personal chiropractor until he ran out of time to attend appointments (11/25/15 Hearing. Tr., p. 62-63).

37. The Claimant specifically stated that he did not contend that he injured his neck in September of 2014 and that the September 2014 injury was the source of his current problem (11/25/15 Hearing. Tr., p. 33, ln. 4-13).

38. In verified answers to interrogatories sent by the Respondents, the Claimant was specifically asked to describe the circumstances that caused the injury subject to this claim. The Claimant alleged that his current cervical symptoms began on

September 26, 2014 during a lifting injury at work and that he later re-injured his neck on April 27, 2015. He alleged that he sought no treatment for the September 26, 2014 injury. He also made no reference to a shoulder injury occurring on that date (Respondents'. Exhibit J, admitted into evidence at hearing).

39. Despite the medical records that the September 2014 injury was caused by a gym incident and the Claimant's testimony that the September 2014 incident was only a shoulder injury, the Claimant argues that the Claimant had a pre-existing neck condition "albeit probably caused by work done in September 2014.

40. The Claimant testified that he sustained a right shoulder injury while working on September 26, 2014. He did not seek any treatment for this alleged injury. (11/25/15 Hearing, Tr., p. 14, ln. 1-25).

41. The medical records establish that the Claimant strained his right shoulder on September 15, 2014, ten days before reporting the "work" injury to the same body part, while working out at the gym. The medical records specifically state that on the day prior to the September 16, 2014 date of service, the Claimant began experiencing sharp pain rated at a 5/10 in his shoulder. This treatment was sought through the Claimant's personal chiropractor (Respondents' Exhibit E, BS 40).

42. Ten days before the Claimant reported an alleged September 26, 2014 work injury, on September 16, 2014, he was evaluated at Advanced Orthopedics, where it was noted that he had more pain after trying to exercise yesterday (September 15, 2014) [Respondents' Exhibit F, BS 53].

43. The medical records also establish that the Claimant's gym shoulder injury included neck pain and radiation into two of his fingers of his right hand (numbness). The Claimant reported on September 29, 2014 that symptoms were getting worse without any reference to any new event or injury. Specifically, the records establish that the Claimant's "condition has been aggravated for an unknown reason" (Respondents' Exhibit E, BS 38). This was three days after the Claimant's alleged work injury of September 26, 2014 and "no new work injury" was noted as having occurred in the interim, but rather the condition had been aggravated for "unknown reasons." Moreover, this note was recorded by the Claimant's personal chiropractor who the Claimant had had a relationship with for several months.

<u>The Claimant's Testimony</u>

44. The Claimant continued treating for his September 15, 2014 gym injury for over a month until at least October 27, 2014. No mention about a work injury was ever made to his personal chiropractor. When discharged, the Claimant had continuing numbness, radiating pain, shooting, tightness and tingling in his shoulder that he rated at a 5/10, suggesting no improvement (Respondents' Exhibit E, BS 30-40).

45. When specifically asked at hearing if he ever got hurt working out, the Claimant initially denied it, but later clarified that maybe he got hurt while working out overseas in 2012 but he did not recall any other injury. He denied recalling that he informed his chiropractor that the 2014 right shoulder injury was an exercise injury. (11/25/15, Hearing Tr., p. 15-23).

46. According to the Claimant, as a result of the failure to get relief from his personal chiropractor with his shoulder his girlfriend suggested that he make an appointment with a neurologist. This appointment was on April 16, 2015 with Dr. Scott. (11/25/15, Hearing, Tr., p. 46, ln. 7-21).

47. According to the Claimant, the September 2014 injury only included sharp pain to his right shoulder and did not include his neck. The Claimant had previously testified that, in September, what – he was just dealing with the right shoulder." (11/25/15 Hearing, Tr., p. 33, ln. 4-8; 56, ln. 9-10).

48. In verified responses to interrogatories (admitted into evidence), however, the Claimant indicated that it was his allegation that the September 2014 alleged injury included an injury to his neck:

> The first injury occurred on 9/26/14. I lifted a heavy bag, trying to clear the belt, and I felt a pull and a sharp, burning pain in my neck.

The Claimant's response to the interrogatory makes no reference to any shoulder injury occurring on September 26, 2014 (Respondents' Exhibit J).

49. Despite the many inconsistencies in the Claimant's histories to medical providers, and in his testimony, the actual fact that the Claimant was taken off work after the April 27, 2015 incident, plus the fact that Dr. Rauzzino based his causal opinion on this fact as opposed to the Claimant's histories, the ALJ hereby determines that the Claimant's lack of credibility is not an important factor in determining a work-related aggravation and acceleration of the Claimant's underlying condition on April 27, 2015. Dr. Rauzzino's ultimate causal opinion, which is credible and highly persuasive, is based primarily on the fact that the Claimant could not work after the April 27, 2015 incident, whereas the Claimant always worked prior thereto.

<u>Causal Relatedness</u>

50. Dr. Rauzzino stated in his deposition that his opinions as to causation were based on the "overall veracity of [the Claimant] in terms of his subjective complaints to him" (Rauzzino Depo. Tr. p. 24, ln. 20-25).

51. Dr. Rauzzino stated that his causality opinion regarding compensability and/or the need for surgery could be changed if there was a question as to whether or not the subjective reports of the Claimant were accurate (Rauzzino Depo. Tr. p. 25, ln. 1-6).

52. Dr. Rauzzino, ultimately, was of the opinion that it was likely that something occurred on April 27, 2015 because the Claimant's functional status changed dramatically, going from being able to work to no longer being able to function at work. Dr. Rauzzino stated that the events of April 27, 2015 caused the prior condition to worsen or aggravated it to the point where the Claimant was no longer able to work (Rauzzino Depo., p. 10, ln :1 – 12.) On cross-examination, Dr. Rauzzino stated that not everyone that has C7 radiculopathies needs surgery, but in the Claimant's case, the need for surgery is based upon the Claimant's inability to live his life and do his job (Rauzzino Depo., p. 18, ln 17 – 20.) When asked if his opinions were based upon subjective reporting, Dr. Rauzzino testified that it was not totally subjective and that it had to be factored in that the Claimant worked up until a certain day and then he stopped working (Rauzzino Depo., p. 19, ln 1 – 15).

Average Weekly Wage (AWW) and Temporary Total Disability (TTD)

53. At the commencement of the first session of the hearing, the parties stipulated and the ALJ finds, that if the claim is compensable, the Claimant's AWW is $827.58 (which yields a TTD rate of $551.74 per week, or $78.22 per day); and, the Claimant was temporarily and totally disabled from April 28, 2015 through September 18, 2015 (both dates inclusive, a total of 144 days, and November 13, 2015 and continuing. The period from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, is 109 days).

Compensability/Aggravation of Pre-existing Condition

54. It is clear from the medical records, as well as the testimony of the Claimant, that he had preexisting conditions in his neck which included some radicular symptoms. These were reported in his medical records. He and other ramp agents went to Dr. Ishan Erhuy, D.C., on a regular basis and the Claimant reported low back and shoulder pain in July of 2014 (Claimant's Exhibit 8, BS 76 – 88.) Dr. Erhuy, however, notes radicular symptoms on September 29, 2014 (Claimant's Exhibit 8, BS 89.) This was two days after the reported an on-the-job incident documented in the Employer's Injury Report of September 26, 2014 (Claimant's Exhibit 13, BS 125.) Nonetheless, the Claimant continued to work without problems until April 27, 2015 when he felt a pop in his neck while lifting a heavy bag. Even then, while he reported it to his supervisor, he did not seek medical treatment. The next day, the Claimant had difficulty even getting out of bed but he still went to work and tried to work using only his left arm. It was only after other coworkers noticed his difficulty and encouraged him to go to

management, that the Claimant stopped working, reported an alleged work-related injury to management and went to HealthOne.

55. While the Claimant had a preexisting neck condition, it was not disabling until it was aggravated while lifting a bag at work on April 27, 2015. Consistent with Dr. Rauzzino' s testimony, the work-related aggravation rendered the Claimant unable to perform his work and necessitated the recommended cervical spine surgery.

Ultimate Findings

56. Based on his greater familiarity with the Claimant's medical case, plus his candid testimony in his deposition, the ALJ finds that the ultimate causation opinion of Dr. Rauzzino is more credible and persuasive than other opinions to the contrary. As found, herein above, the inconsistencies in the Claimant's medical histories and his hearing testimony, are overshadowed by Dr. Rauzzino's ultimate causation opinion, thus, the Claimant's lack of credibility is not an important factor in determining the overall credibility of work-related causality of the April 27, 2015 incident.

57. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the ultimate opinion of Dr. Rauzzino on aggravation and acceleration of the Claimant's underlying condition, by virtue of the April 27, 2015 incident and the causal relatedness of the need for the surgery recommended by Dr. Rauzzino, and to reject all opinions to the contrary.

58. The Claimant has proven, by a preponderance of the evidence that he sustained a work-related aggravation of his underlying neck condition on April 27, 2015, and this compensable injury arose out of the course and scope of his employment with the Employer herein.

59. After reporting an alleged work-related injury to the Employer, the Employer referred the Claimant to HealthOne, and all referrals emanating from HealthOne were within the authorized chain of referrals.

60. All medical care and treatment for the compensable injury of April 27, 2015 was and is causally related to the compensable injury of April 27, 2015, and it was and is reasonably necessary to cure and relieve the effects thereof, including the cervical arthroplasty at C6-7, recommended by Dr. Rauzzino.

61. The Claimant's AWW is $827.58 (which yields a TTD rate of $551.74 per week, or $78.22 per day); and, the Claimant was temporarily and totally disabled from April 28, 2015 through September 18, 2015 (both dates inclusive, a total of 144 days, and November 13, 2015 and continuing. The period from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, is 109 days). Aggregate days of TTD equal 253 days. Consequently, aggregate TTD benefits as of February 29, 2016, the last session of the hearing, equal $19,789.66.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, based on his greater familiarity with the Claimant's medical case, plus his candid testimony in his deposition, the ultimate causation opinion of Dr. Rauzzino is more credible and persuasive than other opinions to the contrary. The inconsistencies in the Claimant's medical histories and his hearing testimony, are overshadowed by Dr. Rauzzino's ultimate causation opinion, thus, the Claimant's lack of credibility is not an important factor in determining the overall credibility of work-related causality of the April 27, 2015 incident.

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, based on substantial evidence, to accept the ultimate opinion of Dr. Rauzzino on aggravation and acceleration of the Claimant's underlying condition, by virtue of the April 27, 2015 incident, and the causal relatedness of the need for the surgery recommended by Dr. Rauzzino, and to reject all opinions to the contrary.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting 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 preexisting 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 preexisting 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). As found, the Claimant sustained a work-related aggravation of his underlying neck condition on April 27, 2015, and this compensable injury arose out of the course and scope of his employment with the Employer herein.

Medical

d. Because this matter is compensable, the Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Aan 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, upon the Claimant's reporting of the April 27, 2015 alleged work-related injury, the Employer referred the Claimant to HealthOne and all subsequent medical referrals emanated from HealthOne and were, thus, authorized.

e. 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 aggravation of his underlying neck condition of April 27, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment as reflected in the evidence was and is reasonably necessary to cure and relieve the effects of that injury, including the C6-7 arthroplasty recommended by Dr. Rauzzino.

Average Weekly Wage and temporary Total Disability

f. The parties stipulated, and the ALJ found that the Claimant's AWW is $827.58 (which yields a TTD rate of $551.74 per week, or $78.22 per day); and, the Claimant was temporarily and totally disabled from April 28, 2015 through September 18, 2015 (both dates inclusive, a total of 144 days, and November 13, 2015 and continuing. The period from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, is 109 days). Aggregate days of TTD equal 253 days. Consequently, aggregate TTD benefits as of February 29, 2016, the last session of the hearing, equal $19,789.66.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay for the costs of medical care rendered by the Employer's designated provider, HealthOne and any other medical providers within the chain of referral, including the costs of the surgery recommended by Michael J. Rauzzino, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents shall pay the Claimant temporary total disability benefits at the rate of $551.68, or $78.22 per day, from April 28, 2015 through September 18, 2015, both dates inclusive, a subtotal of 144 days; and, from November 13, 2015 through the date of the last session of the hearing, February 29, 2016, both dates inclusive, a subtotal of 109 days, for a grand total of 253 days, in the aggregate amount of $19,789.66, which is payable retroactively and forthwith.

C. From March 1, 2015 and continuing until termination or modification of temporary disability benefits is warranted by law, the Respondents shall pay the Claimant $551.68 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_____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*.

CERTIFICATE OF SERVICE

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

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

_____
Court Clerk

Wc.ord

ISSUES

The issues presented for hearing are:

1. Whether the claimant established by a preponderance of the evidence that she sustained an injury to her right knee with a date of injury of either February 25, 2015, and/or March 9, 2015, and/or May 6, 2015, arising out of and in the course of her employment with the respondent-employer; and,

2. If so, has the claimant established by a preponderance of the evidence that she is in need of reasonable and necessary medical care to cure or relieve her from the effects of the injury.

Based upon the findings and conclusion below that the claim is not compensable the ALJ does not reach a determination on the remaining issue.

PROCEDURAL MATTER

The claimant called Melissa Denoo as a witness in her case-in-chief. The respondents objected based upon the fact that the witness was not endorsed by either party, or added by agreement, or an order of the ALJ. Based upon this objection the ALJ sustained the objection and did not allow the witness to testify.

Subsequent to the hearing the parties submitted post-hearing position statements. The claimant provided additional documentation along with her position statement. Since this additional documentation was not provided and admitted at the hearing, the ALJ cannot consider this documentation in the resolution of the issues.

FINDINGS OF FACT

1. The claimant testified on her own behalf substantially as follows:

   a. The claimant has been working for the respondent-employer since August of 2003.

   b. The claimant agrees that she does have arthritis in her knees.

   c. She has treated with medical providers and has been seen by orthopedic clinics.

d. She has maintained her knees and knows what she needs to do to prolong her knees. She states she is too young for a total knee replacement; therefore, she maintains her weight, diet, and exercise and aerobics.

e. While admitting she has arthritis she questions what gives someone the right to kick her, repeatedly.

f. She has done everything to maintain herself so that she doesn't have to have surgery.

g. The claimant declares it is documented repeatedly, "don't touch me, do not hit me, don't kick me."

h. She feels she should be compensated for her pain.

i. She did not act to be put in this position to be injured.

j. She states that in exhibit 9, the report clearly states that she was kicked repeatedly.

k. She reported it to the administration.

l. She states that the form says she was going to get training on this but she never did and she never was removed from the two students.

m. The claimant did not try to take advantage of the respondent-employer by calling in sick and saying she can't work because of her knee.

n. She never said she did not want to work with special education kids as that has been her passion for 17 and ½ years.

2. Prior to the first reported incident the claimant was examined, diagnosed and treated for both left and right knee problems. The claimant had medical documentation of early degenerative arthritic changes to her bilateral knees and has had two surgeries to her right knee.

3. The claimant was seen on March 12, 2015 where she had bilateral knee x-rays. "Indication: chronic bilateral pain." Review of the report establishes "there is tricompartmental osteoarthritis involving both knees manifested by joint space narrowing and marginal osteophytes. …the findings demonstrate mild progression at the medial and patella foraminal compartments since the prior exam (5/15/2002)."

4. A March 16, 2015 chart note under history of present illness does not document any corroboration of the February 25 or March 9, 2015 incidents. Under review of systems "musculoskeletal: no musculoskeletal symptoms and no non-specific pain, swelling, and stiffness." Under physical examination "musculoskeletal system: general/bilateral normal movement of all extremities. Other: general/bilateral no musculoskeletal swelling was seen." Under neurological: "gait and stance: no ataxic gait was observed." Complete review of the March 16, 2015 chart note does not support the February 25 or March 9, 2015 incidents as generators of the need to seek healthcare treatment.

5. Review of the June 29, 2015 chart note does not support the May 6, 2015 incident occurring in general and/or requiring healthcare treatment to claimant's right knee in specific. Review of the physical exam musculoskeletal system: "general/bilateral: musculoskeletal system: normal neck, back, shoulders, elbows, wrists, hips-5 strength and normal ROM. Normal gait and stance." "Knee: general/bilateral: knee showed no abnormalities normal flexion and extension strength and normal ROM bilaterally."

6. Review of the letters submitted by claimant from October 28, 2015 to January 11, 2016 does not support a compensable industrial injury of February 25, March 9 and/or May 6, 2015. While the claimant has a torn meniscus and requires medical care, the credible evidence does not support that the pathology was as a direct and proximate result of any of the incidents as averred by the claimant.

7. The respondent had the claimant evaluated by Eric Ridings, M.D. on October 5, 2015. Upon receipt of the claimant's medical records from Evans Army Hospital Dr. Ridings prepared an addendum on October 29, 2015. Dr. Ridings noted that "in my Independent Medical Examination of [the claimant] on October 5, 2015, I had asked her about any prior history of any problems with her knees, particularly the right knee which is the subject of this claim. The patient reported prior history of severe arthritis over her opposite, left knee with prior recommendation for a total knee replacement on that side, which the patient has not pursued, instead having left knee arthroscopic surgery in February 2015. She reported that she did not have injuries or problems with the right knee prior to the 5 separate workers' compensation injuries involving trauma to her right knee in 2015." On my intake form asking "have you had any previous injuries or problems in the area that we are evaluating" she circled "no" and it was stated in the provided space below "at times I could feel a little discomfort when the weather is extremely cold outside."

8. When Dr. Ridings reviewed the medical records he commented "the provided medical records from the military indicate that the patient was not forthcoming regarding previous serious problems with her right knee before 2015, with previous recommendation for right total knee replacement."

9. Based upon a complete review of all of the medical records Dr. Ridings noted "assuming the incident occurred acute care for being kicked in the knee would be appropriate under workers' compensation "for any verifiable episodes of trauma at work that treatment for claimant's underlying chronic preexisting degenerative changes should not be handled by workers' compensation." Based upon his physical examination of October 5, 2015 the claimant did not require any healthcare treatment because of the incidents.

10. Post-hearing, Dr. Ridings was provided with the claimant's exhibits 1 through 6 for review. Upon review Dr. Ridings specifically stated, "the more recent notes mention a right knee meniscal tear. When I examined the patient on October 5, 2015, she did not have any signs of a meniscal tear on examination. Additionally, the recent note from her orthopedic surgeon states that the care was "acute" and therefore would not be expected to have occurred on or about May 6, 2015, but more likely sometime after my examination in October, and would therefore not be related to this claim. Additionally, meniscal tears typically occur with a twisting motion of the knee which was not reported in any of the incidents in which she was kicked at work."

11. The ALJ finds Dr. Ridings' analyses and opinions to be credible and persuasive.

12. The ALJ finds that the incidents of February 25, 2015, March 9, 2015, and May 6, 2015 while sufficient to cause pain, were not sufficient to cause a need for compensable treatment as it did not cause, aggravate, or accelerate the claimant's need for treatment for her underlying arthritic condition.

13. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffers from an injury, occurring on either February 25, 2015, and/or March 9, 2015, and/or May 6, 2015, that arose out of and occurred in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." See §8-40-201(1) C.R.S. In contrast, an injury contemplates the physical or emotional trauma caused by an accident. An accident is the cause and an injury is the result. No benefits flow to the victim of an industrial accident unless the accident causes compensable injury. A compensable injury is one that causes disability or the need for medical treatment. See *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). See also *Soto-Carrion v. C&T Plumbing, Inc., W.C. 4-650-711 (ICAO Probate 15 2007).* Compensable injuries involve an "injury" which requires medical treatment or causes disability. See *H&H Warehouse v. Victory,* 805 P.3d 1167 (Colo. App. 1990). Whether compensable injury has been sustained is a question of fact to be determined by the ALJ. See *Lou v.* ICAO, 224 P.3d 397 (Colo. App. 2009).

2. The mere fact that claimant experienced pain at work does not necessarily require a finding of a compensable injury. In Miranda vs. Best Western Rio Grande Inn, W.C. No. 4-663-169 (ICAO April 11, 2007) the Panel stated, "pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." The occurrence of symptoms at work may represent the result of a natural progression or a preexisting condition that is unrelated to the employment. See *F.R. Orr Construction v. Renta,* 717 P.2d. 965 (Colo.App.1995).

3. A preexisting disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or condition to produce a disability or need for medical treatment. See *Duncan v. ICAO,* 107 P.3d.999 (Colo. App. 2004).

4. Claimant shoulders the burden of proof of proving by a preponderance of the evidence that she sustained an injury arising out of and within the course of her employment and that she is entitled to benefits under the Act. See §8-43-201(1), §8-41-301(1). See also *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the triar–of–fact, after considering all of the evidence, to find that a fact is more probably true than not. See *Page v. Clark* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. See §8-43-201.

5. It is the claimant's burden to prove that the alleged injury is a "significant" cause of the need for treatment in a sense that there is a direct relationship between the alleged precipitating event and the need for treatment. The claimant must prove a causal relationship between the injury alleged and the medical treatment claimant is seeking. See *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997.) Treatment for a condition not caused by employment is not compensable. See *Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002.) Where an industrial injury does not accelerate the need for treatment for the underlying disease, treatment for the preexisting condition is not compensable. See *Robinson v. Youth Track* 4-649-298 (ICAO May 15, 2007).

6. In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a casual nexus between the need for treatment and the work related injury. See *Singleton v. Kenya Corp.* 961 P.2d. 571 (Colo. App. 1998). It is up to 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. See *F.R. Orr, supra.*

7. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility and determinations, determine the weight to be accorded to expert testimony, and draw reasonable inferences from the evidence. See *Bodensieck v. ICAO,* 183 P.3d 684 (Colo. App. 2008). In determining credibility the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

8. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she suffers from an injury, occurring on either February 25, 2015, and/or March 9, 2015, and/or May 6, 2015, that arose out of and occurred in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

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 7, 2016

/s/ original signed by:

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

ISSUE

The following issue was raised for consideration at hearing:

Whether Claimant proved by a preponderance of the evidence that she is entitled to an award of penalties under Section 8-43-304(1), C.R.S. for Respondent's alleged failure to timely pay TTD.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the ALJ enters the following Findings of Fact.

1. Claimant is a 20 year-old female who was injured in a motor vehicle collision on April 28, 2015, while in the course and scope of her employment at the Respondent in her capacity as a home delivery employee. Claimant was seated in the passenger seat of the home delivery van at a stop light when she and her co-worker were rear-ended by another vehicle.

2. Since Claimant's pain did not resolve following her shift, she sought medical treatment at Concentra on April 29, 2015, where she was ordered to take the rest of the shift off and return to work with restrictions effective April 30, 2015.

3. Claimant worked with restrictions from April 30, 2015, to May 25, 2015, per Claimant's authorizing treating provider's written release to return to modified employment.

4. On May 26, 2015, Claimant's authorized treating physician (ATP), Robert Nystrom, D.O., issued a no-work order for two (2) weeks until her follow-up appointment with him on June 9, 2015. Per Dr. Nystrom's no-work order, Claimant was unable to earn any wages from May 26, 2015, to June 8, 2015.

5. On June 9, 2015, Claimant's ATP gave Claimant a written release to return to modified employment effective June 9, 2015. Claimant earned partial wages from June 9, 2015, to July 2, 2015.

6. On July 3, 2015, Rosalinda Pineiro, M.D., issued the second no-work order. From July 3, 2015, to September 10, 2015, Claimant's authorized treating providers issued five (5) no-work orders on the following dates: July 3, 2015; July 7, 2015; July 21, 2015; August 13, 2015; and September 10, 2015. Thus, Claimant was rendered unable to earn any wages from July 3, 2015, to October 21, 2015. Claimant was released to full duty by Dr. Nystrom on October 22, 2015.

7. Claimant's testimony regarding her inability to earn any wages from July 3, 2015, to October 21, 2015, per her doctors' multiple no-work orders is credible and supported by the medical records.

8. On June 17, 2015, Respondent filed a General Admission of Liability admitting to medical benefits and temporary partial disability benefits (TPD) from April 29, 2015, and continuing.

9. On June 18, 2015, Respondent issued a TPD check to Claimant in the amount of $537.20 for the TPD period of April 29, 2015, to June 13, 2015. On July 2, 2015, Respondent issued a TPD check to Claimant in the amount of $175.26 for the TPD period June 14, 2015, to June 27, 2015. Then, on July 30, 2015, Respondent issued a TPD check to Claimant in the amount of $336.14 for the TPD period June 28, 2015, to July 2, 2015.

10. Pursuant to statute, following the TPD payment on July 2, 2015, Claimant's next payment of TPD was due by July 16, 2015. On July 30, 2015, Respondent issued the next TPD check to Claimant in the amount of $336.14 for the TPD period of June 28, 2015, through July 2, 2015.

11. From July 2, 2015, through September 1, 2015, Respondent issued no indemnity payments to Claimant, neither TPD nor TTD payments were made to Claimant by Respondent.

12. Then, on September 2, 2015, Respondent issued nine (9) TTD checks to Claimant for the periods of July 3, 2015, to August 4, 2015, and August 13, 2015, through September 2, 2015.

13. On September 4, 2015, Respondent issued three (3) TTD checks to Claimant for the periods of August 5, 2015, to August 12, 2015, and September 3, 2015, to September 6, 2015.

14. On September 11, 2015, Respondent issued a TTD check to Claimant for the period of September 7, 2015, to September 9, 2015.

15. Claimant credibly testified that she suffered economic hardships as a result of Respondent's payment of indemnity benefits. Claimant credibly testified that during the period of non-payment of indemnity benefits, July to September 2015, she was in her second trimester of pregnancy and due to her inability to earn any wages, her cell phone service was shut off, she was unable to afford the necessary and medically recommended nutrient-rich foods for prenatal health, and she was unable to afford the necessary repairs to her vehicle to make it operational.

16. Claimant credibly testified that she contacted her attorney's office numerous times to find out why she was not receiving the temporary disability benefits to which she was entitled.

17. On July 16, 2015, Claimant filed an Application for Hearing claiming penalties for Respondent's failure to pay TTD benefits. Claimant contends that Respondent did not cure their violation for failure to pay TTD benefits. Respondent issued its first installment of TTD benefits on September 2, 2015.

CONCLUSIONS OF LAW

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

The parties' arguments

1.Claimant argues that she proved by a preponderance of the evidence that she is entitled to an order awarding penalties against Respondent pursuant to Section 8-43-304 for failure to timely pay TTD. Claimant contends that Respondent was under a duty to pay TTD benefits to Claimant after she was taken off work by her authorized providers. Claimant further contends that Respondent received notice of the claim for penalties and did not attempt to cure the alleged violation. Respondent contends that it had no duty to pay TTD benefits. Respondent's further contend that it did not violate a provision of the Act, a rule or order of the Director or panel and therefore a penalty is not justified in this case.

Summary of Judge's determination

2. The Judge finds that Claimant failed to establish by a preponderance of the evidence that Respondent violated the Act, a rule or an order of the Director or panel. The Judge could not find authority for Claimant's argument that Respondent had a duty to pay TTD to Claimant after the July 3, 2015, no work orders from her authorized providers. The Judge further finds that a penalty for Respondent's failure to pay TPD conistent with the General Admission of Liability filed on June 17, 2015, was not raised by Claimant in the application for hearing. It is concluded that Claimant failed to pled with specificity a claim for penalty for failure to timely pay TPD benefits.

General legal principles

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

employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, *supra*.

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

The claim for penalties for failure to timely pay TTD

5. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The statute then creates a procedure for the alleged violator to cure the alleged violation within twenty days after the mailing of the application. If the violation is cured, the proponent of the penalty bears an increased burden of proof to establish by clear and convincing evidence that the violator knew, or reasonably should have known, that "such person was in violation."

6. The ICAO has held that the purposes of the specificity requirement contained in Section 8-43-304, C.R.S are to provide notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *Davis v. K Mart,* W.C. No. 4-493-641 (ICAO April 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (ICAO December 27, 2001). In essence, the notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *Matthys v. City of Colorado Springs,* W.C. No. 4-662-890 (ICAO April 2, 2007). The statute does not prescribe a precise form for pleading penalties, and an ALJ may consider the circumstances of the individual case to determine whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, W.C. No. 4-493-641 (ICAO April 28, 2004) (factual allegations contained in pleading were sufficiently specific to notify the respondent of the rule of procedure that was allegedly violated, and to extent respondent was unsure of precise nature of allegations discovery was available to assist in clarifying the issues.)

7. Section 8-43-304(1) provides for the imposition of penalties of up to $1,000.00 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" The assessment of penalties under this statute requires a two-step analysis. The ALJ must first determine whether the insurer's conduct constituted a

violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was "objectively unreasonable." *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Skelly v. Wal-Mart Stores, Inc.*, WC 4-632-887 (ICAO July 31, 2008).

8. In this case, Claimant failed to establish by a preponderance of the evidence that Respondent violated any specific rule, statute or order. There is no credible or persuasive evidence of record that Respondent should be penalized for late payment of TTD. The Judge can find no basis in a rule, statute or order that required Respondent to pay TTD beginning July 3, 2015, when Claimant was taken off work. Since it was not proven that Respondent violated any specific rule, statute or order, it cannot be found that an award of penalties under Section 8-43-304(1) is warranted.

The claim for penalties for failure to timely pay TPD

9. Claimant's primary argument appears to be that Respondent had a duty to pay TTD and failed to do so. However, it is also argued that notice to Respondent that Claimant was seeking penalties for late payment of TTD constitutes notice to Respondent that a penalty is sought for late payment of TPD. In support of this position, Claimant argues that the Act references the payment of "temporary disability benefits," without specification whether it is TTD or TPD. Claimant contends that, since there is no differentiation between TPD and TTD, notice of a claim for penalties for failure to timely pay TTD provides sufficient notice of a claim for penalties for failure to timely pay TPD.

10. As previously stated above in paragraph 5 of these Conclusions of Law, the requirement that a claimant plead with specificity the basis of a claim for penalties has two purposes. The specificity requirement provides notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and provides notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense.

11. The statute, Section 8-42-106, C.R.S., governing the payment of TPD required Respondent to continue the payment of those benefits until Claimant reached MMI or Respondent offered modified employment and Claimant failed to respond to the offer of modified employment. Claimant was not placed at MMI nor was he given an offered of modified employment to which he failed to respond. Thus, TPD was the only indemnity payment that was required by law to continue. Yet, Claimant failed to plead a penalty for late payment of TPD

12. In this case, the ALJ concludes that Respondent had a duty under Section 8-42-106, C.R.S. to pay TPD to Claimant once every 14 days after the first payment of TPD was made to Claimant pursuant to the June 17, 2015, General Admission of Liability. Yet, it is also concluded that Claimant's pleading regarding a penalty claim for late payment of TPD was deficient to the extent that it did not identify TPD to be the benefit for which a late payment penalty was sought.

ORDER

It is therefore ordered that:

1. Claimant's claim for penalties under Section 8-43-304(1), C.R.S. is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman 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 29, 2016

DIGITAL SIGNATURE:

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-987-724, 4-986-776

ISSUES

- Whether Claimant demonstrated by a preponderance of the evidence that she suffered a compensable inguinal hernia while in the course and scope of her employment for Employer on May 29, 2015.

- If compensable, Claimant requests temporary disability benefits from September 12, 2015 and ongoing. She requests an average weekly wage (AWW) of $904.21. If compensable, Respondents contend Claimant's AWW is $569.12, and request penalties for Claimant's failure to report the May 29, 2015 injury until June 26, 2015.

FINDINGS OF FACT

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

1. On April 9, 2015, Employer hired Claimant to work as a furniture salesperson at its Thornton store. As part of her job duties, at the end of her shift Claimant dusted, vacuumed, and organized a portion of the showroom.

2. Claimant testified that on May 29, 2015, at approximately 9:45 p.m., she was vacuuming her work area. She stated that when she picked up the vacuum to get it over a shag rug, she had immediate pain in her right groin which went down her lower back. She stated that the pain was very severe but that after a short time, her pain lessened.

3. Claimant worked the rest of her shift and did not report any injury. She sought no medical care and she lost no time from work.

4. Claimant testified that on June 22, 2015, at about 9:15 p.m., she was walking at work while carrying a spray bottle and cloth when she experienced severe pain. She did not tell her manager that she had a work injury. She told her manager that she did not know what the problem was.

5. At hearing, Claimant testified that her pain on June 22, 2015 was the "same pain" that she previously had on May 29, 2015. Claimant testified that she was not injured on June 22, 2015, but instead experienced pain that day, which she stated was caused by the event on May 29, 2015 when she lifted the vacuum.

6. On June 23, 2015, Claimant went to the Emergency Room at St. Anthony's North. Those records state that Claimant started to have pain in her right lower back on the previous day, with no specific trauma or injury. Claimant was

diagnosed with right leg pain and probable sciatica. The record states that Claimant "had a similar incident one month ago that resolved on its own without any difficulty."

7. At hearing, Claimant testified that this medical record was incorrect because she did not tell the E.R. staff that her pain from the previous month (i.e., on or about May 29, 2015) had resolved.

8. The June 23, 2015 Emergency Room records contain no reference to Claimant's condition being work-related. At hearing, Claimant testified that she told the E.R. staff that her injury was work-related, and that the failure to reflect that fact was an error in the medical records.

9. On June 25, 2015, Claimant saw her personal physician, Dr. Karen Ratner, whose records reflect that Claimant had right back and right leg pain, which had a sudden onset three days ago "pushing heavy furniture at work" (quotation marks in original).

10. At hearing, Claimant testified that this medical record was incorrect, and that she did not tell Dr. Ratner that her pain was due to pushing heavy furniture at work.

11. On June 26, 2015, Claimant met with her store manager, Steve Williams. She testified that this was the first time that she reported an injury to her Employer. Claimant and Mr. Williams filled out an "Incident Report" together; he asked her questions, she answered, and he wrote down the answers. The Incident Report consists of two pages, both of which Claimant signed. It lists Claimant's injury as "sciatic nerve" and the body part as "lower back." It states that Claimant was injured while "reaching into an overhead cabinet to get some cleaning rags." It further notes that Claimant thinks "she may have injured herself vacuuming about a month prior at the Thornton store."

12. Steve Williams testified that he is Employer's store manager and Claimant's supervisor. Claimant called him on June 25, 2015, and asked to meet with him. He met with Claimant on June 26, 2015 to fill out an Incident Report and workers' compensation paperwork. He testified that prior to June 26, 2015, he had no knowledge that Claimant had any work-related injury, or that she had pain between late May and June 26, 2015.

13. Mr. Williams asked the Claimant various questions about her claimed work injury and he wrote down what she told him. On the Incident Report, he wrote "she tweaked her lower back while reaching into an overhead cabinet. This is what [Claimant] explained happened." He also wrote that Claimant "thinks she may have injured herself vacuuming about a month prior at the Thornton store." He stated that Claimant did not tell him that she lifted a vacuum.

14. Mr. Williams testified that Claimant continued to work for Employer through September 4, 2015, and then she stopped coming to work. He stated that

Employer was aware of Claimant's work restrictions and had accommodated them, and that no one at the store told Claimant that she should not come back to work. He stated that if she had continued to show up for work, she would still be working there, and that he did not know why she stopped showing up for work.

15. After meeting with Mr. Williams, Claimant went to see Dr. Michael Striplin. His records dated June 26, 2015 state that Claimant was pushing a vacuum on carpet a month ago and that she said she had some mild symptoms that persisted until June 22, 2015, when she noted the sudden onset of right hip and groin pain with no known injury. He noted she was diagnosed with sciatica at St. Anthony's North Emergency Room. He determined Claimant's pain complaints were not work-related and recommended that she follow-up with her personal care physician.

16. Contained in Dr. Striplin's records is Claimant's handwritten statement which reads, "I was vacuuming one day, I felt the pain while pushing the vacuum but I walked it off, a month later I was walking at work and the pain started again, but this time I could not walk, I went to the E.R."

17. Claimant testified that although her handwritten statement makes no reference to her pain being associated with lifting the vacuum, that she did lift it. She also stated that although she wrote that she had "walked off" the pain associated with vacuuming; her written statement was incorrect, and wrongly phrased.

18. Claimant stopped working for Employer on September 4, 2015. She said this was because she could not walk due to pain. She testified that no one told her she could not come back to work. She provided no documentation, including any medical record, to corroborate her statement that she was not able to continue working.

19. Employer's records show Claimant's last day at work was September 4, 2015, and that Claimant called in sick on September 5, 2015, and did not return.

20. On September 5, 2015, Claimant went to Kaiser and saw Dr. Jennifer Kuhl. Those records state that Claimant's "pain increased two weeks ago while playing with children and her son pulled her arm." At hearing, Claimant testified that her pain had increased the day before she saw Dr. Kuhl, not two weeks before.

21. On July 7, 2015, Claimant went to the North Suburban Medical Center Emergency Room for abdominal pain. This record reflects that Claimant reported "a tearing sensation in her right groin several weeks ago, progressively worse since that time occurred while lifting heavy objects at work at [Employer]." An ultrasound showed that Claimant had a "small defect" within the fascia, which measured 6.1 mm. The defect was referenced as a "small, fat-containing right-sided inguinal hernia."

22. On July 10, 2015, Claimant was seen by Edward Medina, M.D., who noted that he could not palpate Claimant's hernia. His note states that Claimant "lifted up a

vacuum when she felt pain in her right groin." This is the first reference in the medical records which associates Claimant's pain with having lifted a vacuum at work.

23. Medical records from Dr. Karen Ratner show that Claimant was diagnosed with chronic low back pain and arthropathy of multiple sites on three occasions prior to her May 2015 alleged injury. However, in her recorded statement, taken on July 8, 2015, Claimant denied having prior medical treatment to her low back.

24. A Kaiser record dated August 18, 2015 reflects that Claimant asked for a letter "to take to her work" and that her Kaiser physician, Dr. James Hutchings, responded that he had no documentation that Claimant truly had a hernia, and that he could not state that it was work-related. He stated that he could document only that Claimant reported that she had a work-related injury.

25. A Kaiser record from Dr. Karen Black dated November 20, 2015 reflects that Claimant called Dr. Black that day in order to obtain documentation regarding the causes of hernia. These records contain an email from Claimant to Dr. Black dated November 23, 2015 stating "I have never experienced this groin pain until I lifted a vacuum over a shag rug, can you please explain on your note if you think that vacuum could cause or aggravate a hernia." In response, Dr. Black wrote Claimant a letter dated November 25, 2015. This letter contains data on various factors that are associated with hernias. Dr. Black wrote, inter alia, that "the relationship between inguinal hernias and intermittent straining or heavy lifting is not clear; some studies suggest that the incidence of hernia is no higher in professions performing heavy manual labor than in sedentary professions, while others have come to the opposite conclusion." Dr. Black did not state that Claimant's having lifted a vacuum probably caused or aggravated her hernia.

26. At hearing, Claimant testified that no one had told her that there was a relationship between the pain which she felt on or about May 29, 2015 and the pain which she felt on June 22, 2015. Claimant submitted no medical record or report which: a) concluded there was any relationship between her pain on the two dates; b) found that her pain on May 29, 2015 was likely caused by lifting a vacuum at work; or c) found that lifting the vacuum probably caused her hernia.

27. Dr. Lesnak performed an IME for Respondents and testified at hearing. He testified that Claimant's complaints were primarily groin pain, and that while a hernia can cause groin pain, there are other causes, including hip pathology, muscle or nerve pathology, and unknown causes. He stated that an increase in abdominal pressure can cause a hernia and/or hernia pain. He noted that Claimant stated that she had pain while walking, including at work on June 22, 2015. He stated that walking does not cause an increase in intra-abdominal pressure, and that it is not probable that Claimant's pain complaints on June 22, 2015 were related to a hernia.

28. Dr. Lesnak testified that although an ultrasound detected a hernia, it was so small that he could not feel it. He characterized her hernia as a small, fat-filled

defect, which was not likely a pain generator. While Claimant had stated that walking, twisting, sitting, or having her child pull on her arm caused her symptoms, Dr. Lesnak testified that these activities do not cause an increase in abdominal pressure, and would not cause a hernia to become painful. He stated that any pain related to these activities would probably be related to Claimant's preexisting chronic multi-site arthralgia, i.e., joint pain, and was not work-related.

29. Dr. Lesnak stated that it was not medically probable that lifting a vacuum on or about May 29, 2015 caused Claimant's hernia, because lifting in the way Claimant described would not cause an increase in abdominal pressure. Dr. Lesnak testified that it is more probable than not that Claimant's pain on or about May 29, 2015 was due to her preexisting chronic back and joint pain.

30. Dr. Lesnak noted that the record shows multiple histories of how Claimant's purported injury occurred, and that it was not until July 10, 2015 that the records reflect that Claimant said she injured herself by lifting a vacuum at work. He commented that although Claimant testified she did not tell the E.R. personnel on June 23, 2015 that her prior pain from May 2015 had "resolved on its own without difficulty", that the E.R. note is more reliable. He stated that E.R. personnel would be unlikely to concoct such a note.

CONCLUSIONS OF LAW

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

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence 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).

Claimant carries the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. *See City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either Claimant or Respondents. Section 8-43-201. C.R.S. A preponderance of evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

Claimant alleges that she sustained a work-related hernia on May 29, 2015 while pushing and then lifting a vacuum cleaner over a shag rug at work. She did not report this incident, sought no medical treatment, and lost no time from work. She alleges that her pain from this incident recurred on June 22, 2015 while she was walking at work. She does not contend that she was injured on June 22, 2015. Rather, she states that she felt pain on that day, which she believes was due to a hernia from lifting a vacuum on May 29, 2015. Claimant alleges she was misdiagnosed with sciatica.

When Claimant first sought treatment on June 23, 2015, those records state that while Claimant had pain from a similar incident a month earlier, her pain "resolved on its own and without difficulty." Although Claimant states she did not make this statement, it is improbable that the E.R. staff entered this note into the record without Claimant having made the statement. Claimant's testimony that several of her medical records contain errors or misstatements is not credible.

Prior to her claimed injury of May 29, 2015, Claimant had been diagnosed with chronic back and joint pain. While she may have had a flare of back pain on May 29, 2015 associated with vacuuming, there is no evidence that she sustained a compensable injury that day. She sought no treatment and lost no time from work. Instead, she stated that her pain lessened after a few minutes. The medical records show that this pain resolved on its own. While Claimant had another flare of pain while walking at work on June 22, 2015, she admitted that she was not injured at work on that day.

The evidence shows that Claimant's inguinal hernia is probably not the cause of her pain complaints. It is more probable that her pain complaints are due to her preexisting condition.

The record contains no documentation from any physician indicating that Claimant's pain, whether on May 29 or June 22, 2015, was probably related to her hernia. Claimant has failed to prove the existence of a compensable injury by a preponderance of the evidence.

ORDER

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

1. Claimant's claim for compensation is denied and dismissed.

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

DATED: March 9, 2016

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained an injury proximately caused by the performance of service arising out of and in the course of his employment?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing July 15, 2015 and ongoing?
- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable and necessary medical benefits to treat the alleged injury?
- What is Claimant's average weekly wage?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 though 8 were received into evidence. Respondents' Exhibits A through E were received into evidence.

2. Employer operates a large storage facility. Claimant was employed as a janitorial type worker. His duties included operating a forklift, opening railcar doors and lifting shingles.

3. Claimant testified as follows. On May 6, 2015 he was performing his duties at work. A broken pallet caused bundles of shingles to fall on the floor. Claimant was responsible for picking up the bundles and placing them on a different pallet. Each bundle of shingles weighed approximately 60 pounds. Claimant picked up one of the bundles and twisted to place it on a pallet. He experienced immediate pain in the area beneath his left breast. Claimant also experienced shortness of breath and began vomiting. Claimant remembered that lead manager Larry Clark, a "supervisor" and four other persons were present at the time of this event. Larry Clark remarked that Claimant didn't look good and instructed Claimant to sit down. Claimant sat down and rested for about 20 minutes but completed his shift. Claimant went home about 3 p.m. but was still experiencing severe pain in his chest. That night Claimant went to North Suburban Medical Center (NSMC) for treatment.

4. In answers to interrogatories Claimant stated that his supervisor "Bruce Smith" was also present at the time he lifted the bundle. Claimant stated that Bruce Smith asked if Claimant was "alright."

5. Claimant admitted that he did not immediately report the injury to his employer. Claimant testified did not report the injury to the Employer until July 15, 2015.

6. Mr. Brad Abell (Abell) testified on behalf of the Employer. Abell is the Employer's facilities manager and was Claimant's manager. Abell testified that the Employer has regular meetings and posts signs instructing employees on to how to report injuries. Abell testified he has no difficulties in speaking with Claimant and that in May 2015 Claimant did not report that he sustained an injury while lifting shingles. However, Abell recalled that on July 1, 2015 Claimant came to his office and reported that 3 months previously he felt burning pain while opening a railcar door. Abell stated that he reminded Claimant he should have reported the incident within 72 hours. Claimant replied that he did not mention the episode because he had experienced previous episodes of heartburn and thought this was just another one of them.

7. Mr. Bruce Smith (Smith) testified on behalf of the Respondents. Smith testified that he worked in the same area as Claimant but was not Claimant's supervisor. Smith did not recall observing any incident on May 6, 2015 where Claimant lifted shingles and then began to lose his breath and vomit. Smith denied that he went up to Claimant and asked if Claimant was "alright."

8. Claimant reported to the NSMC emergency department (ED) late in the evening of May 6, 2015. He was seen by a physician early on May 7, 2015. The Claimant gave a history that the previous day he saw a dentist for a molar infection. After visiting the dentist Claimant reportedly took "new medications" including vicodin, amoxicillin and ibuprofen. Claimant reported that he lay down after taking the medications and began to experience shortness of breath (SOB), diaphoresis, tingling, light headedness and nausea. Claimant denied vomiting and abdominal pain. Claimant was discharged at 4:25 a.m. on May 7 with a "primary impression" of "near syncope" and "secondary impressions" of history of dental abscess and "medication reaction." Claimant agreed to stop taking vicodin. The May 6, 2015 NSMC ED record does not indicate that Claimant reported a lifting injury at work or that he associated his symptoms with a lifting injury.

9. Claimant reported to the NSMC ED on May 20, 2015 at 6:18 p.m. Claimant reported he was experiencing "upper abdominal burning with some shortness of breath." Claimant gave a history that these symptoms began earlier in the day shortly after he "had spicy food/burrito." Claimant also reported he "had prior symptoms in the past when he took an acid reflux medication that improved his symptoms." Claimant's pain improved "in the ED with GI cocktail." Claimant was diagnosed with gastritis (irritation of stomach lining) and discharged home. The May 20, 2015 NSMC ED record does not indicate that Claimant reported a lifting injury at work or that he associated his symptoms with a lifting injury.

10. Claimant returned to the NSMC ED on May 21, 2015 at 7:00 a.m. Claimant gave a history that he was driving to work when he experienced burning pain in the throat, vomiting and dyspnea. The symptoms were reportedly similar to those

claimant experienced the previous day. The ED physician assessed gastroesophageal reflux disease (GERD) and discharged Claimant. The May 21, 2015 NSMC ED record does not indicate that Claimant reported a lifting injury at work or that he associated his symptoms with a lifting injury.

11. On May 22, 2015 Claimant went to Clinica Family Health (Clinica) where he was examined by NP Kelley Creamer. Claimant reported that he had been to the emergency room 4 times over the previous month and was diagnosed with gastritis. His symptoms included problems swallowing and breathing. Claimant stated the hospital told him "everything was normal" but he wanted his tonsils checked because his "heartburn" was ongoing. NP Creamer assessed GERD, environmental allergies, snoring, atypical chest pain, obesity and "encounter to establish care." NP Creamer recommended Claimant continue famotidine and carafate for GERD and prescribed an albuterol inhaler. The May 22, 2015 Clinica record does not indicate that Claimant reported he sustained a lifting injury at work or that he associated his symptoms with a lifting injury.

12. On May 28, 2015 Claimant returned to Clinica for blood work, a PE and follow-up from the May 22 examination. NP Creamer noted Claimant stated that his GERD was "a lot better, except when he lifts heavy objects." On PE NP Creamer noted Claimant's abdomen was normal with no tenderness, no hepatic enlargement, no splenic enlargement and no hernia. Claimant's respiration was also normal.

13. On June 29, 2015 NP Creamer again examined Claimant for reported "abdominal pain." The pain reportedly began 2 months previously, had not changed and was located in the "epigastric" area. Claimant did not report dyspnea or heartburn or nausea. Rather, Claimant reported "chest pressure" that sometimes "goes away fast" and was "worse with work or with stress." NP Creamer prescribed albuterol, omeprazole and released Claimant from work until July 2, 2015. NP Creamer further recommended that Claimant undergo a cardiac "stress test."

14. On July 3, 2015 Claimant was seen at the NSMC ED for chest pain "over the last 2 months." Claimant reported the pain had worsened over the last two days. The ED physician's "primary impression" was GERD and Claimant was discharged home.

15. On July 10, 2015 Claimant returned to Clinica and was examined by NP Devon Gershaneck. Claimant complained of a "possible chest hernia." He explained that he had experienced 2 months of chest pain and SOB that had been treated as heartburn. Claimant stated his pain began "after lifting a heavy bundle of shingles at work." NP Gershaneck assessed "chest tightness" and obesity. NP Gershaneck opined the chest tightness was "likely multi-factorial" and that Claimant's "story seems c/w musculoskeletal strain."

16. On July 14, 2015 Claimant underwent a resting EKG. The test was negative for ischemia.

17. On July 14, 2015 Claimant was again examined by NP Creamer. Claimant advised Creamer he believed his SOB and chest pain were caused by an injury at work on May 6, 2015 when he was "lifting something heavy." NP Creamer assessed active chest pain of "uncertain etiology." Based on PE NP Creamer was highly suspicious of a hiatal hernia or possibly an "MSK injury." Claimant was encouraged to wear a "lifting belt while at work" and educated "regarding worsening of hernia if lifting belt is not worn while lifting."

18. Claimant testified that on July 15, 2015 he informed the Employer of the May 6, 2013 injury. Claimant recalled speaking to an Employer representative, Mr. Joe Esteban (Esteban), on July 15. According to Claimant Esteban called saying that he had spoken to the hospital and wanted to know what happened to Claimant. Claimant testified that he told Esteban that he had been treated for gastritis, but since he wasn't getting any better he told Esteban about the May 6 injury.

19. On July 15, 2015 Claimant selected Michael Ladwig, M.D., as the authorized treating physician (ATP) for the alleged injury.

20. Dr. Ladwig examined Claimant on July 15, 2015. Claimant gave a history that on March 5, 2015 [sic] he was lifting multiple packs of shingles when he felt pain on the left side of his abdomen. Claimant advised he had been treated by his primary care physician (PCP) for three months and the PCP believed he had a hernia related to the lifting incident. On PE of the abdomen Dr. Ladwig noted no swelling, no deformity, no redness, no ecchymosis and no edema. Claimant was tender to palpation of the left upper quadrant and splenic area. Dr. Ladwig assessed abdomen strain versus hernia versus a medical issue. Dr. Ladwig wrote that it was undetermined if Claimant's condition was "work-related or not." Dr. Ladwig indicated he would request records from NSMC and Claimant's PCP and review the medical records to determine "work relatedness" of Claimant's condition. Dr. Ladwig restricted Claimant to no lifting, carrying, pushing or pulling in excess of 10 pounds and no repetitive lifting.

21. Claimant testified that the restrictions imposed by Dr. Ladwig would have prevented him from performing some of his regular job duties including opening railcar doors and lifting shingles.

22. Dr. Ladwig saw the Claimant on July 21 and July 22, 2015. On July 22 Dr. Ladwig issued a report stating he rechecked Claimant for complaints of chest and abdominal pain. Dr. Ladwig stated that he reviewed a note from Claimant's "PCP" diagnosing Claimant with GERD with no relationship to work. Dr. Ladwig assessed abdominal pain and GERD unrelated to Claimant's employment. Dr. Ladwig opined Claimant had reached maximum medical improvement without impairment and released Claimant to return to work without restrictions.

23. On July 23, 2015 Claimant was examined by Mark Flannigan, M.D. Dr. Flannigan recorded a history that Claimant was "lifting" and "felt something tear in epigastric" area. Claimant also reported SOB and that he had been treated for gastritis 7 times in 2 months. On July 24, 2015 Dr. Flannigan authored a note opining that

Claimant has a "history compatible with traumatic hiatal hernia" and recommending that he be seen by a workers' compensation gastroenterologist for continued hiatal hernia symptoms.

24. On August 19, 2015 Claimant underwent an upper gastrointestinal endoscopy. This procedure was performed by Daniel Siegel, M.D. Dr. Siegel's impressions included a "small hiatus hernia" and "LA Grade B reflux esophagitis." Dr. Siegel recommended Claimant use omeprazole and adhere to an anti-reflux regimen.

25. On November 25, 2015 Albert Hattem, M.D., performed an independent medical examination (IME) of Claimant. This examination was performed at Respondents' request. Dr. Hattem is a board certified in occupational medicine, practices occupational medicine and is level II accredited. In connection with the IME Dr. Hattem took a history from Claimant, reviewed some of Claimant's medical records and performed a PE.

26. Dr. Hattem issued a written report on November 25, 2015. Respondents' counsel requested that Dr. Hattem address noted the question of whether Claimant's gastrointestinal complaints were related to his work activities. Claimant gave a history that on May 6, 2015 he lifted 70 pounds of shingles, twisted and developed left upper abdominal pain. On review of systems Claimant reported symptoms of chest pain, SOB, nausea and vomiting. Claimant informed Dr. Hattem that he recently had a "scope" and was diagnosed with "two hernias – one upper and one lower on his esophagus." On PE Dr. Hattem noted that Claimant weighed 259 pounds with a BMI of 35.1. The abdomen was examined and there was no tenderness to palpation, no masses and no umbilical or ventral hernias.

27. Dr. Hattem assessed Claimant as suffering from GERD and a likely hiatal hernia. Dr. Hattem explained that a hiatal hernia occurs when the upper portion of the stomach protrudes through the diaphragm into the lower esophagus causing the lower esophageal sphincter to remain open. This condition can allow stomach contents to enter the esophagus resulting in "heartburn" related to GERD.

28. Dr. Hattem opined Claimant's GERD and hiatal hernia are not causally related to the alleged industrial injury of May 6, 2015. In support of this conclusion Dr. Hattem noted that umbilical and ventral hernias are commonly caused by lifting, but Claimant does not have either of these conditions. Dr. Hattem explained that GERD and hiatal hernias are very common conditions among the population. Dr. Hattem further explained that hiatal hernias are even more common among obese persons such as Claimant. Dr. Hattem wrote that a hiatal hernia is a congenital condition in which the "junction of the esophagus and stomach lose elasticity." Dr. Hattem noted that The American Medical Association Guides to the Evaluation of Disease (AMAGED) and Injury state that "no clear occupation is associated with increased risk for development of GERD." Therefore, the AMAGED state that GERD and hiatal hernias "are not considered work related." Dr. Hattem noted that the only medical literature "implicating trauma as a cause of hiatal hernia involves only very violent motor vehicle accidents in which, for instance, a steering wheel is pushed up into the driver's chest

wall." Dr. Hattem opined that lifting shingles does not constitute the type of trauma necessary to cause a hiatal hernia. Dr. Hattem also opined that the temporal relationship between lifting tiles and the development of gastrointestinal symptoms "does not imply that one causes the other." Dr. Hattem agreed with Dr. Ladwig that Claimant's GERD and hiatal hernia were not caused by work activities.

29. Dr. Hattem testified at the hearing. Dr. Hatter's testimony was consistent with his written report. Dr. Hattem stated that his opinions were expressed to a reasonable degree of medical probability. Dr. Hattem opined that lifting does not aggravate or accelerate GERD or a hiatal hernia. He testified that in his 25 years of experience he has not seen a case of work-related GERD or hiatal hernia.

30. Claimant failed to prove it is more probably true than not that lifting tiles at worked caused him to suffer GERD and a hiatal hernia, or that lifting tiles aggravated or accelerated either of these conditions.

31. The credible and persuasive evidence establishes that Claimant suffers from a hiatal hernia and GERD. The upper gastrointestinal endoscopy establishes that Claimant has a hiatal hernia and GERD. Dr. Hattem persuasively opined that Claimant suffers from a hiatal hernia and GERD. Dr. Hattem credibly explained how a hiatal hernia causes GERD by permitting stomach contents to enter the esophagus and cause inflammation. Dr. Flannigan agrees with Dr. Hattem that Claimant has a hiatal hernia and related symptoms.

32. Dr. Hattem credibly and persuasively opined that Claimant's hiatal hernia and related GERD symptoms were not caused, aggravated or accelerated by Claimant's work-related activity of lifting tiles. Dr. Hattem credibly and persuasively explained that hiatal hernias and GERD are common conditions among the population, and that hiatal hernias are particularly prevalent among obese persons such as the Claimant. Dr. Hattem also credibly and persuasively opined that hiatal hernias are typically congenital rather than work-related conditions, and that this opinion is supported by the medical literature. Dr. Hattem also credibly explained that Claimant's history does not demonstrate that lifting the tiles generated the type of force necessary to cause a "traumatic" hiatal hernia.

33. Dr. Hatter's opinions are substantially corroborated by the opinions expressed by Dr. Ladwig.

34. Dr. Flannigan's opinion that Claimant's history is consistent with a "traumatic" hiatal hernia is not as persuasive as Dr. Hattem's contrary opinion. Dr. Flannigan's notes do not reflect that he reviewed any of Claimant's medical records prior to examining Claimant on July 23, 2015. Therefore, Dr. Flannigan could not have known that Claimant failed to even hint that his gastrointestinal symptoms were related to lifting at work until at least three weeks after the alleged incident. (See Finding of Fact 12). Dr. Flannigan could not have known that when Claimant went to the NSMC ED on May 7, 2016, within hours of the alleged lifting incident, Claimant associated his symptoms with taking new medications rather than lifting tiles. Neither could Dr.

Flannigan have known that on May 20, 2015 Claimant would advise the ED his symptoms were associated with eating spicy food. Because Dr. Flannigan's opinion concerning causation is not grounded in a meaningful review of Claimant's medical records, the opinion is not persuasive. Moreover, Dr. Flannigan did not persuasively refute Dr. Hattem's arguments that hiatal hernias are typically congenital and that the lifting incident did not generate sufficient force to cause a "traumatic" hiatal hernia.

35. Insofar as Claimant's testimony could permit the inference that he sustained a hiatal hernia and consequent GERD from lifting tiles on May 6, 2015, that testimony is not credible. Claimant's testimony that on May 6 he experienced sudden chest pain, trouble breathing and vomiting after lifting tiles is contradicted by the medical records and other evidence. Claimant indicated in answers to interrogatories that the tile incident was witnessed by several other workers including Smith. However, Smith credibly testified he did not witness any such event. Abell's testimony persuasively establishes that Claimant was informed of the obligation to report work injuries, but Claimant did not report any injury to the Employer until at least July 1, 2015. When Claimant initially reported an injury to Abell on July 1 Claimant stated that he incurred the injury while opening a railcar door, not while lifting tiles. It was not until July 10, 2015 that the medical records document any report by Claimant that his injury was caused by lifting tiles. (See Finding of Fact 15).

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

CONCLUSIONS OF LAW

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

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

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

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

COMPENSABILITY OF GERD AND HIATAL HERNIA

Claimant contends he proved it is more probably true than not than on May 6, 2015 he sustained injury proximately caused by the performance of service arising out of and in the course of his employment. Specifically, Claimant alleges that lifting tiles caused him to suffer a hiatal hernia and consequent GERD. Respondents contend that the credible and persuasive evidence establishes that Claimant's gastrointestinal symptoms were not proximately caused by the alleged injury of May 6. The ALJ agrees with Respondents.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks disability benefits and medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and 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 a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 30 through 35, Claimant failed to prove it is more probably true than not that he sustained an injury arising out of and in the course of his employment that proximately caused, aggravated or accelerated his hiatal hernia and GERD. As found, the ALJ credits the opinion of Dr. Hattem that Claimant's hiatal hernia and GERD are most probably the result of a congenital condition uninfluenced by the performance of his work including lifting tiles on May 6, 2015. The ALJ further credits Dr. Hattem's opinion that lifting tiles would not cause sufficient force to cause, aggravate or accelerate a hiatal hernia and GERD. Dr. Flannigan's opinion is not credible and persuasive for the reasons stated in Finding of Fact 34. Insofar as Claimant's testimony would permit an inference that lifting tiles caused, aggravated or accelerated his hiatal hernia and GERD his testimony is not credible for the reasons stated in Finding of Fact 35.

Because Claimant failed to prove that he sustained a compensable injury the ALJ need not consider the other issues raised by the parties.

ORDER

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

1. The claim for workers' compensation benefits in WC 4-988-804 is denied and dismissed.

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

DATED: March 29, 2016

DIGITAL SIGNATURE:

David P. Cain

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-988-881-01

ISSUES

- Whether Claimant's EMG on August 18, 2015 is compensable under workers' compensation.

- Whether Claimant's injection for carpal tunnel syndrome on September 15, 2015 is compensable under workers' compensation.

- Whether Claimant's previously recommended medical care is reasonable, necessary, and related to the work injury and compensable under workers' compensation.

- Whether Claimant is entitled to TPD benefits from April 7, 2015 to November 1, 2015, and ongoing.

➢ STIPULATIONS

At the onset of hearing, Respondents advised that they no longer disputed compensability and would be filing a General Admission of Liability. The parties stipulate that this claim is compensable. The parties stipulate that Claimant's average weekly wage (AWW) is $356.26. Additionally, the parties stipulate that time period at issue for temporary partial disability benefits is April 7, 2015, through November 1, 2015. Claimant reserves for future determination her right to temporary disability benefits as of November 2, 2015, and continuing, until terminated by law.

FINDINGS OF FACT

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

1. On April 6, 2015, Claimant, a food preparer and server for Employer, injured her right upper extremity when a box fell and struck her in her right shoulder. Claimant dropped the two bags of trash she was carrying and fell forward, striking her right hand on a metal shelf. Claimant's supervisor, Laura Serrano, witnessed the injury and directed Claimant to the authorized treating physician.

2. On April 7, 2015, Claimant treated with Brian Beatty, D.O, the authorized treating physician, and reported the circumstances of her injury. Claimant reported right shoulder and right hand pain. Dr. Beatty noted tenderness and mild swelling on the dorsum of Claimant's right hand. Dr. Beatty prescribed Claimant medications and assessed work restrictions, including no lifting, carrying, pushing, pulling, or pinching/gripping greater than one pound, as well as no reaching over head or away from her body with her right arm.

3. On April 14, 2015, Claimant treated with Dr. Beatty and reported continued right shoulder pain and right hand pain, including right middle finger pain and stiffness. Dr. Beatty noted tenderness and pain over the dorsum of Claimant's right hand. Dr. Beatty diagnosed Claimant with: a) right shoulder contusion; b) right shoulder acromioclavicular (AC) joint strain; c) right hand contusion; and d) right middle finger tendinitis. Dr. Beatty recommended physical therapy and decreased Claimant's right upper extremity restrictions to no more than two pounds lifting, carrying, pushing/pulling, and pinching and no reaching over head or away from her body.

4. On April 28, 2015, Claimant treated with Dr. Beatty and reported continued right shoulder and right hand pain and right middle finger pain and stiffness. Dr. Beatty noted AC joint tenderness and right hand tenderness and pain over the palmer aspect of the hand along the middle finger. Dr. Beatty maintained Claimant's treatment plan and work restrictions.

5. On May 5, 2015, Claimant treated with Dr. Beatty and reported right shoulder pain and right hand pain with numbness and tingling but without weakness. She also reported pain and stiffness in her right middle finger. Dr. Beatty noted AC joint tenderness, right hand tenderness, and decreased sensation. Dr. Beatty recommended a right shoulder MRI and referred Claimant to Dr. Kawasaki for an EMG/nerve conduction study due to the numbness in her right arm. He referred Claimant to Dr. Fell for chiropractic treatment. Dr. Beatty decreased Claimant's right upper extremity restrictions to no activity more than five pounds.

6. On May 14, 2015, Claimant treated with Dr. Beatty and reported ongoing right shoulder pain, right hand pain with numbness and tingling, and right middle finger stiffness. Claimant added reports of weakness in her right shoulder. Claimant reported having trouble squirting ketchup bottles. Dr. Beatty maintained Claimant's treatment plan and work restrictions.

7. On May 21, 2015, Claimant underwent a right shoulder MRI, which revealed supraspinatus and infraspinatus tendinosis with focal thickening at the anterior aspect of the infraspinatus and possible shallow articular surface tear, and moderate AC joint osteoarthritis.

8. On May 28, 2015, Claimant treated with Dr. Beatty and reported continued right shoulder pain and weakness, right hand pain with numbness, tingling, pain and stiffness in her right middle finger, and right-sided neck pain. Dr. Beatty reviewed Claimant's right shoulder MRI and maintained Claimant's treatment plan and work restrictions.

9. On June 11, 2015, Claimant treated with Dr. Beatty and reported the same complaints regarding her right shoulder, right hand, and right middle finger. Dr. Beatty noted tenderness over the AC joint and other areas of the right shoulder and tenderness over the palmar aspect of Claimant's right hand with decreased sensation in a glove-like pattern. Dr. Beatty maintained Claimant's treatment plan and work restrictions.

10. On June 16, 2015, Claimant underwent her first physical therapy session and reported right shoulder and hand pain with electrical shocks. Claimant reported pain primarily on the palmar/dorsal surface of her right hand. Claimant reported that she would like to be able to work full duty without increased pain. *Claimant's Exhibit 9, pages 88-90*. From June 16, 2015, through September 21, 2015, Claimant underwent seven physical therapy sessions. *Claimant's Exhibit 9, pages 88-108*.

11. On June 25, 2015, Claimant treated with Dr. Beatty and reported ongoing issues with her right shoulder, right hand, and right middle finger, including right shoulder weakness and right hand numbness and tingling. Dr. Beatty made the same objective findings as in prior visits. Dr. Beatty referred Claimant to Dr. Davis for examination regarding her right upper extremity and maintained Claimant's work restrictions.

12. Claimant's June 25, 2015 appointment with Dr. Beatty was the first appointment at which an interpreter was present. Claimant did not have an interpreter present for her first seven visits with Dr. Beatty.

13. In each of Dr. Beatty's reports, he relates Claimant's symptoms to her April 6 work injury.

14. On June 26, 2015, Claimant treated with Craig Davis, M.D., an orthopedic surgeon. She reported the circumstances of her injury and her ongoing pain complaints, including right shoulder and right hand/middle finger pain. Dr. Davis reviewed the right shoulder MRI and noted significant edema around the AC joint with significant degenerative findings, as well as rotator cuff tendinitis. Dr. Davis gave Claimant an injection in her right AC joint and noted that Claimant may have subacromial bursitis. Dr. Davis also prescribed Claimant new medications. Dr. Davis diagnosed Claimant with trigger finger, AC joint separation, and rotator cuff tendinitis and recommended Claimant follow-up for another injection.

15. On June 30, 2015, Claimant treated with Robert Kawasaki, M.D. and reported the circumstances of her injury, including how after the box struck her shoulder, she fell forward "jamm[ing] her hand on a metal shelf." Claimant reported swelling along the ulnar aspect of her hand and her knuckles, as well as some problems with her middle finger. Additionally, Claimant reported numbness and tingling down her right upper extremity and into her hand, mostly in the middle and small digits. On examination of Claimant's right wrist and hand, Dr. Kawasaki noted right hand and right middle finger swelling, positive median nerve compression, and positive Tinel's over the ulnar groove. Dr. Kawasaki commented that Claimant's treatment had been appropriate so far, except that Claimant's physical therapy should not have been terminated. Dr. Kawasaki recommended ongoing therapy. Because he found Claimant's pattern of right upper extremity numbness to be unusual, Dr. Kawasaki recommended an EMG/nerve conduction study to rule out right cervical radiculopathy, brachial plexopathy, and compression neuropathy.

16. On July 9, 2015, Claimant treated with Dr. Beatty with an interpreter present. She reported that she underwent a right shoulder injection with Dr. Beatty and was off work for five days. Claimant reported the injection temporarily resolved her right shoulder and right hand symptoms but that her symptoms worsened since she returned to work. She reported her right hand was about the same as it was prior to the injection. Claimant continued to report right hand pain, numbness, and tingling. Dr. Beatty maintained Claimant's work restrictions.

17. On July 16, 2015, Claimant treated with Dr. Davis and reported excellent improvement for one week following the right shoulder injection but that it had worn off. Claimant reported ongoing right shoulder and right hand/middle finger pain. Dr. Davis noted that Claimant may have subacromial bursitis and injected Claimant's right shoulder. Regarding Claimant's right hand/middle finger, Dr. Davis recommended surgery, including trigger finger release and flexor tenosynovectomy with cyst removal.

18. On July 23, 2015, Claimant treated with Dr. Beatty with an interpreter present. She reported the most recent right shoulder injection temporarily relieved her symptoms, but only for a couple days. Claimant reported that she had right hand surgery scheduled for August 14, 2015. Dr. Beatty maintained his treatment plan and Claimant's work restrictions.

19. On August 14, 2015, Claimant treated with Dr. Davis and reported that her right hand/middle finger surgery had been denied, and that she had not had any treatment since her last visit. Claimant reported that pain was spreading into her neck. Claimant reported ongoing right shoulder and right hand/middle finger pain. Dr. Davis noted Claimant's ongoing pain and other issues in her right shoulder and right hand/middle finger. He emphasized that Claimant's lack of treatment was delaying her recovery.

20. On August 18, 2015, Claimant underwent an EMG/nerve conduction study with Dr. Kawasaki, who diagnosed Claimant with moderate right median nerve compression neuropathy, compatible with moderate right carpal tunnel syndrome.

21. On August 20, 2015, Claimant treated with Dr. Beatty and reported continued pain in her right shoulder and hand without numbness, tingling, or weakness. Dr. Beatty noted that Dr. Davis' requests for right hand surgery and physical therapy were denied. Dr. Beatty noted that he wanted to proceed with Dr. Davis' recommendations, and he otherwise maintained his treatment plan and Claimant's work restrictions.

22. On August 25, 2015, Respondents filed a Notice of Contest, alleging Claimant's injury did not occur within the course and scope of her employment with the Employer.

23. On September 3, 2015, Claimant treated with Dr. Beatty with an interpreter present. Claimant reported continued right shoulder and right hand pain. Dr. Beatty recommended physical therapy for her right shoulder and hand. Dr. Beatty

maintained Claimant's work restrictions, including no lifting, carrying, pushing, or pulling greater than ten pounds, no repetitive lifting greater than five pounds, and restricted pinching and gripping.

24. On September 15, 2015, Claimant treated with Dr. Davis and reported ongoing right shoulder pain and right hand/middle finger pain. Claimant reported continued numbness and tingling in her wrist and hand. With respect to carpel tunnel syndrome, Dr. Davis noted, "At her right hand, she still complains of numbness and tingling involving the radial digits which is worse at night and with activity. She says this has been present since the injury in April and she denies any tingling in her fingers prior to that." Dr. Davis noted positive Tinel's and median nerve compression testing at the right wrist, and crepitation over the flexor sheath with a palpable lump in the right middle finger. Based on these findings and his review of the EMG/nerve conduction test results, Dr. Davis diagnosed Claimant with right carpal tunnel syndrome. Dr. Davis injected Claimant's right carpal tunnel, and the injection provided temporary relief. Dr. Davis also requested authorization for right middle finger flexor tenosynovectomy.

25. On October 20, 2015, Claimant applied for a hearing on: a) compensability; b) reasonable and necessary medical benefits; c) average weekly wage; and d) temporary disability benefits from April 6, 2015, to ongoing.

26. On November 13, 2015, Respondents filed a Response to Claimant's Application for Hearing and endorsed the same issues as Claimant, as well as general affirmative defenses, including course and scope of employment and "Respondents deny and contest the right middle finger flexor tenosynovectomy of Dr. Davis as being non-work related; Claimant is not entitled to TTD benefits; Claimant continues to work for employer and TPD benefits, if owed must be determined."

27. On January 11, 2016, Claimant underwent an independent medical examination with Respondents' retained expert witness John D. Sanidas, M.D. Dr. Sanidas met with Claimant to discuss her injury, examine her, and review her medical records. Dr. Sanidas opined that on April 6, 2015, Claimant sustained an industrial injury to her right upper extremity. Dr. Sanidas diagnosed Claimant with: 1) right shoulder contusion, minimal AC joint separation; 2) right middle finger flexor sheath contusion; and 3) carpal tunnel syndrome. Dr. Sanidas opined Claimant's trigger finger was secondary to her industrial injury. If Claimant's trigger finger continued to be symptomatic, Dr. Sanidas agreed with Dr. Davis' surgical recommendation. Dr. Sanidas noted that Claimant needs medical benefits for her right shoulder and right hand. Dr. Sanidas determined that Claimant's carpal tunnel syndrome was an incidental finding and not related to Claimant's industrial injury.

28. At Hearing, Dr. Sanidas testified as an expert in the field of occupational medicine. He testified that Claimant speaks Spanish and that he communicated with Claimant through an interpreter. Dr. Sanidas testified that on April 7, 2015, the day after her injury, Claimant treated with Dr. Beatty and reported right hand pain, among other issues. Dr. Sanidas agreed that Claimant did not have an interpreter present for her first seven visits with Dr. Beatty and agreed that it would be difficult for Claimant to

communicate without the benefit of an interpreter. Dr. Sanidas testified that, to his knowledge, Claimant did not have any right upper extremity symptoms, including numbness, tingling, and weakness, prior to April 6, 2015. Dr. Sanidas testified that Claimant was working full duty with no limitations and no restrictions prior to her April 6, 2015 industrial injury. Dr. Sanidas testified that on April 6, 2015, Claimant sustained an industrial injury to her right upper extremity.

29. Dr. Sanidas testified that the EMG/nerve conduction study recommended by Claimant's authorized treating physicians, including Dr. Davis, was reasonable, necessary, and related to Claimant's industrial injury. Dr. Sanidas testified that the EMG revealed that there is nothing in Claimant's neck that is affecting the nerves in her hand. He testified that the EMG revealed Claimant has carpal tunnel syndrome and he opined the diagnosis was an incidental finding and not related to Claimant's industrial injury. Dr. Sanidas noted Claimant repeatedly reported decreased sensation in her right hand in a glove-like pattern. While Claimant's treating physicians did not remark on these reports, Dr. Sanidas testified that they were non physiologic.

30. Dr. Sanidas testified that he did not think Claimant hit her hand hard enough on the metal shelf to cause the carpal tunnel syndrome. Nevertheless, He testified Claimant's carpal tunnel syndrome was asymptomatic prior to date of injury. Dr. Sanidas acknowledged that Claimant reported right hand symptoms, including pain, numbness, and tingling, at each appointment following her injury. He testified that the right carpal tunnel injection was both diagnostic and therapeutic and that there was nothing wrong with it from a clinical standpoint.

31. Before her April 6, 2015 industrial injury, Claimant had no right upper extremity injuries and no right upper extremity symptoms, including no pain, numbness, tingling, or weakness in her right shoulder, arm, or hand. After her injury, she consistently reported symptoms consistent with carpel tunnel syndrome.

32. Dr. Sanidas testified that Claimant's mechanism of injury, as described to him by Claimant would be insufficient to aggravate or accelerate Claimant's right carpal tunnel syndrome. However, no persuasive evidence was offered regarding whether Dr. Sanidas discussed with Claimant the amount of force with which her hand struck the metal shelving or whether Dr. Sanidas knew what amount of force would be required to aggravate or accelerate previously existing but asymptomatic carpel tunnel syndrome. Thus, the ALJ finds Dr. Sanidas' testimony on this issue not persuasive.

33. Regarding Dr. Davis' recommendation for right middle finger flexor tenosynovectomy, Dr. Sanidas testified that when he examined Claimant, she had full range of motion in her finger. Dr. Sanidas testified that he does not recommend the surgery because while Claimant has pain, her finger is fully functional. Dr. Sanidas testified that it had been over five months since Claimant underwent treatment and that she was improving. Additionally, Dr. Sanidas testified that he did not find any evidence of trigger finger during his examination.

34. Dr. Sanidas testified that on September 3, 2015, Dr. Beatty assigned Claimant work restrictions, and no doctor has released Claimant to full duty. Dr. Sanidas testified that Claimant told him she was working six hour shifts due to Employer's scheduling needs.

35. Per the parties' stipulation, on April 6, 2015, Claimant sustained a work-related injury to her right upper extremity. Per the parties' stipulation, Claimant's AWW is $356.26, with a corresponding temporary disability rate of $237.51.

36. However, the ALJ finds that no persuasive evidence was offered to support a finding that Claimant's injury resulted in her working reduced hours, sustaining a wage loss, or a causal connection between the industrial injury and a subsequent wage loss were such a wage loss to have been found. Based on the totality of the evidence the ALJ finds that Claimant has not met her burden of establishing by a preponderance of the evidence an entitlement to temporary partial disability benefits.

37. Based on the totality of the evidence, the ALJ finds that Claimant has established by a preponderance of the evidence that the EMG/nerve conduction study is reasonable, necessary, and related to the industrial injury.

38. Based on the totality of the evidence, the ALJ finds that Claimant has established by a preponderance of the evidence that the right carpal tunnel injection is reasonable, necessary, and related to the industrial injury.

39. Based on the totality of the evidence, the ALJ finds that while Claimant has proven by a preponderance of the evidence that the right middle finger flexor tenosynovectomy recommended by Dr. Davis is related to her industrial injury, the recommended surgery is not reasonable or necessary given her current lack of symptoms and the potential risk of harm from the procedure.

CONCLUSIONS OF LAW

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

GENERALLY

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

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

The 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, 389 (Colo. App. 2000).

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 (2007).

TEMPORARY DISABILITY BENEFITS

Claimant seeks an award of TPD benefits from April 7, 2015, through November 1, 2015. Claimant has the burden of proving she is entitled to TPD benefits by a preponderance of the evidence. § 8-42-103(1)(a), C.R.S. C.R.S. section 8-42-103(1) requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Indus. Claim Apps. Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate an entitlement to TPD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she is off work due to the disability, and the disability resulted in the 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).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). The existence of disability presents a question of fact for the ALJ. No requirement exists that the claimant produce evidence of medical restrictions imposed by an authorized treating physician or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Dr. Beatty assigned Claimant work restrictions directly related to her industrial injury and no physician ever took Claimant off work restrictions. However, no persuasive evidence supports a conclusion that Claimant actually worked pursuant to those restrictions. Rather, persuasive evidence indicates that Claimant continued to work full duty after the work restrictions were assigned. Claimant offered no persuasive evidence to support a finding that her injury resulted in her working reduced hours or

sustaining a wage loss. Rather, the ALJ credits Dr. Sanidas' testimony that Claimant reported working six hour shifts due to Employer's scheduling needs.

Claimant's entitlement to temporary partial or temporary total disability benefits as of November 2, 2015, and continuing is reserved for future determination.

MEDICAL BENEFITS

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 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 Apps. 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. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence; expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

As found, Claimant has proven by a preponderance of the evidence that the EMG/nerve conduction study was reasonable, necessary, and related to her April 6, 2015 industrial injury. This is supported by Dr. Kawasaki noting Claimant's pattern of right upper extremity numbness to be unusual, and his recommendation that an EMG/nerve conduction study be performed to rule out right cervical radiculopathy, brachial plexopathy, and compression neuropathy. Additionally, Dr. Sanidas testified that that the EMG/nerve conduction study recommended by Claimant's authorized treating physician was reasonable, necessary, and related to Claimant's industrial injury.

As found, Claimant has proven by a preponderance of the evidence that the carpel tunnel injection was reasonable, necessary, and related to her April 6, 2015 industrial injury. Based on consistent symptoms Claimant reported throughout the course of her treatment and the results of her EMG/nerve conduction study, Dr. Davis diagnosed Claimant with carpel tunnel syndrome. The syndrome became symptomatic when Claimant hit her hand on metal shelving incidental to her workplace accident. The ALJ finds unpersuasive Dr. Sanidas' testimony that the force of Claimant's hand on the metal shelving was insufficient to cause her carpel tunnel syndrome to become symptomatic.

Claimant has proven by a preponderance of the evidence that the right middle finger flexor tenosynovectomy recommended by Dr. Davis is related to her industrial

injury. However, the persuasive medical evidence establishes that Claimant most recently has full function in her finger, and that surgery could potentially be harmful to Claimant without providing any functional improvement.

ORDER

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

1. On April 6, 2015, Claimant sustained a work-related injury during the course and scope of her employment with Employer.

2. Claimant's average weekly wage is $356.26, with a corresponding temporary disability rate of $237.51.

3. Claimant is not entitled to temporary partial disability benefits from April 7, 2015, through November 1, 2015. Claimant's entitlement to temporary partial or temporary total disability benefits as of November 2, 2015, and continuing is reserved for future determination.

4. The EMG/nerve conduction study and the right carpal tunnel injection performed by Dr. Davis on September 15, 2015 are reasonable, necessary, and related to Claimant's industrial injury.

5. The right middle finger flexor tenosynovectomy recommended by Dr. Davis although related, is not reasonable or necessary because she is currently asymptomatic.

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

DATED: March 29, 2016

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

ISSUES

Whether the total knee replacement surgery performed by Dr. Duffey was causally related to the claimant's May 18, 2015 industrial injury.

STIPULATIONS

The parties stipulated that the claimant sustained a work related injury to his left knee on May 18, 2015, that Dr. Nanes and Dr. Duffey are authorized treating physicians, that the claimant's average weekly wage is $1,109.81, and that if the surgery performed by Dr. Duffey is found to be causally related to the claimant's industrial injury, that the claimant is entitled to temporary total disability (TTD) benefits from August 21, 2015 to October 13, 2015.

FINDINGS OF FACT

1. The claimant is a 54-year-old male who has been employed with the respondent-employer, since 1997. On May 18, 2015, the claimant was in charge of a bus that transported prisoners. The claimant was in the course and scope of his employment when he attempted to close a cargo bay door on the side of the bus. The cargo bay door had previously been damaged and was difficult to close. The claimant had to put all of his weight into closing the door. When he did, the door kicked out, striking him in the left knee while he was weight bearing. The claimant immediately felt and heard a pop in the left knee and experienced a sudden onset of pain. Soon after the incident, the left knee began to swell up. The claimant reported the injury to the proper personnel with the respondent-employer who then referred him for medical treatment.

2. The claimant was referred by the respondent-employer to Dr. Richard Nanes of the Centura Centers for Occupational Medicine, who became the claimant's authorized treating physician (ATP). Dr. Nanes treated the claimant from May 18, 2015 to November 19, 2015. From the first encounter with Dr. Nanes, the claimant was open and honest about his left knee injury and surgical history.

3. In 1996, the claimant experienced a torn ACL in the left knee from a motorcycle accident that was not work-related. The claimant underwent an ACL reconstruction at that time and he made a full recovery. The claimant was symptom free relative to his left knee when he was hired by the respondent-employer in 1997. From the time he was hired in 1997, until April of 2007, the claimant worked unrestricted full duty as a corrections officer. During this time the claimant had no pain in his left knee and he did not have any physical limitations relative to his left knee.

4. On April 20, 2007, the claimant experienced a left knee injury in the course and scope of his employment with the respondent-employer. The claimant was stepping down out of a van when he hyper-extended his left knee. The claimant had an immediate onset of pain and was referred for treatment with the respondent-employer's designated health care provider. Dr. Daniel Olson of CCOM served as the primary ATP for this case.

5. On May 8, 2007, the claimant underwent a left knee MRI which showed that the ACL repair was intact but revealed complex tears of the posterior horns of both the medial and lateral meniscus. On May 31, 2007, the claimant underwent medial and lateral partial meniscectomies as well as chondroplasty. The claimant recovered from the surgery but was still symptomatic as of the time he was placed at maximum medical improvement (MMI) on August 14, 2007. The impairment rating report authored by Dr. Olson indicates that the claimant was still experiencing 3 out of 10 pain present 30% of the time. The claimant received a 17% left lower extremity rating (8% table 40; 10% ROM) and was returned to work without permanent physical restrictions. Dr. Olson also opined that the claimant would not need future medical care for this injury. The claim was closed at that point.

6. Following the 2007 left knee surgery, the claimant returned to unrestricted full duty as a corrections officer. The claimant, however, continued to experience symptoms of pain and functional limitations in his left knee after the 2007 work-related left knee injury.

7. In 2012, the claimant sought a second opinion with an orthopedic surgeon of his choosing. The claimant chose Dr. Rowell. The claimant sought his own second opinion instead of going back to the workers' compensation doctors and resuming treatment with them the workers' compensation doctors had told him there was nothing else that could be done and they had closed the case. The claimant believed his workers' compensation claim had been closed and that he was on his own for treatment.

8. The claimant had sustained no new left knee injury in 2012, he had tired of living with the ongoing left knee pain from the 2007 work-related injury and surgery and he wondered if something could be done to fix it.

9. In 2012, Dr. Rowell obtained a MRI which showed a loose fragment in the left knee. Shortly thereafter, Dr. Rowell performed a left knee arthroscopy with microfracture. After this 2012 left knee surgery the claimant again became symptom free relative to his left knee. The claimant was able to return to playing golf, running, and other physical activity.

10. The claimant then suffered the work-related left knee injury which forms the basis of this claim on May 18, 2015.

11. Dr. Nanes, upon initial referral, requested an MRI, X-rays, and physical therapy. The May 26, 2015 MRI revealed a subtle peripheral tear involving the posterior horn of the lateral meniscus, an undersurface tear involving the posterior horn of the medical meniscus, and a 9mm cartilaginous defect in the central aspect of the lateral femoral condyle. He then referred the claimant to James Duffey, MD of Premier Orthopedics. Dr. Duffey took an accurate history of the claimant's treatment of the left knee. He assessed "advanced end-stage osteoarthritis" that was previously asymptomatic, but once again symptomatic following the work related injury. He recommended a total knee replacement and submitted a preauthorization request to the respondent.

12. The respondent obtained a peer review with Dr. Richard Lutz. Dr. Lutz did not take issue with causation. However, he wanted to see more conservative therapy before the total knee replacement was authorized. The respondent denied the request.

13. On August 24, 2015, in an attempt to return to work prior to losing his job, the claimant underwent a total knee replacement with Dr. Duffey through his private health insurance. After the surgery, the claimant continued to treat with Dr. Nanes who continues to support the compensability of the May 18, 2015 left knee injury. Dr. Nanes opines that the incident aggravated the claimant's pre-existing arthritis causing the need for the total knee replacement.

14. On September 2, 2015, the respondent issued a Notice of Contest denying liability for the claim.

15. On November 19, 2015 Dr. Nanes placed the claimant at MMI with 14% impairment for ROM and 20% impairment per table 40. The claimant returned to unrestricted full duty on October 14, 2015.

16. In anticipation of litigation, the claimant obtained a written opinion from Dr. Nanes regarding whether the May 18, 2015 work-injury caused the need for the total knee replacement. Dr. Nanes opined, within a reasonable degree of medical probability, the May 18, 2015 work-related injury caused an aggravation of the pre-existing injury to the left knee. Consistent therewith, Dr. Nanes opined that the cause of the need for the total knee replacement was the May 18, 2015 work injury.

17. Dr. James Duffey provided an assessment of "[a]dvanced end stage osteoarthritis of the left knee. This was previously asymptomatic, but has become symptomatic once again following the work-related injury. Consistent therewith, Dr. Duffey opined that the claimant was a candidate for a total knee replacement.

18. Also, in anticipation of litigation, the respondent obtained an IME opinion from Dr. Timothy O'Brien. Dr. O'Brien ultimately opined that the claimant suffered a compensable left knee injury in the course and scope of employment on May 18, 2015. However, Dr. O'Brien testified that he did not feel the total knee replacement was related to the work-injury.

19. Dr. O'Brien states "the 2008 (although he must be referring to the 2007 work-related injury as there was no 2008 left knee injury or surgery) work-related injury was a contributor to [the claimant's] current end state osteoarthritis that existed prior to May 18, 2015. Dr. O'Brien goes on to opine that if the 2012 surgery performed by Dr. Rowell was work-related, this 2012 surgery would also be work-related trauma that contributed to the overall end stage arthritis present in 2015. However, Dr. O'Brien opined that because the 2012 left knee surgery was performed outside of the workers' compensation system, it is not work-related surgical trauma. However, the ALJ finds that the 2012 surgery performed by Dr. Rowell was directly caused by the 2007 work-related injury and surgery. The only reason the claimant had this surgery on his own outside of the workers' compensation system is because the workers' compensation doctors had told the claimant there was nothing further to offer. Believing that his claim had properly been closed, the claimant sought medical care for his work-related symptoms on his own.

20. Reading Dr. O'Brien's report, it is clear that Dr. O'Brien had trouble saying whether or not the total knee replacement in this case was due to the work-related injury. In fact, Dr. O'Brien went so far as to offer alternative opinions on the subject. Dr. O'Brien states:

> In summary, the May 18, 2015, work injury did not result in the need for a total knee replacement. The May 18, 2015, injury was a minor injury and in my

> opinion it is medically probable this injury would have healed within a matter of weeks and at the very outside three months. This is keeping with the natural history of minor injuries such as that which [the claimant] sustained.
>
> On the other hand, [the claimant] has been employed by the [respondent-employer] since 1997, and he has sustained numerous work-related left knee injuries including surgeries, and these prior surgical interventions have been materially contributory causative factors that have in part contributed to [the claimant's] current need for a total knee replacement.

21. The ALJ finds the claimant to be credible.

22. The ALJ finds that the analyses and opinions of Dr. Nanes, supported by the opinion of Dr. Duffey, are credible and more persuasive than medical analyses and opinions to the contrary.

23. The ALJ finds that the cumulative trauma of the claimant's work-related injuries with the respondent-employer, culminated in a work-related injury on May 18, 2015 that exacerbated his asymptomatic, dormant knee condition causing the need for the total knee replacement to be accelerated.

24. The ALJ finds that the claimant has established that it is more likely than not that the total knee replacement surgery performed by Dr. Duffey on August 24, 2015 is reasonable, necessary, and related to his industrial injury of May 18, 2015.

CONCLUSIONS OF LAW

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

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

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

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Treatment for a condition that is not caused by employment is not compensable. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). Where an industrial injury merely causes the discovery of the underlying condition but does not accelerate the need for the surgery for the underlying condition, treatment for the underlying condition is not compensable. *Robinson v. Youth Track*, W.C. No. 4-649-298 (May 15, 2007).

5. The burden is on the claimant to prove a causal relationship between his employment and his injury or condition. *See, Industrial Comm'n v. London & Lancashire Indem. Co.,* 135 Colo. 372, 311 P.2d 705 (1957). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with

reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens,* 136 Colo. 111, 134 P.2d 698 (1957).

7. The ALJ concludes, as found above, that the analyses and opinions of Dr. Nanes, supported by the opinion of Dr. Duffey, are credible and more persuasive than medical analyses and opinions to the contrary.

8. The ALJ concludes, as found, that the claimant has established by a preponderance of the evidence that the need for the left total knee replacement surgery performed by Dr. Duffey is causally related to his May 18, 2015 industrial injury.

9. The claimant generally has the burden of proving a causal relationship between a work related condition or injury and the wage loss for which compensation is sought by a preponderance of the evidence. *Romayor v. Nash Finch Co.*, W.C. No. 4-609-915 (March 17, 2006); *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (July 27, 2001).

10. As was stipulated at the outset of the hearing, the claimant is entitled to TTD benefits for the period from August 21, 2015 to October 13, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent is responsible for the claimant's medical care to cure or relieve him from the effects of his injury, specifically the surgery performed by Dr. Duffey on August 24, 2015.

2. The respondent shall abide by the stipulations as stated at the outset of the hearing.

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

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

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

DATE: March 22, 2016

/s/ original signed by:

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

ISSUE

The issue for determination involves Claimant's entitlement to additional medical treatment. The question to be answered is:

I. Whether Claimant established, by a preponderance of the evidence, that a right shoulder rotator cuff tear he suffered at home, while performing exercises he was taught in physical therapy for an admitted June 19, 2015 injury to his left wrist, right shoulder and neck, is sufficiently causally connected to that admitted injury so as to be deemed a compensable part of the claim making Respondent liable for all right shoulder care, including the surgery performed by Dr. David Weinstein on November 5, 2015.

STIPULATIONS

At hearing, the parties advised the Court of the following stipulations, which were accepted and approved by the Court:

- Claimant's average weekly wage (AWW) for purposes of this claim is $1,254.38; and,

- In the event the right shoulder rotator cuff tear is deemed a compensable component of the claim, the time periods for which temporary disability benefits would be owed extend from July 29, 2015 through September 11, 2015, and November 5, 2015 and continuing until terminated by operation of law.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Ms. Bogenschuetz-Bonn, the ALJ enters the following findings of fact:

1. Claimant is employed with the Pueblo County Sheriff's Office (PCSO). He has worked for the PCSO as a patrol officer for the past twenty seven years. (Resp's Exh. A; Hrg. Tr. p. 11, ll. 1-5).

2. On June 19, 2015, Claimant was assigned to the CSU-Pueblo Campus with duties that included calls for service, handling issues on the campus itself, and typical patrol work. (Hrg. Tr. p. 11, ll. 6-10) Claimant started his shift that day at approximately 5:45 a.m. (Hrg. Tr. pp. 11-12, ll. 23-2) As part of his duties, Claimant was tasked with opening up the technology building. In the process of opening the building, Claimant tripped over a rock used to prop the outside door to the building open. Claimant caught his foot under a rug lying on the floor in the vestibule of the building and was pitched forward. Claimant's momentum carried toward the inside door where he tried

unsuccessfully to break his fall by reaching for the inside door with his right arm/hand. Claimant fell to the floor on his outstretched left hand; landing on his left side and injuring his left wrist, right shoulder and neck. (Hrg. Tr. pp. 12-13, ll. 11-12, 1-10) Claimant reported the injury to his supervisor and was referred to CCOM for medical treatment. (Hrg. Tr. pp. 14-15, ll. 15-18, 1-6) Liability for the claim has been admitted.

3. Claimant was evaluated at CCOM on June 19, 2015 by Steven Byrne, PA. (Resp's Exh. G, pp. 48-51) Claimant reported pain and discomfort in his left wrist, neck and right shoulder. X-rays of the wrist were negative for acute bony injury. In his narrative report, PA Byrne diagnosed contusion/strain left wrist and strain right sternocleidomastoid muscle. However, in his M164 report, PA Byrne noted the diagnoses as strain of the left neck and strain of the left wrist. Based upon the evidence presented, the ALJ finds that PA Byrne's reference to strain of the right neck was likely a reporting error and that Claimant, more probably than not strained the left side of his neck along the area of the sternocleidomastoid muscle. The record is also devoid of any reference to a specific diagnosis regarding the right shoulder. Although PA Byrne did not provide a specific diagnosis concerning the right shoulder, the ALJ finds that the evidence presented, including the history Claimant provided to the medical providers involved in this case supports a finding that he injured his right shoulder while reaching for the inside door with his right arm/hand. PA Byrne directed Claimant to use ice, take ibuprofen, use a neoprene thumb spica support during working hours and a spica wrist support at home and at bedtime. PA Byrne released Claimant to return to regular work.

4. Claimant saw PA Byrne in follow up on June 25, 2015. (Resp's Exh. G, pp. 42-46) During this encounter, Claimant reported pain in the neck, left wrist and left ear, although he stated that his wrist was feeling considerably better. Cervical spine films were negative for acute injury. PA Byrne referred Claimant to Centura Center for Rehabilitation for physical therapy (PT) twice a week for three weeks. A Notification of Workers' Compensation Referral to Centura Center for Rehabilitation dated June 25, 2015 indicates the diagnosis as contusion of wrist. There is no documentation of right shoulder pain in the records from this visit.

5. Claimant's initial PT evaluation was conducted on June 26, 2015 by Mary Bogenschuetz-Bonn. Following physical examination, Ms. Bogenschuetz-Bonn assessed Claimant as having hypomobility in the cervical spine along with "significant scapular dysfunction." Ms. Bogenschuetz-Bonn recommended that therapy be initiated two times a week to include dry needling and an "[i]ndependent home exercise program."

6. On June 29, 2015, Claimant was seen in PT at which time he was "instructed in [a] customized program of skiled (sic) physical therapy to include mobility, strength and stability for cervical spine and B shoulders." The ALJ finds that the reference to "B shoulders", more probably than not, means "bilateral" shoulders.

7. Claimant testified that he received instruction regarding the home exercises he was to perform on his own. According to Claimant, the exercises were preformed with resistance bands and varied by movement. He was provided with a written description of

the exercises to perform, which material contained pictorial diagrams demonstrating the proper technique for the movement.

8. On July 10, 2015, Claimant returned to PT at which time it was noted that Claimant was working on "upper extremity strengthening and postural ex per flow sheet." The ALJ finds the reference to "EX" in this note, more probably than not, refers to "exercise."

9. Claimant next presented to CCOM on July 14, 2015, at which time he was evaluated by Paul Merchant, M.D. (Resp's Exh. G, pp. 38-41) Other than the "Patient Description of Accident" which is dated June 19, 2015 and appears to be cut and pasted from Claimant's initial evaluation of that date, there is no mention in this report of any right shoulder discomfort. Rather, Dr. Merchant noted that Claimant returned for follow up of his cervical strain and left wrist sprain. Claimant reported that he has been participating in physical therapy with good results, and that he "typically has benefitted from the dry needling of his neck and trapezius." Dr. Merchant's diagnoses were contusion of wrist and strain, cervical spine. Dr. Merchant continued Claimant in physical therapy and continued Claimant's release to full duty work.

10. On July, 17, 2015, Ms. Bogenschuetz-Bonn added crossover band exercises to Claimant's exercise protocol. Claimant had noted weakness of the right shoulder while performing crossover band exercise according to the July 17, 2015 PT report authored by Ms. Bogenschuetz-Bonn. Claimant testified that he could not do more than 2 reps of the cross over reverse fly exercise with a heavier resistance band, so he proceeded to try the exercise with lighter resistance and was only able to complete two reps. Consequently, Claimant testified that Ms. Bogenschuetz-Bonn instructed him to concentrate on this particular exercise. Claimant submitted a copy of the pictorial diagram he was provided describing the crossover exercises he was to complete as part of his exercise regimen.

11. On July 28, 2015, while performing the crossover reverse fly exercise at home, Claimant felt a tearing sensation in his right shoulder. According to Claimant, he was on his third repetition and his arms were extended away from his body at 90 degrees (a right angle) when he felt the muscle in his right arm tear. Claimant testified the muscle then rolled and pulled up into his chest area and he experienced substantial pain.

12. Claimant called Dr. Merchant and was scheduled for an appointment for the same day. A report generated from this appointment reflects that Claimant reported that he was "at his residence and performing prescribed home physical therapy using a 'thera-band' when he felt a pop in his right shoulder followed by immediate pain. Claimant complained of an inability to raise his arm to the level of his shoulder and 9/10 pain 100% of the time. Dr. Merchant noted that Claimant's objective findings were consistent with the "history of work-related etiology." Dr. Merchant ordered a right shoulder MRI and took Claimant off work until he was seen the following day.

13. The MRI of Claimant's right shoulder was obtained on July 28, 2015 at St.

Mary Corwin Medical Center. The radiologist's impression on MRI was full-thickness tear of the supraspinatus tendon anteriorly with retraction to the mid humeral line. (Resp's Exh. I, pp. 62-63) Claimant followed up with Dr. Merchant on July 29, 2015 to review the MRI results. (Resp's Exh. G, pp. 30-34) Dr. Merchant continued to diagnose contusion of wrist and added rotator cuff tear, shoulder, right. Dr. Merchant assigned temporary work restrictions, placed physical therapy on hold pending orthopedic evaluation, and referred Claimant to Dr. David Weinstein for evaluation.

14. Claimant has a prior history of right rotator cuff injury and prior rotator cuff repair on two occasions.

15. Claimant saw Dr. Weinstein pursuant to Dr. Merchant's referral on August 19, 2015. (Resp's Exh. J, pp. 67-70) Dr. Weinstein noted a history of two rotator cuff repairs, noting further that Claimant "returned to a normal shoulder until his recent injury on June 19, 2015." Dr. Weinstein went on to describe Claimant's more recent history of feeling severe pain and a pop in the anterior aspect of his right shoulder after doing "band exercises" on July 28, 2015. Dr. Weinstein reviewed Claimant's imaging studies, including Claimant's MRI scan and diagnosed right rotator cuff tendinitis with full thickness rotator cuff tear and right biceps tendinitis with partial tear. Dr. Weinstein wrote that he discussed nonoperative management versus surgery with Claimant and that Claimant wished to proceed with surgery. The specific surgical procedure identified by Dr. Weinstein was an arthroscopic subacromial decompression with rotator cuff repair and possible biceps tenodesis.

16. Respondent-Employer denied liability for right shoulder treatment, including the surgery recommended by Dr. Weinstein following Claimant's August 19, 2015 evaluation.

17. Prior reports from Dr. Weinstein dated February 16, 2011, March 23, 2011, and April 7, 2011 reflect that Claimant underwent a rotator cuff repair in 1998 and had evidence of a re-tear in 2006 but elected to defer from additional surgery at that time. (Resp's Exh. J, pp. 71-74) By February of 2011, Claimant's right shoulder symptoms had worsened, particularly with any weighted activities including working out in the weight room. Claimant had tried a home exercise program from his therapist in the past and noted that he would like to consider having a second rotator cuff repair in the summertime, if warranted. The March 23, 2011 report reflects that a repeat MRI confirmed that Claimant had re-torn his rotator cuff and that there had been significant progression in the last five years since his last exam. Dr. Weinstein noted that Claimant's tear was approaching the level of being irreparable. According to an operative report dated April 7, 2011, Dr. Weinstein performed a right arthroscopic subacromial decompression, rotator cuff repair and biceps tenodesis on Claimant's right shoulder. Nonetheless, following his examination of Claimant and review of his July 28, 2015 MRI, Dr. Weinstein noted the following in his August 19, 2015 report:

> . . . this appears to be an acute injury. As there is only minimal atrophy and no permanent changes, this indicates that his previous rotator cuff tears

have healed appropriately and it is doubtful an injury, based on his MRI scan, would have occurred in the last several months, consistently with his history.

18. Claimant acknowledged at hearing that he had undergone two rotator cuff surgeries on his right shoulder and one rotator cuff repair surgery on his left shoulder prior to the date of injury in this claim. (Hrg. Tr. p. 24, ll. 1-6) Claimant also testified that both of the prior right shoulder surgeries were performed by Dr. Weinstein, and were essentially the same procedure that Dr. Weinstein again performed on the right shoulder on November 5, 2015. (Hrg. Tr. pp. 26-27, ll. 23-9)

19. Claimant testified that he underwent the right shoulder rotator cuff repair surgery recommended at his August 19, 2015 appointment with Dr. Weinstein on November 5, 2015 under his own insurance. (Hrg. Tr. p. 21, ll. 17-25) According to Claimant he has incurred out of pocket expenses associated with his November 5, 2015 surgery.

20. On December 3, 2015, Dr. Allison Fall completed an independent medical examination (IME) of Claimant at the request of Respondent-Employer. Dr. Fall opined that Claimant's right shoulder weakness was "likely related to his scapular dysfunction" caused by his prior rotator cuff surgeries and that performing crossover band exercise above shoulder level with increased resistance would be contraindicated in a patient who had a history of two prior rotator cuff repairs. According to Dr. Fall, the exercise Claimant preformed on July 28, 2015 directly led to the "need for specific treatment of the right shoulder which in this case was the rotator cuff repair by Dr. Weinstein" on November 5, 2015.

21. Based upon the evidence presented, including the opinions form Dr. Fall, the ALJ finds that Claimant, more probably than not, sustained an acute rotator cuff tear while performing crossover band exercise on July 28, 2015.

22. Ms. Bogenschuetz-Bonn, PT, provided testimony at a post-hearing deposition. Ms. Bogenschuetz-Bonn confirmed that Claimant was referred to her for physical therapy by PA Byrne with a diagnosis of neck strain. (Bogenschuetz-Bonn Depo, pp. 4-5, ll. 18-21, 16-20) PT Bogenschuetz-Bonn further testified that, while the diagnosis of neck strain was consistent with the complaints that Claimant reported to her and Claimant had limited mobility of the neck to the left and right, both Claimant's subjective complaints and her objective findings were primarily left sided. (Bogenschuetz-Bonn Depo, p. 5, ll. 21-24; p. 7, ll. 11-2, 18-20)

23. Ms. Bogenschuetz-Bonn confirmed that Claimant was shown crossover band exercises; including the reverse fly and victory exercise and that they were added to his exercise protocol. (Bogenschuetz-Bonn Depo, p. 10, ll. 5-12) According to Ms. Bogenschuetz-Bonn, the reverse fly exercise works the scapular muscles which help support posture and keeping the head in an upright position and are done with both hands to strengthen both side of the body. Bogenschuetz-Bonn Depo, p. 13, ll. 6-25; p. 14, ll. 1-18)

24. Ms. Bogenschuetz-Bonn's testimony regarding whether Claimant was instructed to perform the crossover band exercises at home as part of his home exercise program is unclear. Ms. Bogenschuetz-Bonn testified that Claimant advised her that he had bands at home and asked if he could do the crossover band exercises at home to which Ms. Bogenschuetz-Bonn responded "that would be great." (Bogenschuetz-Bonn Depo, p. 15, ll. 5-9) Based upon the testimony of Ms. Bogenschuetz-Bonn, the ALJ finds that Claimant reasonably believed that the crossover band exercises were effectively added to his home exercise regimen. In this case, Ms. Bogenschuetz-Bonn acquiesced to Claimant's suggestion that he incorporate the crossover band exercises as part of his home program by affirmatively telling him that "that would be great." Consequently, the ALJ rejects Respondent's contention that the crossover exercises, including the reverse fly, were not part of Claimant's home exercise program and that he was not to perform them as part of his home exercise routine.

25. Based upon the evidence presented, the ALJ is not persuaded that Claimant's actions in completing the reverse fly exercise were in direct contradiction to the instructions that he had been by PT Bogenschuetz-Bonn. While it is true that Claimant was, probably told not to go beyond the point of pain, Respondents did not provide convincing evidence that he did so. Expending maximum effort and noting that performance of exercise was painful, does not support a conclusion that Claimant had exceeded the point of pain causing a tear in his rotator cuff. Furthermore, as Claimant credibly testified, the goal with exercise was "stretch out farther" with each rep. Consequently, the ALJ rejects, as speculative and unconvincing, Respondent's suggestion that Claimant's right shoulder rotator cuff tear is the direct consequence of a "deviation or efficient intervening" event because Claimant failed to comply with the physical therapist's instructions regarding the performance of his exercises.

26. Based upon the evidence presented, the ALJ finds that Claimant has established a sufficient causal connection between his July 28, 2015 right shoulder rotator cuff tear and his June 19, 2015 left wrist, left neck strain and right shoulder injury so as to result in the right rotator cuff tear to be compensable part of the June 19, 2015 claim under the quasi course of employment doctrine.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2014), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact,

after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. Assessing the weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. 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).*

Compensability of Claimant's Right Rotator Cuff Tear

D. 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.; *Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001); *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question*

Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this case, Claimant asserts that the right shoulder rotator cuff tear that he sustained on or about July 28, 2015, while performing exercises at home, should be deemed compensable as part of this claim under the quasi course of employment doctrine. Respondent asserts that the rotator cuff tear is not compensable under the quasi-course of employment doctrine because Claimant's performance of the exercises at the time he sustained the rotator cuff tear was not due to an implied employment contract arising out of the June 19, 2015 left wrist, right shoulder and neck strain. Respondent further asserts that, even if Claimant's performance of these exercises at his home were deemed to be within the quasi-course of his employment with the Employer, the right shoulder rotator cuff tear is still not compensable because such injury was the result of Claimant performing the exercises in such a way that failed to comply with the physical therapist's instructions. Thus, Respondent argues, even if the quasi-course of employment doctrine were deemed to apply to this case, Claimant's rotator cuff tear was nevertheless the result of a subsequent deviation or efficient intervening event that renders such injury beyond the scope of the compensable consequences of this claim. Based upon the evidence presented as a whole, the ALJ is not persuaded by Respondent's position.

G. With regard to the quasi-course of employment doctrine, the Colorado Supreme Court has held as follows:

> [A] subsequent injury is compensable under the quasi-course of employment doctrine only if it is the "direct and natural" consequence of an original injury which itself was compensable. See 1 A. Larson, supra § 13.11 at 3-348.91; *Wood v. State Accident Insurance Fund*, 30 Or. App. 1103, 569 P.2d 648 (1977)(accidental injury suffered during rehabilitation program compensable because direct and natural consequence of original injury); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1265 (Colo. 1985); *see also Turner v. Industrial Claim Appeals Office*, 111 P.3d 534, 535-536 (Colo. App. 2004); *see also Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993)(where claimant was injured in a slip-and-fall accident while leaving a physical therapy session, second injury was compensable because it was a natural and proximate result of the original compensable injury).

H. Under the doctrine, compensation is awarded when a claimant is injured during treatment of an industrial injury. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993) *Hembry v. Farmers Implement Company, Inc.*, W.C. No. 4-106-004 (October 5, 1993).. The rationale for the doctrine is that, although such injuries occur outside the time and space limits of normal employment and would not be considered employment activities for usual purposes, an employer has a quasi-contractual obligation to provide treatment for the compensable injury and the claimant has an obligation to submit to such treatment or risk the suspension/termination of benefits. *Employers Fire Insurance Co. v. Lumbermen's Mutual Casualty Co.,* 964 P.2d 591 (Colo. App. 1998)*; Shreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. App. 1993). Simply put, because the medical treatment is an implied part of the employment contract, the subsequent injury is related to the employment and therefore both prongs of the compensability test as set out above are met. See, *Colorado Workers Compensation Practice and Procedure*, West's Colorado Practice Series, Vol. 17, § 4.19.

I. In this case, the evidence presented persuades the ALJ that Claimant's right rotator cuff tear, which occurred while he was performing home exercise to remediate the effects of his June 19, 2015 injury, is compensable because it occurred as a "direct and natural" consequence of an original injury which itself was compensable and during an activity, i.e. physical therapy which implicates the implied contractual obligations between the parties inherent in the workers' compensation system. Here, Claimant's rotator cuff tear is a consequence of obtaining medical treatment for the admitted June 19, 2015 accident. His participation in home exercise was a reasonable and necessary activity that would not have been undertaken but for the compensable injury occurring on June 19, 2015. As found, Claimant reasonably assumed that the crossover reverse fly and victory exercises were added to his physical therapy home program and that it "would be great" if he did them at home in an effort to further remediate the effects of his June 19, 2015 admitted claim. Consequently, Claimant's rotator cuff tear is compensable under the quasi-course of employment doctrine because of the employer's obligation to provide such physical therapy treatment and the Claimant's duty of cooperation. *See Turner v. Industrial Claim Appeals Office,* 111 P.3d 534 (Colo. App. 2004); *Excel Corp. v. Indus. Claim Appeals Office, supra.* As found above,

Respondent's contrary assertions that Claimant's rotator cuff tear represents a "deviation or an efficient intervening cause that severs any causal connection with the June 19, 2015 work injury" because it was "directly and naturally caused by his failure to comply with the physical therapist's instructions regarding the performance of his exercises" are unconvincing and explicitly rejected as being speculative in nature.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that his right rotator cuff tear is compensable as part of the June 19, 2015 claim under the quasi-course of employment doctrine.

2. Respondent shall provide all reasonably necessary and related medical treatment to cure and relieve Claimant from the effects of his compensable right rotator cuff tear, including but not limited to the November 5, 2015 surgery performed by Dr. Weinstein.

3. Pursuant to the parties stipulation Claimant's AWW for purposes of this claim is $1,254.38. Temporary total disability benefits shall be paid at a rate of sixty-six and two-thirds percent of this AWW so long as Claimant's disability is total, not to exceed a maximum of ninety-one percent of the state AWW per week. Section 8-42-105(1), C.R.S.

4. Respondents shall pay temporary disability benefits consistent with the parties' stipulation from July 29, 2015 through September 11, 2015, and November 5, 2015 and continuing until terminated by operation of law.

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

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

DATED: March 8, 2016

/s/ Richard M. Lamphere

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

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

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

STIPULATIONS

The parties stipulated to the following and the ALJ approves and accepts the following stipulations:

1. The parties stipulate to an average weekly wage from July 1, 2015 to September 11, 2015 of $381.48 and an average weekly wage of $390.81 from September 12, 2015 ongoing.

2. If the claim is found compensable, Banner Occupational Health, Dr. Vlahovich and Dr. Bussey are deemed authorized treating physicians.

ISSUES

1. Whether the Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease.

2. If the Claimant's claim is compensable, whether the Claimant proved that medical treatment the Claimant has received is reasonably necessary to cure and relieve the effects of her occupational disease.

3. If the Claimant's claim is compensable, whether the Claimant proved that she is entitled to temporary partial disability benefits from August 5, 2015 ongoing.

FINDINGS OF FACT

1. The Claimant has worked for Employer since September, 2013 as a customer care assistant. Until approximately August 5, 2015, the Claimant worked 8 hour shifts and her full workday included a 30 minute break for lunch and two 10 minute breaks, which are in addition to the 8 hour shift.

2. The Claimant's duties as a customer care assistant were to handle incoming calls. She answered incoming calls using a headset. She would use a computer keyboard and mouse during her entire eight hour work shift while taking the calls on the headset. The Claimant testified that her work space was extremely cramped and she did not have proper wrist rests to use while typing and using the computer mouse.

3. Thus, over the course of a day, the Claimant is typing with her wrists bent and/or placed in an awkward position for approximately 4 hours per day and she is using her mouse for 4 hours per day on average. If she is engaging in less of one

activity, presumably she would be doing more of the other since her work day is comprised of either keyboarding or mouse use while answering a telephone using a headset. So, if the Claimant were to keyboard for only 3 hours, then she would be using her mouse for 5 hours and conversely, if she were using a mouse for 3 hours, she would be typing for 5 hours (and doing so in an awkward bent wrist position).

4. The Claimant testified she began having pain in the webbing of her right hand and her right wrist shortly after starting her employment with Respondent Employer. She testified that over time the pain in her hands became worse and she began to experience swelling in her hands.

5. The Claimant testified the pain and swelling in her hands continued to worsen and, on July 1, 2015, she reported her symptoms to her supervisor at her Employer. The Claimant was referred to Banner Occupational Health by her Employer. She saw Dr. Vlahovich at Banner Occupational Health twice and was also referred to Dr. Bussey, a hand specialist.

6. The Claimant was initially evaluated by Kevin Vlahovich, M.D. at Banner Occupational Health on July 8, 2015. The Claimant reported that her job duties entailed answering phones with a headset, typing and mousing. Claimant reported her symptoms primarily occur at work and improve on breaks and at home. She reported that she used a mouse with her right hand but recently switched to her left hand because her right hand was hurting. She also reported that she did not use a wrist pad at her keyboard and frequently rested her wrists on the edge of her desk. The Claimant denied non-work causes of her injury (Claimant's Exhibit 1, p. 1). Upon examination, Dr. Vlahovich noted the left wrist examination was abnormal with pain to palpation present on the palmar side of the wrist. Swelling was also present on the palmar side of the forearm and range of motion and strength were decreased. Examination of the right wrist was abnormal with pain to palpation present on the palmar side of the right wrist and decreased range of motion and strength. Swelling was present on the palmar side of the right wrist. Dr. Vlahovich stated the medical causation as unknown but requested a worksite evaluation and reported it was possibly from poor ergonomics at her workstation and resting wrists on the edge of the table. He prescribed bilateral wrist supports and recommended the Claimant stretch and/or rest her hands at least 5 minutes every hour (Claimant's Exhibit 1, pp. 2-4). In response to the question, "Are your objective findings consistent with history and/or work related mechanism of injury /illness?" Dr. Vlahovich checked the box "unknown" (Claimant's Exhibit 1, p. 5).

7. The Claimant returned to Dr. Vlahovich on July 29, 2015 with complaints of pain and swelling in both wrists. The Claimant reported that since her initial visit she had gotten worse. She was frustrated with lack of progress and the worksite evaluation with ergonomic changes not being done. Dr. Vlahovich noted that the worksite evaluation was for determining causation and to make ergonomic changes. Since it was not done yet, Dr. Vlahovich recommended the Claimant take breaks to stretch and rest her hands when possible and use a padded wrist support when typing. Dr. Vlahovich prescribed Meloxicam and Prednisolone to reduce inflammation and help with her pain. He referred her for an orthopedic evaluation (Claimant's Exhibit 1, pp. 8-11).

8. Randy Bussey, M.D. performed an orthopedic examination on August 5, 2015. The Claimant reported a history of bilateral hand difficulties since February of 2014 with an official date of injury of 07/01/2015. The Claimant reported her symptoms occur at work primarily. Outside of work, she may have numbness and tingling, but mainly this occurs at work. The Claimant had pain in the right hand on the volar surface and it was associated with puffiness. The Claimant reported pain over the left wrist first extensor compartment. The Claimant reported her pain has not been diminished by the use of splints or prescription medications. Examination demonstrated a right wrist volar Tinel that was extremely irritable and was actually a painful Tinel causing the dysethesias and paresthesias. On the left, Dr. Bussey noted a positive Finkelstein test and palpation of the first extensor compartment recreated the historical pain. Dr. Bussey injected the carpal canal on the right. Dr. Bussey recommended discontinuing use of the splints and recommended only a Futoro splint on the right and only at night. He recommended decreased hours because there was no way to limit both hands sufficiently to keep her active at work. He recommended the Claimant's work be limited to 4 hours a day until her symptoms were controlled (Claimant's Exhibit 2).

9. The Claimant saw Dr. Jeffrey Wunder for an independent medical examination (IME) on December 17, 2015. The Claimant reported her chief complaint was right wrist pain, but further reported that she began to compensate with her left hand and now that is hurting too. The Claimant reported her job duties were to answer phones with a headset, typing and mousing. The Claimant reported working an 8-hour day with an additional 30-minute break and two 10-minute breaks. The Claimant estimated that she spends about 4 hours each day mousing and 4 hours each day typing, She reported her desk is smaller and she has to put her wrist in ulnar deviation to type. The Claimant reported that she has not had symptoms in the past even though she has worked other telephone service jobs. The Claimant reported that her right hand symptoms started in late 2013 and she first developed pain and tingling in the first dorsal web space of her right hand. Later, approximately six months after being hired by Respondent Employer she reported that her pain in this area increased and she continued to have pins and needles in the first dorsal web space. Her symptoms subsequently moved from there to the wrist where she began to experience numbness and tingling in her wrist. The Claimant reported that on or about July 1, 2015 she reported her right wrist symptoms increased in severity and she began to develop numbness and tingling in the first three digits. Dr. Wunder noted the Claimant continued to work, although now she was working only 20 hours per week. The Claimant's current symptoms are volar wrist pain that is constant and throbbing with occasional pins and needles. Her symptoms increase with typing or cooking and improve with rest. On examination, Dr. Wunder noted the Claimant reported diffuse tenderness all across the volar aspect of the wrist with a slightly positive Finkelstein but no tenderness in the first dorsal compartment. Dr. Wunder noted positive Tinel at the right carpal canal with radiation of pain reported from the long finger all the way up to the shoulder. It was negative on the left. Dr. Wunder's impression was of probable right carpal tunnel syndrome. However, he opined that the Claimant was lacking as far as CTD risk factors were concerned according to CTD guidelines of the DOWC. He did not find exposure to vibration or cold or the requisite combination of force, repetition or vibration. He further stated that greater than four hours of mouse use is listed as a primary risk factor; but he

found that the Claimant did not use the mouse more than four hours per day. He recommended electrodiagnostic studies of both wrists so as to compare the left to the right wrist and, if positive, she should return to Dr. Bussey. Nevertheless, he did not believe the Claimant had a work related condition.

10. As set forth in the Cumulative Trauma Disorder (CTD) guidelines of the Division of Workers' Compensation Rules, wrist bending or awkward posture for 4 hours is a risk factor and mouse use of more than 4 hours is a risk factor. While, computer work up to 7 hours per day at an ergonomically correct workstation is not a risk factor, the Claimant testified that her work area was very cramped and she did not have wrist support and had to rest her wrists on her desk and therefore her work was not performed at an ergonomically correct workstation.

11. The Claimant had not experienced pain or swelling in her hands before working for Employer and had not received any treatment for her hands until July of 2015 after reporting her injury. The Claimant did not perform any activities outside of her employment with Employer that required her to repetitively use her hands. The Claimant did not have work restrictions before August 5, 2015. She has not been returned to full time, full duty work by any treating physician since August 5, 2015 nor have her symptoms been controlled. The ALJ credits the testimony of the Claimant along with the medical records and determines that the Claimant has demonstrated that it is more probable than not that the Claimant has suffered a work related occupational disease.

CONCLUSIONS OF LAW

Generally

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

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

testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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

Compensability - Occupational Disease

Section 8-40-201(14) C.R.S. (2010) defines “occupational disease” as:

> “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment.”

An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill,* 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment. The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

The hazardous conditions of employment need not be the sole cause of the disease. The existence of a preexisting condition does not defeat a claim for an occupational disease unless it can be shown that a non-industrial cause was an equally exposing stimulus. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify or aggravate to some reasonable degree, the disability. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an

occupational disease only to the extent that the occupational exposure contributed to the disability. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); see also *Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

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 note in the Claimant's case, as this is a right upper extremity claim based primarily on the diagnosis of carpal tunnel syndrome, is analysis of whether or not she has suffered a work-related cumulative trauma injury which is addressed in Rule 17, Exhibit 5 of the Guidelines.

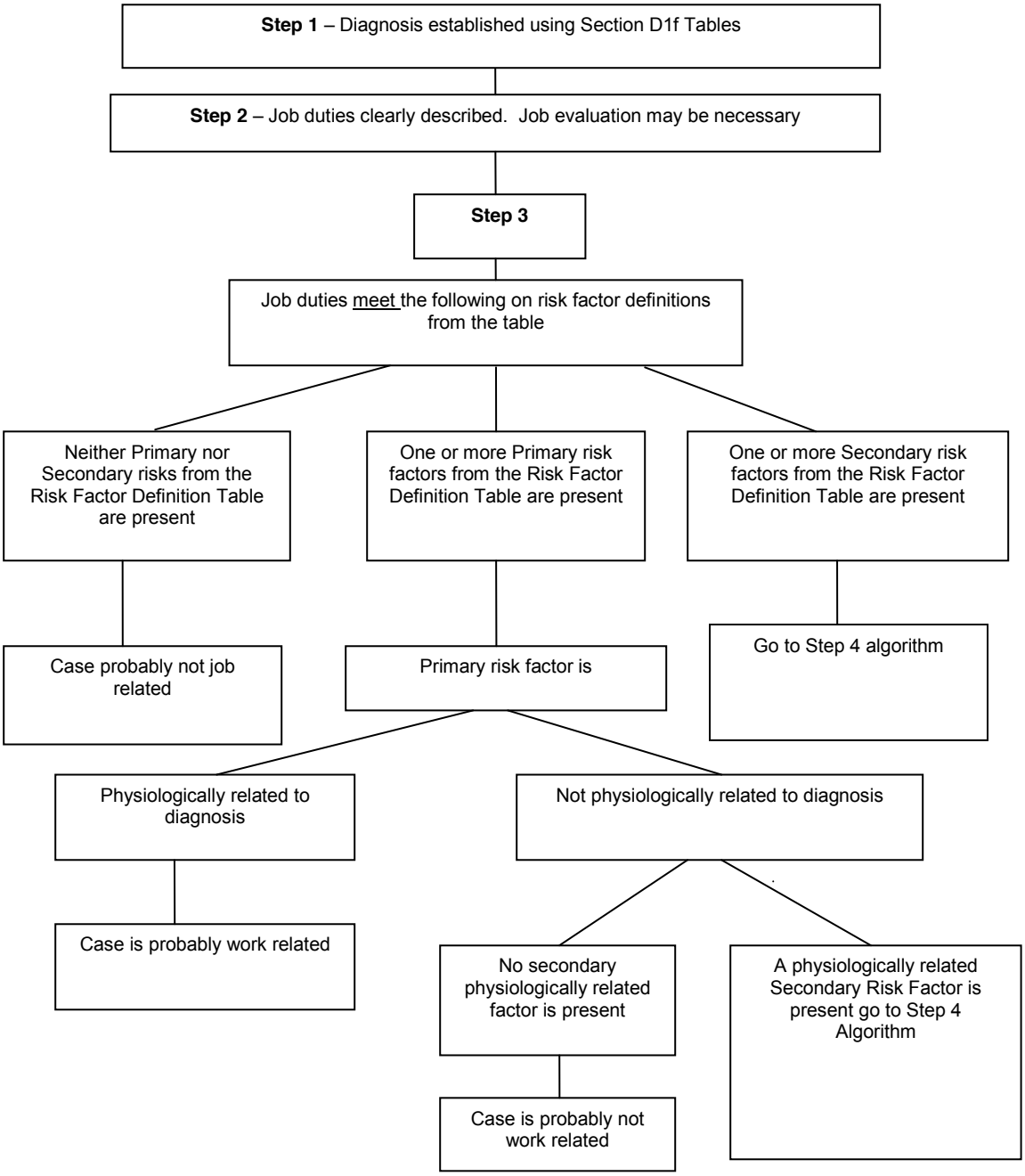
Rule 17, Exhibit 5 (D)(3) provides that,

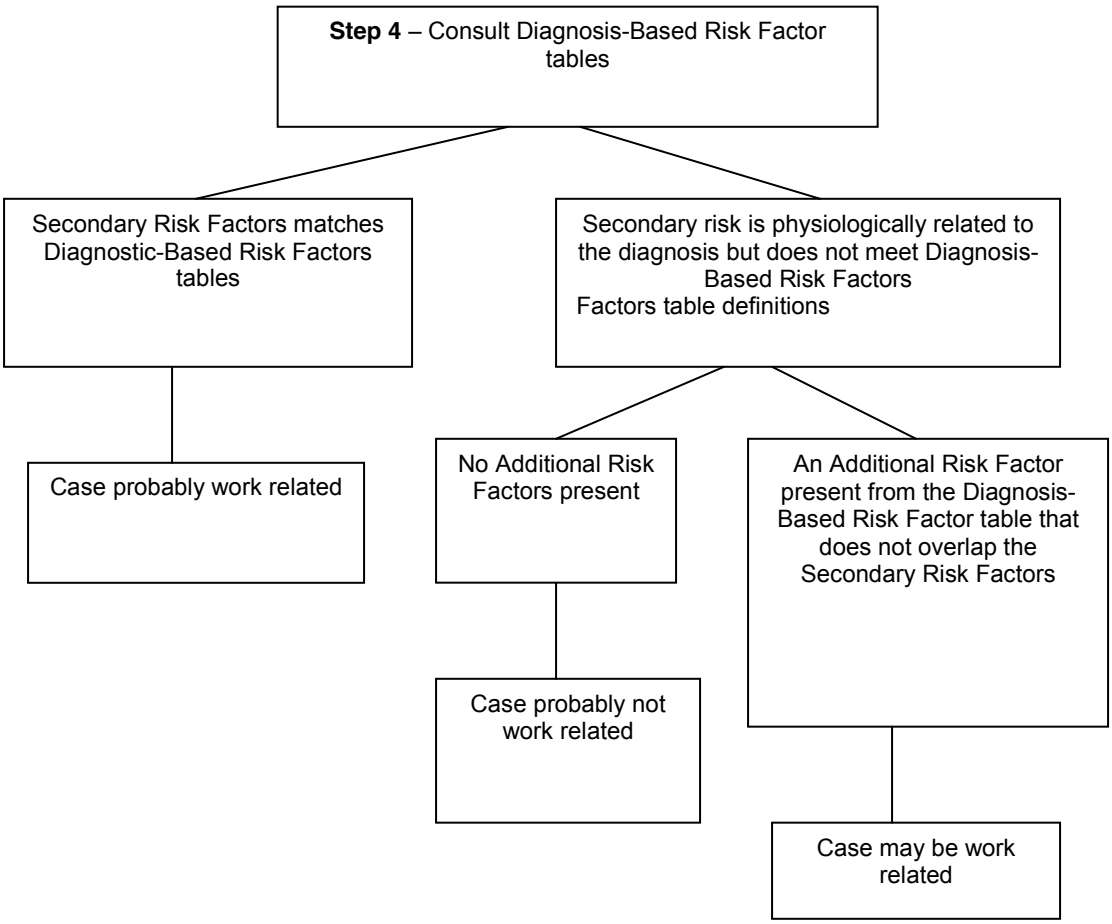
> The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the 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. The Guidelines provide a chart (see next 2 pages) to illustrate the causation analysis as follows:

Algorithmic Steps for Causation Assessment





Here, the Claimant's job duties are described sufficiently by the Claimant to make a determination as to the risk factors and the relationship of the Claimant's carpal tunnel syndrome symptoms to the demands of her job. There was no evidence presented that a job analysis was performed and no job description was provided in evidence in this case. There was no contrary evidence presented from a coworker or supervisor regarding the nature and duration of the Claimant's job duties. Thus, the only evidence presented regarding the Claimant's job duties came from the Claimant herself. The Claimant has consistently reported her job duties to medical providers and in her testimony, which was credible and uncontroverted.

Here, there is some dispute over the amount of time that the Claimant would have spent over the course of her work day keyboarding, using her mouse and holding her wrists in an awkward position.

The Claimant testified that she types or uses her mouse for the full 8 hour shift that she worked until her hours were reduced by 50% by Dr. Bussey. The 8-hour shift does not include her 30 minute lunch break and two 10 minute breaks, which are

additional. She testified that her workspace is small and cramped. The Claimant reported to Dr. Vlahovich that she does not have a wrist pad at work and frequently rests wrists on the edge of her desk, which could provide the requisite time period for awkward posture as a risk factor. The Claimant reported to Dr. Wunder that of her 8 hour shift, she estimated typing occurred over 4 hours and mouse use occurred over 4 hours. Thus, over the course of a day, she is typing with her wrists bent and/or placed in an awkward position for approximately 4 hours per day and she is using her mouse for 4 hours per day on average. If she is engaging in less of one activity, presumably she would be doing more of the other since her work day is comprised of either keyboarding or mouse use while answering a telephone using a headset. So, if the Claimant were to keyboard for only 3 hours, then she would be using her mouse for 5 hours and conversely, if she were using a mouse for 3 hours, she would be typing for 5 hours (and doing so in an awkward bent wrist position).

Thus, in referring to the pertinent sections (see below) of the risk factor definitions chart (at WRCP Rule 17, Exhibit 5, pp. 21-22) and the diagnosis-based risk factors (at WRCP Rule 17, Exhibit 5, pp. 23-30), analysis shows that there are diagnosis-based risk factors or occupational risk factors linking the Claimant's mouse use of greater than 4 hours or the awkward posture activities to her diagnosis of right carpal tunnel syndrome. Even if the Claimant did work an 8 hour work day with the activities divided completely equally (which is not as likely), she still has 4 hours of exposure of awkward position. If on a particular day, she uses her mouse more than she types, then she has more than 4 hours of exposure to that activity. Further, on any day, she compounds one risk factor with the other and while the time may be right at the 4 hour cut-off, there are two activities occurring back to back at that cut-off. While Respondents have argued that the Claimant does not keyboard for more than 7 hours and there is evidence to support that this is not a risk factor for carpal tunnel syndrome, this argument ignores the fact that the 7-hour duration is for keyboarding in a good ergonomic position. There is persuasive evidence in this case to support that the Claimant is not keyboarding in a good ergonomic position and is likely typing with her wrists bent or in a awkward position for 4 or more hours.

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RISK FACTOR DEFINITIONS (excerpt)

CAUSATION MAY BE ESTABLISHED BY THE PRESENCE OF 1) A DIAGNOSIS-RELATED SOLE PRIMARY RISK FACTOR WHICH IS PHYSIOLOGICALLY RELATED TO THE DIAGNOSIS OR; 2) AT LEAST ONE SECONDARY RISK FACTOR THAT MEETS THE REQUIREMENTS FROM THE DIAGNOSIS-BASED RISK FACTOR TABLE

NOTE: Hours are calculated by totaling the cumulative exposure time to the risk over an 8 hour day. Breaks or periods of inactivity or performing other types of work tasks are not included.

Category	As a Primary Risk Factor	Secondary Risk Factor
Force and Repetition/Duration	6 hrs. of: > 50% of individual maximum force with task cycles 30 seconds or less or force is used for at least 50% of a task cycle-maximum force for most individuals is 3-5 kg of force.	4 hrs. of: > 50% of individual maximum force with task cycles 30 seconds or less or force is used for at least 50% of a task cycle-maximum force for most individuals is 3-5 kg of force.
	6 hrs. of: lifting 10 lbs > 60x per hour.	4 hrs. of: lifting 10 lbs > 60x per hour. *
	6 hrs. of: use of hand held tools weighing 2 lbs or greater.	4 hrs. of: use of hand held tools weighing 2 lbs or greater.
Awkward Posture and Repetition/Duration	4 hrs. of: Wrist flexion > 45 degrees, extension > 30 degrees, or ulnar deviation > 20 degrees.	
	6 hrs. of: Elbow - flexion > 90 degrees.	4 hrs. of: Elbow - flexion > 90 degrees.
	6 hrs. of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.	4 hrs. of: Supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.
Computer Work	**Note:** up to 7 hours per day at an ergonomically correct work station is not a risk factor > 4 hrs. of: Mouse use.	
Use of handheld vibratory power tools and Duration	6 hrs. for more common types of vibration exposure	2 hrs. when accompanied by other risks
Cold Working Environment		Ambient temperature of 45F or less for 4 Hrs. or more, such as handling frozen foods that are 10 degrees

DIAGNOSIS - BASED RISK FACTORS					
Hours are calculated by totaling the cumulative exposure time to the risk over an 8 hour day. Breaks or periods of inactivity or performing other types of work tasks are not included. Unless the hours are specifically stated below, "combination" of factors described below uses the Secondary Risk Factor Definitions from the Risk Factor Definition Table					
Diagnosis	**Evidence FOR Specific Risk Factors**			**Evidence AGAINST Specific Risk Factors**	**Non-Evidence-Based Additional Risk Factors to Consider. These factors must be present for at least 4 hours of the work day, and may not overlap evidence risk factors.** [1]
	Strong Multiple high quality studies	**Good One high quality study or multiple adequate studies**	**Some One adequate study**		
Carpal Tunnel Syndrome		Combination of force, repetition, and vibration.	Wrist bending or awkward posture for 4 hrs.	Good evidence - Keyboarding less than or equal to 7 hrs. in good ergonomic position is NOT RELATED.	High repetition defined as task cycle times of less than 30 seconds or performing the same task for more than 50% of the total cycle time.
		Combination of repetition and force for 6 hours.			
		Combination repetition and forceful tool use with awkward posture for 6 hours – Deboning study.	Mouse use more than 4 hours.	Good evidence- Repetition alone less than or equal to 6 hrs. is NOT RELATED.	Tasks using a hand grip.
		Combination force, repetition, and awkward posture.	Combination cold and forceful repetition for 6 hours - Frozen food handling.		Extreme wrist radial/ulnar positions or elbows in awkward postures.

*Excerpt of relevant diagnosis from complete table

In this case, the Claimant proved that she suffered from an "occupational disease" as defined by C.R.S. § 8-40-201(14) with respect to her carpal tunnel syndrome. The Respondents' IME physician, Dr. Wunder, did not dispute that the Claimant had carpal tunnel syndrome, only that it was work related. Although Dr.

Wunder concluded that the Claimant's work duties did not establish that the requisite risk factors were present, analysis of the Claimant's work duties shows that the Claimant had, more likely than not, established that the risk factors were met. Therefore, the ALJ finds that the Claimant established that she suffered from an occupational disease traced to her employment duties as a cause, aggravation or acceleration of her condition.

Medical Benefits

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. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). 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).

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). 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); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). 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. Authorized providers include those medical providers to whom a claimant is directly referred by the employer, as well as providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

As set forth above, the Claimant's carpal tunnel syndrome condition is found to be causally related to the Claimant's work activities and is compensable. The treatment of the Claimant's condition provided by Dr. Vlahovich and Dr. Bussey was reasonably necessary to treat the occupational disease. Respondents shall be liable for the conservative treatment the Claimant has received to date and for further medical

treatment recommended by the Claimant's authorized treating physicians that is consistent with the Act.

Temporary Disability Benefits

To prove entitlement to temporary disability 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 temporary disability 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).

In the case of temporary partial disability (TPD) benefits, the disability benefit is calculated on the "difference between the employer's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability…." Per § 8-42-106(2)(a)-(b), TPD benefits shall continue until the first occurrence of either one of the following:

- the employee reaches maximum medical improvement; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment

In this case, the Claimant established that she suffered a compensable occupational disease and that she has missed work and suffered a wage loss. The Claimant sustained an occupational disease with a gradual onset of symptoms but a date of July 1, 2015 when the symptoms became intolerable enough that the Claimant reported the condition to her employer and sought medical attention. The Claimant's initial treatment was conservative. During her initial conservative treatment, the Claimant continued to work full time. Then, after performing an orthopedic examination on August 5, 2015, Dr. Bussey recommended decreased hours for the Claimant because there was no way to limit both hands sufficiently to keep her active at work. He recommended the Claimant's work be limited to 4 hours a day until her symptoms were controlled. No treating physician has placed the Claimant at MMI nor has any released the Claimant to work full duty, full time and the Claimant's symptoms are not under control. Since August 5, 2015, the Claimant has worked 50% of her normal hours and has suffered a wage loss through the present. The parties stipulated that the Claimant's

average weekly wage for the purposes of calculating a wage loss and any temporary disability benefits was $381.48 from July 1, 2015 to September 11, 2015 and then $390.81 from September 12, 2015 ongoing. The Claimant is entitled to temporary partial disability benefits from August 5, 2015 ongoing until terminated by statute calculated using the stipulated average weekly wage amounts.

ORDER

It is, therefore, ordered that:

1. The Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease of carpal tunnel syndrome related to her work duties for Employer.

2. The conservative treatment for the Claimant's carpal tunnel syndrome provided thus far was reasonable, necessary and related to cure and relieve the effects of the compensable occupational disease and the Claimant is entitled to further medical treatment reasonably necessary to cure and relieve the effects of her work related occupational disease.

3. Respondents shall pay the Claimant temporary partial disability ("TPD") benefits for the time period commencing August 5, 2015 and ongoing.

4. Pursuant to the stipulation of the parties, the average weekly wage is $381.48 from July 1, 2015 to September 11, 2015 and then $390.81 from September 12, 2015 ongoing. The stipulation was approved and shall be used to calculate the Claimant's disability benefits.

5. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

6. 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 21, 2016

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

ISSUES

1. Whether the claimant has met his burden of proof that he sustained a compensable injury when he fell off a table at work on May 18, 2015 striking his right elbow?

2. Whether the claimant has met his burden of proof that the medical care he received at Parkview Hospital, and from Dr.Cheryl Wills, Dr. Sumant Rawat, Dr. William Watson and Dr. Kenneth Danylchuk were authorized and reasonable and necessary?

3. Whether the average weekly wage is appropriately set at $1,040.66?

4. Whether the claimant has met his burden of proof that he is entitled to temporary total disability commencing July 27, 2015, his last day of work, and ongoing?

5. Whether the respondents should be penalized pursuant to §8-43-203(2) C.R.S. for failure to timely admit or deny the claim?

6. Whether the respondent-employer should be penalized for late reporting pursuant to §8-43-101(1) C.R.S.?

7. Whether the claimant should be penalized for late reporting?

FINDINGS OF FACT

1. On May 18, 2015 the claimant was performing his usual duties as a machinist. He was standing on the table that housed his machine while changing gears. As he attempted to step off of the table he slipped and fell striking his right elbow on the table. At first he was not sure that he would need medical attention but he was experiencing a sharp pain in his elbow shooting down his arm. He reported the injury immediately to his supervisor, Jack Johnson. He did not at first request medical attention. Mr. Johnson completed a document entitled "Accident Investigation Supervisor's Report" and signed it on the date of the injury. It provides that the injury was reported by the employee on May 18, 2015 and describes the injury consistently with the claimant's testimony.

2. The claimant's condition did not resolve and he asked for the respondent-employer to refer him for medical care. The claimant asked Mr. Johnson and asked the plant manager, Craig Fetty. Mr. Fetty informed the claimant that he would not be provided medical care because this was not considered by the respondent-employer to be a work related injury. The claimant then sought medical care on his own and initially went to Parkview Medical Center on July 27, 2015. The emergency room report notes that the claimant was complaining of medial right elbow pain after having fallen about a month before. The final diagnosis was medial epicondylitis and he was referred to his family doctor, Dr. Cheryl Wills. The claimant was given discharge instructions from Parkview which he took to the respondent-employer. The claimant was released to light duty until August 3, 2015, with the diagnosis and referral to his family doctor as set forth above. The claimant delivered these documents to the respondent-employer on July 27, 2015. Neither light duty nor a referral for medical care was offered.

3. The claimant was seen the following day by his family doctor, Dr. Wills. Dr. Wills' medical records provide that the claimant hurt his elbow at work approximately 1 ½ months ago after he fell and hit it on a counter at work. The initial medical record states that the claimant is unable to use his right upper extremity at work, that light duty was not available, and therefore he was unable to work. Dr. Wills referred the claimant to Dr. Danylchuk at Maple Leaf Orthopedics and to Parkview for an MRI. She also indicated subsequently that until his condition improved her restrictions of no use of his right upper extremity would be reasonable.

4. The claimant was seen by Dr. Danylchuk's partner, Dr. William Watson on September 1, 2015. The claimant advised Dr. Watson that he fell on his right elbow on May 18, 2015. Dr. Watson notes the MRI, done on August 4, 2015, indicates a ". . . combination of arthritis, a small volume of joint effusion, a partial tear, and extensor tendon origin non specific mildly increased signal intensity in the medial collateral ligamentous structures which may be a partial tear or degeneration of the menisci." According to Dr. Watson, the claimant stated that he felt pain and numbness. The numbness was in the ulnar nerve distribution. The diagnosis was advanced arthritis of the right elbow aggravated from work related injury, strain of the medial collateral ligament structure with involvement of the ulnar nerve and probable intermittent subluxation ulnar nerve cubital tunnel with secondary cubital tunnel syndrome. Dr. Watson referred the claimant for an EMG to evaluate the ulnar nerve.

5. Dr. Watson referred the claimant to Dr. Rawat for the EMG and provided sedentary only work restrictions.

6. The claimant returned to see Dr. Watson on October 27, 2015. After reviewing the EMG results which indicated a moderately severe right ulnar neuropathy with entrapment at the elbow mild bilateral carpal tunnel syndrome, his impression was a severe right ulnar neuropathy with entrapment of ulnar nerve at the elbow with subluxation. Surgery was discussed. The claimant was subsequently scheduled for an ulnar nerve release of his right elbow which occurred on December 8, 2015 and which was performed by Dr. Watson's partner, Dr. Kenneth Danylchuk. The claimant testified credibly that the surgery has improved but not yet alleviated the shooting pain and numbness. The claimant testified credibly that prior to May 18, 2015 he had never had symptoms in his right elbow or upper extremity pain and numbness.

7. After initially seeing Dr. Wills on July 28, 2015 the claimant brought to the respondent-employer a release from work for that day. Taken all together the employment records, the medical records, and the claimant's testimony supports the determination that the claimant sustained a compensable injury.

8. On August 19, 2015 Dr. Wills completed a form on behalf of the claimant's effort to get short term disability through the respondent-employer. Dr. Wills checked a box that the claimant's condition did not arise out of his employment. This document, as it turns out, was the last of three versions prepared by Dr. Wills and submitted to the respondent-employer. Ms. Lucero, as the HR coordinator received the first two versions which indicated in that same box that the condition was work related. She refused to accept those two versions. She contacted Dr. Wills, indicting she would not accept statements by Dr. Wills that the condition was work related.

9. The second version signed by Dr. Wills August 13, 2015 states that the condition of ulnar neuropathy and elbow pain arose out of his employment and also provides that there is a partial tear secondary to his work related injury.

10. There is insufficient evidence that any effort was made by the respondent-employer to provide authorized medical care. This is true even after the claimant brought in medical records from Parkview Hospital and from Dr. Wills on July 27 and July 28. The claimant's ongoing requests for authorized medical care were specifically denied. The ALJ finds that the claimant's selection of Parkview and the subsequent referrals from Parkview to Dr. Wills and from Dr. Wills to Dr. Danylchuk and his partner are all authorized. The referral to Dr. Rawat by Dr. Watson is further authorized.

11. The medical care received by the claimant was reasonable and necessary as set forth in the medical records from the treating doctors and facilities. Diagnostic studies ordered by Dr.'s Watson and Wills confirm the ulnar neuropathy. The claimant

underwent the surgery to relieve him of the ulnar neuropathy. There have been no Rule 16 denials.

12. The claimant testified that he normally worked a 40 hour work week and was paid, as of December 2014 at the hourly rate of $17.33 per hour. Employment records support his position. Payroll records from pay date January 8, 2015 through April 17, 2015 establish the total hours the claimant was working was between 73 and 88 hours per two week period. The ALJ finds the average weekly wage is fairly based upon a 40 hour work week which equates to $693.20 or a temporary total disability rate of $462.13.

13. As of September 30, 2015 the loss of fringe benefits increases the average weekly wage. The ALJ finds the claimant lost his fringe benefits for himself and his family. According to his testimony and the COBRA letter found the cost to replace the medical coverage for his family is $1,429.16 per month. The cost for dental was $74.74 per month, and the cost for vision was $1.76 per month. These premium costs total $1,505.66 per month which equates to an average weekly increase of $347.46 as of the termination event of September 30, 2015. Combined with the base of $693.20 the average weekly wage can fairly be placed at $1,040.66. An average weekly wage of $1,040.66 provides for a temporary total disability rate of $693.77.

14. The claimant testified that his last day of work was July 27, 2015. On that date he went to Parkview Hospital. He returned to the respondent-employer and gave the respondent-employer a release to return to work light duty only. The employer offered no employment. The following day the claimant saw Dr. Wills who provided a specific restriction of no use of upper right extremity. This written restriction was also provided to the respondent-employer. No work was offered to the claimant then or later. No work has ever been offered to the claimant. While under restrictions the claimant's employment was terminated as part of a "layoff". The claimant has neither reached maximum medical improvement, nor has there been a determination that the claimant may return to work full duty. Dr. Wills confirmed restrictions are continuing in her note of December 17, 2015. The claimant has not worked since going to the hospital on July 27, 2015. All of these facts are unrefuted. The claimant is entitled to temporary total disability benefits commencing July 27, 2015 and continuing as allowed by law.

15. Section 8-43-203(1)(a) C.R.S. provides that the insurance carrier shall notify in writing the Division and the injured employee within twenty (20) days after a report is or should have been filed with the Division pursuant to §8-43-101, whether liability is admitted or contested. The claimant filed his Workers' Claim for Compensation with the Division with copies to the respondents. The claim was dated

August 4, 2015. In response, the Division of Workers' Compensation issued its letter of August 12, 2015 to the insurance carrier notifying them that they had 20 days from August 12, 2015 to state a position. The respondent-insurer did not file their position; namely, the Notice of Contest until received by the claimant on September 17, 2015. The filing of the Notice of Contest was 16 days late. The claimant may be awarded up to one day of compensation for each day late pursuant to §8-43-203(2)(a) C.R.S. The ALJ finds that the claimant is entitled to 16 days of compensation for the respondent-insurer's failure to timely file a position.

16. Section 8-43-101(1) C.R.S. requires that every employer shall notify the Division within ten (10) days after notice or knowledge that an employee has sustained a loss-time injury. The HR coordinator, Nadine Lucero, who agreed that this was part of her job admitted that she never notified the Division because she never wanted to treat this as work related. This was not done in the face of the claimant reporting the injury, the supervisor reporting the injury and medical records being delivered that indicated a work related injury. Pursuant to §8-43-304(1) a party may be penalized for any violation of any provision of the Workers' Compensation Act or fails or refuses to perform any duty mandated by the statute within time prescribed for up to $1,000.00 per day. The Division indicates that an Employer's First Report was received on September 9, 2015. The claimant requests penalties from August 7, 2015 through September 9, 2015 be assessed. The respondent-insurer knew that the claimant was missing time from work due to this industrial injury no later than July 27, 2015. They had ten (10) days to report the lost time claim. As of August 7, 2015 they were in violation of the statute. The ALJ finds that the respondents are liable for penalties for the period August 7, 2015 through September 9, 2015, a period of 33 days. The ALJ finds that a penalty of $100.00 per day is sufficient to address this violation.

17. There is no question that the claimant reported the industrial injury to his supervisor on the date it occurred. It is established that the claimant sought medical attention once he determined that his symptoms were not going away. It is established that he provided medical records for treatment at both Parkview and Dr. Wills on July 27, 2015 and July 28, 2015. The claimant filed a Workers' Claim for Compensation when he was not provided medical care dated August 4, 2015. The claimant provided written notice by the Workers' Claim for Compensation within ten (10) days of his lost time with the employer.

18. The statute provides that a written report can be made by the employee, a foreman, superintendent, manager or any other supervisor or by any person who has notice of the injury. §8-43-102(1)(a) C.R.S. The claimant's supervisor was provided notice and signed his incident report on the date of injury. The decision to assign a

penalty is discretionary. The time question would be July 27th through August 4th, the filing of the Workers' Claim for Compensation. The ALJ finds that the claimant provided sufficient notice, on multiple occasions and in multiple ways of the industrial injury. The respondents knew that the claimant was asserting a work related claim. The respondents simply chose not to treat this as work related.

19. The ALJ finds that the claimant should not be penalized under the totality of the evidence.

CONCLUSIONS OF LAW

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

2. Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1977), cert. denied September 15, 1997.

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

4. The employer and its insurance company must provide all medical benefits which are reasonably needed at the time of injury and thereafter during the disability to cure and relieve the injury. §8-42-101 C.R.S. The employer and the insurer have the first right to select the attending physician at the time of injury. §8-43-404(5)(a) C.R.S. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts connecting the injury or occupational disease with the employment and indicating "to a reasonably conscientious manager" that a potential workers' compensation claim may be involved.

Bunch v. Industrial Claim Appeals Office, 148 P.3d 381 (Colo. App. 2006). If the employer does not provide medical care the employee is permitted to select the treating physician. §8-43-404(5)(a)(I)(A) C.R.S. The attending physician is selected by the employee from a list provided by the employer at the time of injury. There is insufficient evidence that a list was provided to the claimant. There is insufficient evidence that any effort was made by the respondent-employer to provide authorized medical care. The claimant's ongoing requests for authorized medical care was specifically denied. The ALJ concludes that the claimant's selection of Parkview and the subsequent referrals from Parkview to Dr. Wills and from Dr. Wills to Dr. Danylchuk and his partner are all authorized. The referral to Dr. Rawat by Dr. Watson is further authorized. Referrals from an authorized provider made in the course of treatment of the Claimant are authorized. *Rogers v. Industrial Commission,* 746 P.2d 565 (Colo. App. 1987); *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985).

5. The fact that the claimant did not initially seek medical care does not relieve the respondent-employer of the absolute duty to provide medical care once requested by the claimant. The fact that the claimant was providing notes of his visits alerted the respondent-employer that he was, indeed, requesting medical care. A "reasonably conscientious manager" would have made a referral. If an employee does not report the injury for several days, it is impossible for the employer to tender medical care at the time of injury. However, at the time of notification, the employer must immediately exercise its right of selection. If the employer does not select the physician, the employee's right to pick the treating doctor becomes vested. *Sims v. Industrial Claims Appeal Office,* 797 P.2d 777 (Colo. App. 1990).

6. The ALJ concludes that the medical care received by the claimant was reasonable and necessary as set forth in the medical records from the treating doctors and facilities. Diagnostic studies ordered by Dr.'s Watson and Wills confirm the ulnar neuropathy. The claimant underwent the surgery to relieve him of the ulnar neuropathy. There have been no Rule 16 denials. The ALJ concludes that the treatment is the responsibility of the respondent-insurer, subject to a fee schedule.

7. The ALJ concludes that the claimant's average weekly wage, as found above, is $1,040.66. This based upon the premium costs totaling $1,505.66 per month which equates to an average weekly increase of $347.46 as of the termination event of September 30, 2015. This combined with the base of $693.20 results in the average weekly wage being $1,040.66. An average weekly wage of $1,040.66 provides for a temporary total disability rate of $693.77.

8. Pursuant to §§8-42-103 and 8-42-105, C.R.S., a claimant is entitled to an award of 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 (3) 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. §8-42-103 C.R.S; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P.3d 872 (Colo. App 2001). The ALJ concludes that the claimant has met his burden of proof that he is entitled to temporary disability benefits. The claimant testified that his last day of work was July 27, 2015, and as found above has not returned to work due to his industrial injury. The claimant has neither reached maximum medical improvement, nor has there been a determination that the claimant may return to work full duty. Dr. Wills confirmed restrictions are continuing in her note of December 17, 2015. The ALJ concludes that the claimant is entitled to temporary total disability benefits commencing July 27, 2015 and continuing as allowed by law.

9. Section 8-43-203(1)(a) C.R.S. provides that the insurance carrier shall notify in writing the Division and the injured employee within twenty (20) days after a report is or should have been filed with the Division pursuant to §8-43-101, whether liability is admitted or contested. The claimant filed his Workers' Claim for Compensation with the Division with copies to the respondents. The claim was dated August 4, 2015. In response, the Division of Workers' Compensation issued its letter of August 12, 2015 to the insurance carrier notifying them that they had 20 days from August 12, 2015 to state a position. The respondents did not file their position; namely, the Notice of Contest until received by the claimant on September 17, 2015. The filing of the Notice of Contest was 16 days late. The claimant may be awarded up to one day of compensation for each day late pursuant to §8-43-203(2)(a) C.R.S.

10. The ALJ concludes that the claimant is entitled to 16 days of compensation for the respondent-insurer's late filing.

11. Section 8-43-101(1) C.R.S. requires that every employer shall within ten (10) days after notice or knowledge that an employee has sustained a loss-time injury, notified the Division. The HR coordinator, Nadine Lucero, who stated in her deposition testimony that this was part of her job admitted that she never notified the Division because she never wanted to treat this as work related. This was not done in the face of the claimant reporting the injury, the supervisor reporting the injury and medical records being delivered that indicated a work related injury. Pursuant to §8-43-304(1) a party may be penalized for any violation of any provision of the Workers' Compensation Act or fails or refuses to perform any duty mandated by the statute within time

prescribed for up to $1,000.00 per day. The Employer's First Report was received on September 9, 2015. The ALJ concludes that penalties are assessed from August 7, 2015 through September 9, 2015. The respondents knew that the claimant was missing time from work due to this industrial injury no later than July 27, 2015. They had ten (10) days to report the lost time claim. As of August 7, 2015 they were in violation of the statute.

12. The ALJ concludes that a penalty of $100.00 a day is sufficient to address this penalty.

13. The statute provides that a written report can be made by the employee, a foreman, superintendent, manager or any other supervisor or by any person who has notice of the injury. §8-43-102(1)(a) C.R.S. The Claimant's supervisor was provided notice and signed his incident report on the date of injury. The decision to assign a penalty is discretionary. The time question would be July 27, 2015 through August 4, 2015, the date of filing of the Workers' Claim for Compensation. The ALJ concludes that under these circumstances the claimant should not be penalized. The ALJ concludes that the claimant provided sufficient notice, on multiple occasions and in multiple ways of the industrial injury. The respondents knew that the claimant was asserting a work related claim. The respondents simply chose not to treat this as work related.

14. The ALJ concludes that the claimant has established by a preponderance of the evidence that he sustained an injury on May 18, 2015, arising out of and in the course of his employment with the respondent-employer.

15. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant is entitled to medical care to cure or relieve him from the effects of his injury, including that medical care found above to be reasonable and necessary.

16. The ALJ concludes that the claimant has established by a preponderance of the evidence that his average weekly wage is $1,040.66.

17. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits commencing July 27, 2015 and continuing until terminated by operation of law.

18. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled to 16 days of compensation for the respondent-insurer's failure to admit or deny, for a period of 16 days.

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondents should be penalized for failure to notify the Division of a lost time injury for a period of 33 days.

20. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the claimant should be penalized for late reporting.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of the injury, including the care received as found above.

3. The respondent insurer shall pay benefits based upon an average weekly wage of $693.20 from July 27, 2015 through September 30, 2015.

4. The respondent-insurer shall pay benefits based upon an average weekly wage of $1,040.66 beginning October 1, 2015.

5. The respondent-insurer shall pay the claimant temporary total disability benefits beginning July 27, 2015 and ongoing until terminated by operation of law, at the average weekly wage amounts ordered herein.

6. The respondent-insurer shall pay the claimant 16 days of compensation for failure to timely admit or deny.

7. The respondent-insurer shall pay a penalty of $3,300.00 to be apportioned 80% to the claimant and 20% to the workers' compensation cash fund created in section 8-44-112(7)(a); thus the claimant is awarded $2,640.00 with the cash fund being awarded $660.00.

8. The respondents request to penalize the claimant for late reporting is denied and dismissed.

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

10. 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 3, 2016

/s/ original signed by:

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-990-258-01

ISSUES

- Whether Claimant suffered a compensable injury on June 22, 2015.

- Whether Claimant is entitled to further treatment to her back as a result of the June 22, 2015 injury.

STIPULATIONS

- Should this claim be found compensable, the parties stipulate that Claimant's average weekly wage is $590.87.

- Should this claim be found compensable, the parties stipulate that treatment Claimant received between June 25, 2015 and August 2, 2015 was not rendered by authorized providers, and therefore is not payable under the Worker's Compensation Act.

- Should this claim be found compensable, the parties stipulate that treatment Claimant received from August 3, 2015 forward was reasonable, necessary, and authorized. Respondent agrees to pay the cost of that treatment rendered.

- Should this claim be found compensable, the parties stipulate that Claimant's lost time from work, if there was any, can be determined by the wage records previously exchanged between the parties.

FINDINGS OF FACT

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

1. Claimant works as a laundry attendant at Vail Resorts where she is responsible for linens used at two Vail Resorts properties. Claimant's job duties include collecting, washing, drying, folding, and restocking between 500 and 600 pounds of linens per eight hour shift.

2. On Sunday June 21, 2015, Claimant's shift began at approximately 10:00 p.m. and ended on Monday June 22, 2015 at approximately 7:00 a.m. At approximately 11:00 p.m. on June 21, 2015, a water line to or from the industrial washing machines broke resulting in flooding in the laundry room. Engineers working that night repaired the water line and used fans and vacuums to remove water. "Chase," the night supervisor, mopped up water. Claimant used towels to remove water from the floor by placing them on the floor, allowing them to become saturated with water, then picking them up three at a time, and placing them into a 55-gallon garbage container. Claimant spent approximately twenty to

thirty minutes on this task which involved "lots of bending" and "some twisting." Claimant experienced soreness in her lower back, and within approximately sixty minutes, her back locked-up or seized and she experienced a dramatic increase in pain and decrease in mobility. Claimant testified that at approximately 2:00 a.m. she told Chase that she injured her back and needed to go home to rest. She returned for approximately the last two hours of her shift. Claimant did not ask to file a workers' compensation claim, nor did Chase offer to do so.

3. Claimant was not scheduled to work on Monday night. She returned to work on Tuesday night, June 23, 2015, and told her manager, Andy Stoll, that she needed help doing her job. Mr. Stoll provided her with an assistant. Claimant also worked the Tuesday night/Wednesday morning shift with assistance moving heavy items and bending to the floor. Claimant had been released from restrictions for an unrelated injury on June 4, 2015. No persuasive evidence was offered to support a finding that Claimant distinguished for Mr. Stoll that she needed assistance due to the June 21, 2015 incident.

4. On Wednesday, June 24, 2015, Claimant, using her personal insurance, sought chiropractic treatment from Dr. Pitcher for her then-moderate back pain. On Dr. Pitcher's intake form Claimant responded "no" to the question "Is today's visit due to a work related injury?" But when asked what caused her pain, she wrote, "Not sure – I was at work and my back went out/seized up completely – had to go home." Dr. Pitcher noted Claimant's history of onset as "the patient is a 45-year-old female that presents to the office with a chief complaint of right-sided low back pain after bending and lifting laundry on Sunday. She had immediate pain which increased with time." Dr. Pitcher noted the following on physical exam:

   - Claimant's lumbar straight leg raise (SLR) was negative, prone SLR was positive,
   - Local pain and dysfunction in the right sacroiliac (SI) joint,
   - Sustained lumbar hyperextension was unremarkable,
   - Hypertonicity in lumbar para spinal musculature, especially at the lumbo-sacral junction.

   Claimant continued to treat with Dr. Pitcher through the end of June and part of July 2015. Dr. Pitcher's notes reflect that work in the laundry aggravated Claimant's problem. Claimant was able to continue working in her position as a laundry attendant through July because she was very careful about picking up items and limited her bending. Claimant also purchased a tool to pick up items that fell on the floor so she would not have to bend.

5. Other than an unrelated event twenty years earlier, Claimant has not had prior back pain, symptoms, treatment, or evaluations.

6. In approximately mid July, Claimant's improvement stalled. She attributed the stall to an increase in her workload due to the holidays, and to one of the properties sending their laundry in large heavy bags as opposed to wheeled carts which increased her required lifting. By early August the property began sending its laundry in wheeled carts.

7. On July 13, 2015, Claimant, on her own referral, presented for physical therapy at Howard Head Sports Medicine. She filled out a "Patient Health History" noting that her date of injury was June 21, 2015, and that she injured her right spine and her SI joint. Claimant's response to the question "What do you think caused your injury?" was "Work – bending and twisting." While Claimant reported minimal pain and very limited effect on her abilities, when asked to rate her back as a percentage of normal, with 100% being normal; Claimant rated her back at just 20%. In the history of injury section of her Initial Evaluation, it states, "Patient's low back pain began on the evening of June 21, 2015 during a work shift. She reports her back became so painful it locked up on her at work and she had to leave early." While Claimant rated her then-current pain at 1/10, she verbally reported that she was constantly aware of her pain. Claimant winced and withdrew with pain on palpation of her right SI joint line.

8. Claimant attended twenty physical therapy appointments ending on October 6, 2015. She cancelled her October 7, 2015 appointment noting a personal conflict.

9. Claimant's personal insurance covered ten chiropractic visits. Claimant exhausted that benefit by July 15, 2015. Because Claimant's symptoms had not resolved, Dr. Pitcher referred Claimant to Rachel Segerdahl, a P.A. who is supervised by John Hughes, D.O.

10. Claimant first saw Ms. Segerdahl on July 22, 2015. Under history of present illness, Ms. Segerdahl noted, "patient cannot recall any specific incident that occurred before the onset of pain." Ms. Segerdahl's findings on physical exam included the following:

    - Patient is able to heel-toe walk without difficulty,
    - Forward flexion is without pain,
    - Extension is 0 degrees with pain in lower back,
    - Tender to palpation over midline spine L3-S1, bilateral lumbar paravertebral muscle, and over right SI,
    - SLR (straight leg raise) is negative bilaterally.

11. On July 23, 2015, Claimant underwent a lumbar spine MRI without contrast. Claimant used her personal insurance to cover the costs of the procedure. Michele Lajaunie, M.D., the neuro radiologist who interpreted the MRI, found:

- Mild to marked bilateral facet joint arthropathy from L2 through S1,
- Mild to moderate disc bulges at L2 through S1,
- The right L4 and L5 nerve roots could be irritated,
- Mild to moderate bilateral foraminal stenosis at L4 through S1,
- Claimant was also noted to have a congenitally narrow spinal canal.

12. Although Claimant asserts that Ms. Segerdahl referred Claimant for physical therapy as well as for a spinal injection, the ALJ finds no persuasive evidence to support such a referral.

13. On August 3, 2015, Claimant reported her injury to her supervisor, Andrew Stoll. He then filled out an Employer's First Report of Injury. Claimant testified that she told Mr. Stoll that her injury was worse than she thought and that she needed to pursue a workers' compensation claim. Claimant testified that she had not pursued a workers' compensation claim earlier because she was unaware of the procedure to do so, and she did not realize how badly she was injured until she was advised of the MRI findings.

14. Claimant testified that Mr. Stoll filled out the report. The report specifies that the injury occurred at 1:00 a.m. on June 22, 2015. It further provides, "Had a gradual progression of soreness in right hip, lower back, and right glut [sic] area. Jo's back eventually 'locked up' causing her to be una [no further text]." Claimant testified that she was not given a copy of the report, and that she had no input into the preparation of the first report of injury. Claimant testified she disagrees with Mr. Stoll's statement that her back pain had a gradual onset. Mr. Stoll did not give Claimant a list of providers, but Insurer's adjuster called her later and provided that information.

15. Claimant selected Dr. Steve Yarberry from the list of designated providers and first saw him on August 7, 2015. His notes reflect that Claimant's injury occurred on June 22, 2015 and started with Claimant bending over a lot at work. Claimant complained that her back had locked up five times since the original injury, that she had done a lot of bending the day before and thought her back could lock up again. On examination of Claimant's lumbar spine, he noted:

    - Tender in the lower lumbar area, midline, and right para midline,
    - Some SI joint tenderness,
    - Pain with forward flexion and back extension, worse on extension,
    - And positive SLR.

Dr. Yarberry did not have the MRI or report and speculated that it sounded like a possible annular tear or recurrent sprain. He referred Claimant to Scott Raub, D.O., who prescribed physical therapy twice a week for four weeks, and Naprosyn.

16. On August 11, 2015, Dr. Yarberry completed a Physician's Report of Worker's Compensation Injury. His work related diagnoses were low back pain, spinal stenosis, and facet arthritis. The report included his referral to physical therapy twice a week and Naprosyn prescription, and temporary work restrictions. Dr. Yarberry indicated that his objective findings were consistent with Claimant's history and work related mechanism of injury.

17. Claimant filled out a Spine History form on August 19, 2015 indicating that her injury was "work related but was denied work comp." Marginal notes on the form not in Claimant's handwriting read, "0 prior probs W/C Denied caused from picking up wet towels Multiple evals 'Lock up' x 6 can last up to 3 days."

18. On December 18, 2015, Claimant was evaluated by Scott E. Raub, D.O. At that visit, Claimant attributed her back problems to repetitive lifting of wet towels on June 22, 2015, and she denied any prior low back issues. On physical exam, Dr. Raub noted that Claimant was very guarded and difficult to palpate due to her obesity. This interfered with his ability to evaluate her hip range of motion, her straight leg raise, sacroiliac provocation, and lumbar range of motion. Dr. Raub noted:

> I'm concerned that her obesity may limit her recovery or make treatment much less predictable and difficult to provide from a technical standpoint. We talked about the fact that intraspinal injections as well as surgery have a higher degree of difficulty technically given her size, the response [to] such treatments are also less predictable and there are more potential adverse occurrences.

Dr. Raub recommended Facet injections and, injections if the facet injections were not diagnostic, right sacroiliac injections. With respect to whether Claimant's injury was work related, Dr. Raub opined:

- The underlying facet arthritis and disc degeneration clearly predated her work event.
- It was possible that her work activities exacerbated an underlying condition.
- Claimant's obesity and deconditioning predisposed her to developing low back pain.

19. Claimant's personal health insurance policy which is self-insured by Employer notified Claimant via correspondence that it denied treatment because it deemed

Claimant's need for treatment to be related to a work injury. Employer also filed the Notice of Contest on August 25, 2015 denying treatment under workers' compensation. Because of these denials, Claimant did not pursue the injections recommended by Dr. Raub.

20. On September 14, 2015, Claimant saw David Karli, M.D. In describing how her problems began, Claimant recounted:

> I work in Laundry so always bending over. Washers broke one night. After picking up lots of wet towels to dry the floor, back started to feel sore & w/in 30-60 min. completely locked up. Had to go home. No previous back pain but now it flares at work almost every night depending on how much bending or work I do.

Claimant also specified that she was at work when her symptoms began and that a specific accident or injury while at work caused her symptoms.

21. Dr. Karli's notes of Claimant's physical examination indicate that "lumbar range of motion was nonprovocative in flexion/extension." However, in the next section of his report he states, "Extension based provocation confirmed today on exam would also indicate possible posterior element involvement." He was unable to identify whether Claimant's pain was discogenic or facetogenic, and agreed with Dr. Raub's assessment that a course of injections be pursued.

22. On October 8, 2015, Claimant underwent a right L5-S1 transforaminal epidural steroid injection, performed by Dr. Karli. Claimant testified that her father paid for the procedure. Claimant reported some pain relief for a couple of weeks, with her pain levels then returning to baseline.

23. On November 23, 2015, Elizabeth Bisgard, M.D., performed a Respondents sponsored independent medical examination on Claimant. Dr. Bisgard's report is dated December 29, 2015. On physical exam, Dr. Bisgard found Claimant to have a non-physiologic exam with palpation. "I was barely able to touch her jeans without her complaining of increased pain." Dr. Bisgard also found Claimant's response to the straight leg raise to be non-physiologic, in that she was unable to lift her leg in the supine position, but could straighten her knees without pain in a seated position.

24. Dr. Bisgard relied on dates included in a few medical records to conclude that Claimant's injury preceded the broken water pipe incident. Dr. Bisgard also concluded that Claimant only reported to her that the injury was work related. The ALJ finds these conclusions to be contrary to the greater weight of evidence and not persuasive.

25. Dr. Bisgard evaluated Claimant's condition as a cumulative trauma and concluded that Claimant's job description did not meet the causality criteria for a work related back injury. The ALJ finds that Claimant's complaints are more

consistent with an acute injury than with cumulative trauma, and that Dr. Bisgard's cumulative trauma analysis is not persuasive.

26. Dr. Bisgard's opinion that Claimant "does not have a diagnosis" is not persuasive.

    - Ms. Segerdahl diagnosed Claimant with lumbago on July 22, 2015.
    - The MRI referenced diffuse disc bulges at the L4-5 and L5-S1 levels.
    - Dr. Yarberry diagnosed Claimant with Low Back Pain on August 7, 2015.
    - Dr. Karli diagnosed Claimant during the epidural steroid injection procedure with lumbar degenerative disc disease and lumbar radiculitis on October 8, 2015.

27. Dr. Bisgard opined that Claimant's act of bending and lifting wet towels and placing them in a trashcan could be a mechanism of low back injury.

28. At hearing Dr. Bisgard opined that Claimant's symptoms as reported were inconsistent. However, the medical records all reflect right-sided low back pain which worsened depending on the amount of bending she had to do. The severity of Claimant's symptoms fluctuated depending on her work activities, and whether he back was locked up: this is consistently reflected in the medical records.

29. While some of the care providers reported Claimant's history differently than others, overall Claimant's presentation is consistent. The ALJ finds Claimant is credible.

CONCLUSIONS OF LAW

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

Claimant contends the evidence establishes it is more probably true than not that when she picked up the wet towels she caused injury to her back or aggravated pre-existing pathology so as to necessitate medical treatment including additional treatment recommended by Dr. Karli. Claimant argues that this chain of events constitutes a compensable injury that arose out of and in the course of employment. The ALJ agrees.

The Claimant in a workers' compensation case is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course her employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof to

establish these elements is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

An injury occurs "in the course of" employment where the Claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the 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. *Triad Painting Co. v. Blair*, *supra.*

In *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2013) the supreme court stated that risks causing injury to employees may be placed "within three well-established, overarching categories:

> (1) *employment risks,* which are directly tied to the work itself; (2) *personal risks*, which are inherently personal or private to the employee him- or herself; and (3) *neutral risks* which are neither employment related nor personal.

The *City of Brighton* court stated that the first category of risks encompasses "risks inherent to the work environment itself" and the causal relationship of such risks to the employment is "intuitive and obvious." Hence, injuries resulting from such risks are "universally considered to 'arise out of' employment under the Act." 318 P.3d at 502. In contrast, the court stated that the second category of risks are "entirely personal or private" to the employee and include preexisting idiopathic illnesses or medical conditions that are completely unrelated to the employment. Such idiopathic conditions and injuries are generally not compensable unless an exception, such as the "special hazard doctrine," applies. 318 P.3d at 503. The third category of risks are "neutral risks" and are "not associated with either the employment itself nor with the employee him- or herself." Injuries caused by neutral risks, such as lightning, murderous lunatics and stray bullets "arise out of" because they would not have occurred *but for* employment. Such neutral risk or "positional risk" injuries are causally related to the employment because the employment "obligated the employee to engage in employment-related functions, errands, or duties at the time of injury." 318 P.3d at 503-504.

A pre-existing disease or susceptibility to injury does not disqualify a claim if the injury 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). 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 industrial injury and is not attributable to an underlying pre-existing condition. *Sanderson v. The Servicemaster Co.*, WC 4-854-168-02 (ICAO May 14, 2013); *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

In cases where there is a compensable aggravation of a pre-existing condition the Claimant need not show that the industrial injury was the "sole cause" or "principal cause" of a need for medical treatment. Rather, it is sufficient to show the injury was a "significant" cause of the need for treatment in the sense that there is a direct causal relationship between the industrial aggravation and the need for treatment. *Coleman v. General Parts International,* WC 4-912-645-01 (ICAO February 26, 2014); *Nicholl v. Cannino Sausage Co.,* WC 4-473-725 (ICAO March 10, 2003).

The ALJ concludes Claimant proved by a preponderance of the evidence that on or about June 21, 2015 she sustained an injury to her back "in the course of" her employment. As determined, Claimant experienced the onset of low back pain when she picked up heavy wet towels while performing her duties as a laundry attendant. This incident occurred during the time and place limits of Claimant's employment while she was performing her duties.

The ALJ concludes Claimant proved by a preponderance of the evidence that on or about June 21, 2015 she sustained and injury "arising out of" her employment. Specifically, the ALJ concludes that the act of picking up wet towels precipitated an aggravation of Claimant's pre-existing lumbar conditions.

As determined, the ALJ credits the opinion of Dr. Raub that, although Claimant had pre-existing lumbar pathology, the lifting incident of June 21, 2015 "aggravated" the lumbar pathology so as to render it symptomatic and cause a need for treatment. Dr. Raub's opinion is corroborated by Claimant's credible testimony that she did not have any lumbar symptoms or treatment prior to the reaching incident of June 21, 2015, with the exception of a remote event taking place 20 years earlier. Although Dr. Bisgard expressed opinions that conflict with those of Dr. Raub, the ALJ finds Dr. Bisgard's opinions are not persuasive for the reasons stated.

In reaching this result the ALJ necessarily rejects Respondents' argument that Claimant's injury is not compensable because it was "precipitated" by a pre-existing "personal" or "idiopathic condition" condition. In this case the ALJ finds the duties of Claimant's employment precipitated an aggravation of pre-existing pathology. As such the ALJ concludes that the injury in this case resulted from a risk that was inherent in the duties of Claimant's employment and therefore arose out of her employment. *City of Brighton v. Rodriguez, supra.*

As determined, the lifting incident of June 21, 2015 rendered Claimant's lumbar condition symptomatic and caused her need for medical treatment including treatment recommended by Dr. Raub and Dr. Yarberry. Thus, the industrial injury of June 21, 2015 proximately caused a need for medical treatment. The fact that the injury combined with a pre-existing condition to cause the need for treatment does not sever the causal relationship between the injury and need for treatment. *Coleman v. General Parts International*.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a),

C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Because the ALJ finds the claim is compensable the Respondents shall provide reasonable and necessary medical treatment.

ORDER

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

1. On or about June 21, 2015, Claimant sustained a compensable injury to her back arising out of and in the course of her employment.

2. As a result of the compensable injury, Insurer shall provide reasonable and necessary medical treatment.

3. Medical treatment received by Claimant prior to August 3, 2015 was not obtained from an authorized provider and therefore Respondent is not liable for that treatment under the Workers Compensation Act.

4. 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 21, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-990-361-01

ISSUES

- Whether Claimant has established by a preponderance of the evidence that the recommended artificial disc replacement surgery is reasonable, necessary, and related medical care?
- Whether Claimant has established by a preponderance of the evidence that the admitted average weekly wage should be increased?

FINDINGS OF FACT

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

1. On September 7, 2014, Claimant, a manager for the City and County of Denver in the Criminal and Municipal court, was traveling to a conference for his employment on I-70 West, exit 176 towards Vail, when he lost control of his motorcycle and ran into a curb. Claimant fell off the motorcycle and hit the road sustaining admitted injuries.

2. On September 10, 2014, Claimant saw Dr. Szczukowski. In her initial report, Dr. Szczukowski found that Claimant had, among other things, a contusion to his head with headaches, neck, and upper back strain. She noted in her report that Claimant's "headache seems more compatible with a tension headache and the source of the headache may be more than the neck and upper back tension." Dr. Szczukowski referred Claimant for medical massage treatments to decrease his muscle tension.

3. On September 26, 2014, Claimant saw Dr. Blair. Claimant complained of increasing headaches and asked for chiropractic treatment because it helped in the past with similar symptoms. Dr. Blair initially prescribed eight chiropractic visits with Dr. Testa. Dr. Blair's impression was that Claimant was experiencing a cervical sprain with muscle contraction headaches.

4. During a November 12, 2014, visit with Dr. Ann Dickson, M.D., Claimant reported that "he has been treated by a primary care chiropractor for a 'rotator cuff problem' in the right arm that pre existed the motor vehicle accident."

5. On November 17, 2014, Dr. Blair noted that Claimant's neck was the only remaining symptomatic body part remaining from the September injury.

6. Claimant eventually completed twenty visits with Dr. Testa and was reporting good progress. Dr. Blair prescribed six more chiropractic visits. Dr. Blair noted that Claimant was having "no upper extremity radicular symptoms."

7. Medical records dated September 11, 18, 26, 2014; October 23, 2014; November 12, 17, 2014; December 1, 2014; January 6, 2015; February 3, 2015; March 17, 2015; all document Claimant experiencing tense or tight musculature in his neck and upper back which responded to chiropractic and massage therapy until March 17, 2015. On March 17, 2015, Dr. Blair reported that Claimant continued to have waxing and waning posterior neck muscle pain and tightness in spite of multiple chiropractic and myofascial release sessions. Complaints of upper back and neck muscle tightness reappear in medical records dated July 14, 2015; September 3, 2015; and November 16, 2015.

8. On April 27, 2015, Claimant saw Dr. Kawasaki on referral from Dr. Blair. Dr. Kawasaki's notes of Claimant's past surgical history show that Claimant underwent a laminectomy at L5-S1 in 1994 for a ruptured disc. Dr. Kawasaki noted on Claimant's April 27, 2015 physical exam that Claimant had "increased pain with cervical extension and facet loading with pain radiating into the shoulder girdle." Dr. Kawasaki's notes indicate these findings "implicate potential right C5-C6 and C6-C7 facetogenic pain generation."

9. Dr. Kawasaki's physical exam on May 11, 2015 also increased pain with cervical facet load and Spurling's test combined causes increased pain to the posterior aspect of the neck into the shoulder girdle on the right side. Again, these findings indicate facetogenic pain generation.

10. Dr. Kawasaki ordered an MRI of the cervical spine which was completed May 5, 2015. The MRI revealed a right-sided disc herniation at C3-4. The disc protruded and caused some flattening of the ventral aspect of the right side of the spinal cord. There were also vertebral osteophytes causing right foraminal narrowing at C3-4. The C4-5 level showed a disc osteophyte complex, right versus left, with some minimal contact to the right side of the cord. The C5-6 level showed disc protrusion without cord compression. The C6-7 level showed disc protrusion with contact to the ventral aspect of the cord which is being mildly flattened. The MRI Impression was "Multilevel degenerative changes."

11. The MRI findings appear to have shifted Dr. Kawasaki's focus from facetogenic pain generation as revealed on physical exam to cervicogenic pain generation as indicated by MRI. On May 29, 2015, Dr. Kawasaki performed transforaminal epidural steroid injections at both C3-C4 and C4-C5 which provided Claimant with total pain relief for approximately three days. The injections did not distinguish whether the pain was generated at C3-C4 or C4-C5 or both, or whether pain was or was not facetogenic as well.

12. Claimant continued working full duty for Employer during the course of his treatments with the exceptions of May 29, 2015 when the epidural steroid injections

were performed, and then in September and October 2015 for debilitating headaches. These later headaches also responded to chiropractic and massage therapy.

13. Claimant followed up with Dr. Kawasaki June 12, 2015, at which time Dr. Kawasaki opined that Claimant had a "diagnostic response implicating [both] the right C3-4 disc herniation and C4-5 neural foraminal stenosis as the culprits for his continued pain complaints." Dr. Kawasaki referred Claimant for a surgical consultation.

14. On Claimant July 27, 2015, Dr. Rauzzino performed a surgical consultation. Dr. Rauzzino read Claimant's MRI as showing an acute disc herniation at C3-C4 with some cord compression and mild degenerative changes with some foraminal narrowing at C4-C5, and a mild disc bulge at C6-C7. Dr. Rauzzino opined that Claimant should consider motion preservation technology to decompress the spinal cord and replace the disc at C3-C4 with an artificial disc. He opined that the disc herniation was producing significant pain and that the recommended surgery "has a high likelihood of improving his pain symptoms." Dr. Rauzzino acknowledged that there was a myofascial component to Claimant's pain that would "He may still have some myofascial symptoms that will need to be treated" even with surgery.

15. Insurer denied the surgical request on August 17, 2015 and again on October 30, 2015 after it was resubmitted.

16. On September 1, 2015, Ron Carbaugh, Psy.D., performed a presurgical psychological screening on Dr. Blair's referral. Dr. Carbaugh concluded that Claimant has no psychological contraindications to surgery.

17. On September 3, 2015, Claimant was again examined by Dr. Szczukowski who again noted that extension caused more pain than flexion, indicative of facetogenic pain.

18. On September 11, 2015, Dr. Sabin completed an Independent Medical Examination (IME) at Respondents' request. Dr. Sabin found that Claimant had decreased range of motion on flexion to about 45 degrees and very limited extension to about 20 degrees with marked pain. Dr. Sabin noted "no radicular findings." His medical record review also pointed out that Claimant had no radiculopathy at one week and at three plus weeks post accident. In his report, Dr. Sabin opined that the issues of C3-4 disc herniation and C4-5 neural foraminal stenosis were preexisting conditions and degenerative in nature. In addition, Dr. Sabin stated that Claimant does not meet the Colorado Department of Workers' Compensation Cervical Spine Injury Medical Treatment Guidelines for Total Artificial Cervical Disc Replacement Section G-3-c (page 93). He explained that the Treatment Guidelines state that the patient must not have multilevel disc disease and the Claimant does. The Treatment Guidelines also state that the patient must not have facet degeneration or pain, and he believes Claimant has this because his pain is greater on extension. Finally, Dr. Sabin concluded that Dr. Kawasaki's initial treatment plan was reasonable, and that he believed Dr. Kawasaki was sidetracked with the MRI findings which depicted pre-existing degenerative foraminal issues. Dr. Sabin believed it was absolutely necessary to rule out facet

mediated pain in Claimant before performing surgery because a disc replacement would not address facet mediated pain, and Claimant would likely have continued symptoms even if he went forward with the disc replacement.

19. Dr. Blair's notes of an October 27, 2015, visit with Claimant indicate that he agreed with Dr. Sabin's opinion that facet pain needed to be ruled out by injections or medial branch blocks prior to proceeding with any kind of surgery. Dr. Blair opined, "This makes good sense considering the type of pain that [Claimant] has been having and Dr. Kawasaki's assessment." On November 16, 2015, Dr. Blair added "facet arthropathy to his impression.

20. At hearing, Dr. Sabin was qualified as an expert in orthopedic surgery, the Colorado Department of Workers' Compensation Cervical Spine Injury Medical Treatment Guidelines for Total Artificial Cervical Disc Replacement Section G-3, and spinal disorders. He testified in his expert capacity that facet mediated pain had not yet been ruled out. Dr. Sabin added that when there is a degenerative disc in the front, there are almost always going to be degenerative facets in the back. He continued that this is one of the contraindications to doing the disc replacement.

21. Dr. Sabin testified that the relief Claimant experienced from the C3-4 and C4-5 injections was not particularly strong evidence in support of a disc replacement because it did not narrow the pain generator down to C3-4 but to both levels. Two levels were injected, and the Claimant's pain generator was "not adequately localized to give us the best guarantee that surgery is going to help him."

22. On November 23, 2015, Dr. Kawasaki performed right and left medial branch blocks at C2-3 and C3-4 and bilateral third occipital nerve blocks. Dr. Kawasaki then saw Claimant on December 14, 2015 for a follow up. Dr. Kawasaki noted that the medial branch blocks were non-diagnostic, meaning that they did not rule out facetogenic pain.

23. Dr. Rauzzino did not testify at the hearing. However, on December 21, 2015, Dr. Rauzzino wrote a letter responding to Dr. Sabin's September11, 2015 IME. Dr. Rauzzino disagreed that the C3-C4 disc herniation was degenerative. "The fact that it is a disc herniation and not a chronic bony problem would indicate that it is not necessarily degenerative in nature but represents an acute injury." Dr. Rauzzino opined that C3-C4 had been adequately identified as the pain generator because the problems at C4-C5 were degenerative and had not caused pain prior to the date of injury. Dr. Rauzzino opined that Claimant only had one symptomatic level of disease which had been identified at C3-C4. Dr. Rauzzino also noted that while Dr. Sabin had commented on Claimant's pain as being facet related, the MRI made no comment about facet disease or fluid within the facet joints.

24. The ALJ is not persuaded by Dr. Rauzzino's opinion that the disc herniation at C3-C4 is an acute finding as no persuasive evidence was offered suggesting that disk herniations are de facto acute. Further, the ALJ finds that a

degenerative condition at C4-C5 could also have become symptomatic at the time of his motorcycle accident.

25. Claimant has a long history of tension headaches predating the industrial injury. Chiropractic records indicate that Claimant received care for tension headaches through 2008. And February 7, 2013 hospital records for an unrelated issue show that Claimant listed tension headaches as an active problem.

26. At hearing, Dr. Sabin testified that it was possible that Claimant could still be having tension headaches, and that testing was insufficient to rule them out. Dr. Sabin explained that the more defined you can get with the injections, the more you can rule out tension headaches.

27. On January 6, 2016, Respondent filed a General Admission of Liability. At present, Respondent is only contesting reasonableness, necessity, and relatedness of the artificial disc replacement surgery.

28. Claimant submitted a paystub from the pay period of 12/27/15-1/09/16 to determine his average weekly wage (AWW). Claimant used the annual pay rate on this paystub, $78,206.55 divided by 52 to calculate an AWW of $1,503.98.

29. Respondent submitted a Personnel Action Form from January 21, 2014 which documented Claimant's rate of pay on the date of his work related injury to determine Claimant's AWW. Respondent used the monthly rate stated of $6,383.17 multiplied by 12 and then divided by 52 to get an AWW of $1,473.04. Respondent admitted to this amount in its January 6, 2016 Final Admission of Liability.

CONCLUSIONS OF LAW

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

Reasonable, related, and necessary medical benefits

C.R.S. 8-42-101(1)(a) provides that the employer must furnish such medical treatment as may reasonably be needed to cure and relieve an injured employee from the effects of the industrial injury. *Hillen v. Tool King*, 851 P.2d 289 (Colo.App.1993). The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care, or treatment as designed to cure or relieve the effects of such industrial injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo.App.1992*); Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.*, 979 P.2d 584, 585 (Colo.App. 1999). Claimant is seeking disc replacement surgery. This treatment is not designed to cure or relieve the effects of his condition.

Admission on a claim does not entitle an injured worker to any medical treatment he wants. An employer who has admitted liability for medical benefits can dispute a claimant's need for continued medical benefits. *Williams v. Industrial Commission*, 723 P.2d 749 (Colo.App.1986); *Snyder v. Indus. Claim Appeals Office of the State of Colo.*,

942 P.2d 1337, 1339 (Colo.App. 1997). Claimant is only entitled to such medical treatment as may reasonably be needed to cure and relieve an injured employee from the effects of the industrial injury. *Hillen v. Tool King*, 851 P.2d 289 (Colo.App.1993).

The disc replacement surgery is not reasonable or necessary medical treatment for Claimant. Rule 17 Medical Treatment Guidelines Exhibit 8 – Cervical Spine Injury Medical Treatment Guidelines outlines the conditions when Total Artificial Cervical Disc Replacement (TDR) is appropriate. According to the Medical Treatment Guidelines, a patient must either exhibit:

> 1) symptomatic one-level degenerative disc disease (on MRI) with established radiculopathy or myelopathy and not improved after 6 weeks of therapy; **and** radiculopathy or myelopathy documented by EMG or MRI with correlated objective findings or positive at one level; **or**
>
> 2) **All of the following:**
>
> - Symptoms unrelieved after six months of active non-surgical treatment and **one** painful disc established with discogram; **and**
> - All pain generators are adequately defined and treated; and
> - All physical medicine and manual therapy interventions **are** completed; **and**
> - Spine pathology limited to one level; **and**
> - Psychosocial evaluation with confounding issues are addressed

Rule 17, Exhibit 8, pg 94 (emphasis in original).

First, Claimant does not have one level degenerative disc disease. Instead, his MRI shows multi-level degenerative changes. Claimant's C3-4 showed broad-based disc herniation and C4-5 broad-based posterior disc osteophyte complex. The C5-6 level showed disc protrusion without cord compression. The C6-7 level showed disc protrusion with contact to the ventral aspect of the cord which is being mildly flattened. The MRI Impression was "Multilevel degenerative changes." Therefore, Claimant does not meet the first requirement under the Medical Treatment Guidelines for Artificial Disc Replacement Surgery.

Second, Dr. Sabin credibly testified that the pain generator has not been adequately defined. He rationally explained that there has not been sufficient workup to show that the facets are not the problem and the medial branch blocks were non-diagnostic. In addition, Dr. Sabin credibly testified that the relief Claimant experienced from the C3-4 and C4-5 injections was not particularly strong because it did not narrow the pain generator down to just the C3-4 level. Two levels were injected, and

Claimant's pain generator was "not adequately localized to give us the best guarantee that surgery is going to help him."

Dr. Sabin testified in his expert capacity that even absent the Medical Treatment Guidelines, this type of surgical intervention is not appropriate given the facts. Claimant's symptoms do not fit the need for the type of surgery being recommended. Dr. Sabin credibly testified that Claimant likely has problems with his facets because the pain is worse with neck extension, a common symptom with facet mediated pain. Finally, Dr. Sabin testified that, as a spine surgeon, he would need more information before he did any type of neck surgery, including disc replacement.

Dr. Kawasaki initially planned to treat Claimant with facet injections. In his IME, Dr. Sabin opined that this treatment plan was very reasonable. However, Dr. Sabin reasonably deduced that Dr. Kawasaki got sidetracked with the MRI findings depicting pre-existing degenerative foraminal issues. Dr. Sabin concluded that it is "absolutely necessary to rule out facet mediated pain in this patient as a disc replacement would not address this and the patient would likely have continued symptoms."

Average Weekly Wage

C.R.S. § 8-42-102 provides that "Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury." C.R.S. § 8-42-102(2).

On the date of injury, September 7, 2014, Claimant was earning an annual salary of $76,598.04which translates to an AWW of $1,473.04. Respondent has admitted to an AWW of $1,473.04.

Claimant's position is that his AWW is $1,503.98. He reached this figure by using his annual rate from the 12/27/15-1/9/16 post accident pay period from more than a year after his date of injury.

An ALJ has broad, statutorily granted discretion to calculate AWW "in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." § 8–42–102(3), C.R.S.2011; *see also Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867, 869 (Colo.App.2001) ("[Section] 8–42–102(3) . . . grants the ALJ discretionary authority to calculate the [AWW] in some other manner if the prescribed methods will not fairly calculate the wage in view of the particular circumstances."); *Zerba v. Dillon Companies, Inc.*, 2012 COA 78, ¶ 28.

No persuasive evidence was presented at hearing to suggest that the default AWW calculation would not fairly reflect Claimant's AWW in this claim.

Moreover, the point is moot because the maximum AWW for Claimant's 2014 date of injury is $1,322.48, and both Respondent and Claimant present figures which exceed this maximum.

ORDER

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

1. Respondent must only pay for reasonable and necessary medical care. The surgery Claimant requested is not reasonable and necessary. Accordingly, Claimant's request should be denied.

2. Claimant's AWW is appropriate as admitted, at $1473.04 per week.

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

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

DATED: March 14, 2016

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-991-495-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 10, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 2/10/16, beginning at 8:30 AM and ending at 11:00 AM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through U were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the written decision under advisement. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; average weekly wage (AWW); temporary total (TTD) and/or temporary partial (TPD) disability benefits from November 11, 2015 and continuing; and, whether the right carpal tunnel release recommended by Kavi Sachar, M.D., the Claimant's authorized treating physician (ATP), is causally related to the injury of June 17, 2015 and reasonably necessary to cure and relieve the effects of that injury.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant, a 53 year old female, suffered an injury to her right upper extremity (RUE) on June 17, 2015 when she was involved in a takedown of an adolescent patient.

2. The ALJ finds that the injury to the Claimant's RUE was in the course and scope of her employment, while she was performing assigned duties.

3. At the commencement of the hearing the parties stipulated, and the ALJ finds that the Claimant's AWW is $761.50. The parties further stipulated, and the ALJ finds that all of the Claimant's medical care at Denver Health and its referrals, including Dr. Sachar, was authorized, causally related to the June 17, 2015 compensable injury, and reasonably necessary to cure and relieve the effects of that injury.

4. The Claimant has had pain in her right hand and wrist since the date of injury.

5. The Claimant was given modified work as a "greeter" until November 10, 2015. She has not worked since that date nor has she earned wages, been released to return to work without restrictions, nor has she been declared to be at maximum medical improvement (MMI).

6. Dr. Sachar, an ATP and Board Certified Hand Surgeon, has recommended a right carpal tunnel release and the Claimant wishes to proceed with the right carpal tunnel release.

Reasonable Necessity of the Recommended Surgery

7. Henry J. Roth, M.D., an internist, performed an independent medical exam (IME) of the Claimant on November 18, 2015. In his report, Dr. Roth was of the opinion that there was a lack of causal relatedness between the Claimant's right and left carpal tunnel syndrome and the injury of June 17, 2015. Due to this alleged lack of causation, Dr. Roth's medico-legal opinion was that further medical evaluation, diagnosis, and treatment for the carpal tunnel syndrome was not appropriate for workers compensation.

8. Dr. Roth testified at hearing, on behalf of the Respondent, consistently with his report, that the Claimant's carpal tunnel syndrome is not related to work

activities. The ALJ finds that Dr. Roth's opinion on lack of causality is contrary to the weight of all the evidence. Further, the ALJ finds that Dr. Roth's causality opinion is less credible than the opinion of ATP and Hand Surgeon Dr. Sachar because Dr. Sachar has more specific expertise concerning the Claimant's hand, has dealt with the Claimant more than Dr. Roth, and was in a more neutral position than Dr. Roth because he has a treater.

9. Dr. Roth's opinion rests, in significant part, on the proposition that the Claimant also has left carpal tunnel syndrome. Dr. Roth concedes, however, that the left carpal tu8nnel syndrome is less severe than the right carpal tunnel syndrome. In part, Dr. Roth's opinion in this regard is contradicted by Dr. Sachar by virtue of the fact that Dr. Sachar is only recommending surgery for the right carpal tunnel syndrome. Essentially, Dr. Roth stated that left and right carpal tunnel syndromes go "hand in hand." The ALJ finds that Dr. Roth offered little if no support for this opinion.

10 On August 17, 2015, Dr. Sachar, a hand surgeon, examined the Claimant. Dr. Sachar noted that Claimant's EMG showed severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. As a result of the EMG findings, Dr. Sachar recommended the right carpal tunnel release.

Ultimate Findings

11. The ALJ finds the opinions of ATP Dr. Sachar, a hand surgeon, more credible and persuasive than the opinions of IME Dr. Roth, an internist.

12. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Sachar's opinion regarding the right carpal tunnel release and to reject Dr. Roth's opinion.

13. The ALJ finds that the recommended right carpal tunnel release is causally related to the compensable June 17, 2015 injury and reasonably necessary to cure and relieve the effects thereof. Further, Dr. Sachar is within the authorized chain of referrals and, therefore, authorized.

14. The Claimant has proven all designated issues by a preponderance of the evidence, including the issue concerning the recommended right carpal tunnel release is causally related and reasonably necessary.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and 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 weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* C.R.S. § 8-43-210; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Sachar, a hand surgeon, were more credible and persuasive than the opinions expressed by Dr. Roth, an internist.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder

would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Sachar's opinion regarding the causal relatedness and reasonable necessity of the right carpal tunnel release and to reject Dr. Roth's opinion in this regard.

Reasonable Necessity of Right Carpal Tunnel Release

c. Section 8-42-101(1)(a), C.R.S., provides that every employer shall furnish such medical care and treatment as may reasonably be needed to cure and relieve the effects of a compensable injury. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's medical treatment for her right carpal tunnel syndrome, and the surgery recommended by Dr. Sachar is causally related to the compensable injury of June 17, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, and the recommended right carpal tunnel release is reasonably necessary to cure and relieve the effects of the Claimant's compensable injury of June 17, 2015..

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing compensability and entitlement to benefits. §§ 8-43-201 and 8-43-210. *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]. *See also Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688

P.2d 1116 (Colo. 1984). As found, the Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her RUE on June 17, 2015 and that the right carpal tunnel release, recommended by Dr. Sachar, is causally related to her injury of June 17, 2015 and is reasonably necessary to cure and relieve the effects of that injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The request for authorization of the requested right carpal tunnel release, recommended by Kavi Sachar, M.D., is hereby granted.

B. The Respondent shall pay the costs of all authorized medical care and treatment, including the costs of the right carpal tunnel release, recommended by Kavi Sachar, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of March 2016.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

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

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

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant suffer a compensable injury to his left shoulder on August 24, 2015 arising out of and in the course and scope of his employment?
- If compensable, is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?
- What was Claimant's average weekly wage at the time of his injury?

STIPULATION

Claimant and Respondents stipulated that Claimant's average weekly wage at the time of the injury was $1,789.27; giving a TTD rate of $1,192.85. Therefore, Claimant was entitled to the statutory maximum for TTD benefits of $914.27.

The parties further agreed should the claim be found compensable, included within the medical benefits issue was a request for payment of bills from Claimant's personal physicians[1].

FINDINGS OF FACT

1. Claimant, who was fifty-three (53) years old at the time of the hearing, was originally from Ghana. He began working for Respondent-Employer on October 7, 2007, starting first as a temporary employee. After ninety days, he became a permanent employee.

2. Claimant worked for Employer for two (2) years on what was called the dry side and then approximately six (6) years ago became a cook. His job duties in this position included setting up the line for making various batches of food products for customers such as Torani-California and Jack in the Box. The batches made for Torani included white and dark chocolate; for Jack in the Box the batches were for strawberry and chocolate syrup. Claimant estimated they would prepare ten (10) batches per day, sometimes twelve (12).

3. Claimant testified that cooking the product involved a three stage process. In stage two of the process, he was required to carry five 55 pound buckets of invert sugar from a pallet ten to fifteen feet to a kettle, where he would then lift the buckets and pour the sugar into the kettle. A picture of the buckets containing sugar, dry milk

[1] Exhibits 7 and 8.

bags and two cooking kettles was admitted at the hearing[2]. Claimant testified that during the third stage of the process for each batch he would lift, carry and pour a 55-pound bag and 32-pound bag of dry milk into the kettle. Using Exhibit 12, Claimant demonstrated the action of lifting these ingredients, which required lifting above his chest, almost to shoulder level. He would use his body to lift the bag of ingredients into the kettle. The ALJ finds the action of lifting ingredients for the batches required repetitive use of the arms, including the shoulders.

4. Claimant stated he worked 6-7 days per week for Employer over the last four years. Claimant testified he worked 80 regular hours and 70 overtime hours in the 2 weeks before the hearing. The time records admitted at hearing corroborated Claimant's testimony in which he said that he worked 10-12 hours per day, 6-7 days per week. In particular, the time records from Employer revealed Claimant was paid for 3,852.51 regular and OT hours from 8/29/14 through 8/28/15. It also included some holiday and vacation hours. No contrary evidence was before the ALJ.

5. In his limited free time, Claimant testified he would go to church, go home and sleep. There was no evidence in the record that Claimant's non-occupational activities caused an injury to his left shoulder.

6. Claimant's medical history was significant in that he treated for right shoulder pain in February 2012. In particular, Claimant was evaluated on February 24, 2012 by Melissa Helms, M.D. at New West Physicians[3]. His complaints were right-sided neck and shoulder pain, which had been ongoing for 1 year. On examination, Dr. Helms noted inward rotation with difficulty and tenderness on extension with resistance. He was able to abduct his shoulder without difficulty and his muscle strength was intact. Dr. Helms noted Claimant's job required him to lift a lot. Dr. Helms' assessment was muscle spasm, neck strain and shoulder tendinitis. Claimant was given home stretches, was told to apply ice and take ibuprofen and Cyclobenzaprine.

7. There was no evidence before the ALJ which showed Claimant suffered an injury or required treatment for his left shoulder before 2012.

8. Claimant returned to Dr. Helms on March 19, 2012 noting his shoulder pain was improved. Claimant's right shoulder had full range of motion ("ROM") on examination; no weakness or pain was noted with rotator cuff testing and no impingement was found.

9. On August 2, 2012, x-rays of Claimant's cervical spine and right shoulder were taken and read by Robert Lile, M.D. Dr. Lile's impression was C5-6 degenerative disc disease; moderate-mild cervical kyphosis; and asymmetric foraminal narrowing, secondary to uncovertebral osteophytes and facet degeneration. After reviewing the right shoulder radiographs, Dr. Lile's impression was abnormal AC joint, suspect for

[2] Exhibit 12.

[3] These were Claimant's family physicians.

degenerative or inflammatory arthropathy. The remainder of Claimant's shoulder was described as normal.

10. Claimant suffered a work-related injury to his back/neck on or about November 14, 2012. Medical records (M-164 forms) from HealthONE (Drs. Hawke and Kuper), dated November 12 and 21, 2012 were admitted at hearing, which documented treatment for burns to Claimant's back, shoulder and forearm (described as superficial), as well as a neck strain. Claimant thought he treated until approximately January, 2013. There was no record Claimant sustained a permanent medical impairment as a result of the 11/14/12 injury.

11. On March 25, 2015, Claimant was evaluated by Diann Barton, N.P. for left neck and shoulder symptoms[4]. Upon examination, no visible abnormalities were noted in Claimant's left shoulder, which had subacromial bursa tenderness but no AC joint tenderness and full ROM. Claimant reported he had experienced left neck and shoulder pain intermittently since 2012. Claimant testified he spoke to Mr. Slaughter about reopening the 2012 claim, but was told the claim was closed. Claimant stated this was before his injury on 8/24/15.

12. Dr. Helms examined Claimant on April 2, 2015, when he was complaining of left shoulder pain. At that time, Claimant had left shoulder weakness and limited mobility. On examination, Claimant had decreased ROM in the shoulder and was unable to abduct greater than 90 degrees. He had no pain in the infraspinatus or teres minor. Weakness was noted with supraspinatus testing. Dr. Helms believed it could be a rotator cuff tear or rotator cuff tendonitis with associated frozen shoulder. She opined this was a work-related condition, noting "this is clearly a work related overuse injury - heavy lifting and working long hours". Dr. Helms recommended an MRI and discussed options, including going outside the workers' compensation system. Dr. Helms also recommended an orthopedic evaluation and possible arthrogram. There was nothing in the record which indicated Claimant had an MRI before August 2015.

13. On April 15, 2015, Claimant was evaluated by NP Barton for a general physical exam. His shoulder joint pain was referenced, but no physical findings were made with regard to that condition. He declined physical therapy ("PT") and his Cyclobenzaprine prescription was refilled. Claimant testified the reason he did not go for PT was because of his work schedule. Claimant testified he told Marcus (Slaughter) and the GM about the pain he was experiencing at this time. He did not say he suffered another injury. He testified he did not file a claim, as he could still work.

14. Marcus Slaughter testified on behalf Employer at hearing. He has worked for Employer for 19 years, 7 of which he has been the safety coordinator. He was familiar with Claimant's cook job, as had previously held that position. He hired Claimant when he was the production supervisor. Mr. Slaughter stated the goal was to

[4] Claimant was also seen for other general health issues at this appointment.

cook 8-10 batches per shift. He confirmed the kettle was at chest (sternum) level and Claimant was required to lift the invert sugar into the kettle while making a batch.

15. As safety coordinator, Mr. Slaughter was involved in the process of filing worker's compensation claims. He was aware of Claimant's 2012 worker's compensation claim. He conducted an investigation and completed the paperwork. Claimant received treatment for that injury, which was completed in early 2013.

16. Mr. Slaughter said Claimant would complain to him about aches and pains. Mr. Slaughter stated these complaints did not occur very often, every few months. Mr. Slaughter said he offered to send Claimant back to the doctor. However, Claimant declined, saying he had to cook. The ALJ found Mr. Slaughter credible on this point and his testimony was consistent with Claimant's.

17. Claimant came to him complaining of neck pain approximately a week prior to 8/24/15. Claimant asked Mr. Slaughter if he could reopen his neck claim from 2012. Mr. Slaughter testified he contacted Deb Jonas, whom he described as the corporate work comp person, who said Claimant had reached MMI. Mr. Slaughter said he then had a discussion with Claimant.

18. Specifically, Mr. Slaughter testified he spoke with Claimant on August 24, 2015, who said he needed to go back to the doctor for his neck. He said this conversation occurred between 1:30 p.m. and 1:40 p.m. He advised Claimant his claim was not going to be reopened. He said Claimant was mad and then said he would make a new claim. Mr. Slaughter said Claimant should tell his supervisor. He denied telling Claimant not to file a claim. Mr. Slaughter also testified he would not deny an employee medical treatment and would be subject to discipline (termination) if he did so. While Mr. Slaughter may not have directly denied the claim or medical treatment for the Claimant, the ALJ infers he provided the information to Insurer which led to the filing of the Notice of Contest. Significantly, Mr. Slaughter was not working when Claimant was injured in the afternoon of August 24, 2015 as Mr. Slaughter's shift ended at 2:30 p.m.

19. Claimant testified on August 24, 2015 (Monday), at approximately 3:00 p.m., he was lifting a 55 lb. bucket of invert sugar to put it in a kettle when he felt something pop in his left shoulder. He could not lift the bucket all the way up to the top of the kettle, causing some of the liquid sugar to spill on him. He testified that after injuring his shoulder and spilling the liquid sugar, he was required to go change his work clothes. He stated he had been scheduled for nine batches and was cooking the seventh batch when he was hurt. Claimant testified this was the last batch of product he cooked for the day and advised the packaging area.

20. Claimant testified he told his supervisor ("Craig") about his injury the next day. Claimant thought this conversation occurred in the afternoon of August 25, 2015. An Incident Investigation Report (undated) was prepared which documented Claimant's

injury[5]. This document was signed by Craig Liebler, Claimant's supervisor, who noted Claimant took a pail 10-15 feet to the kettle. The report stated Claimant experienced pain while lifting the ingredient to the kettle. Claimant "felt a lot of pain and could no longer lift arm up all the way". Claimant testified that Mr. Liebler came to his work area and saw how far he would carry the various ingredients.

21. An Employee's Statement of Injury/Illness was completed and signed by Claimant on 8/25/15[6]. This statement said Claimant was injured between kettles 11 & 12 and while he was "lifting 55# invert sugar".

22. Mr. Slaughter testified he had a conversation with Claimant in the morning on August 25, 2015 (Tuesday), the day after the alleged injury. Mr. Slaughter asked how Claimant was doing. Mr. Slaughter stated Claimant said nothing about suffering an injury the day before and appeared to be working normally, including using his arms. Mr. Slaughter also testified he became aware that Claimant had reported a new injury in the afternoon "ops" meeting.

23. Claimant's version of the 8/25/15 meeting was that he advised Mr. Slaughter he was injured while lifting the 55 lb. bag of sugar. Claimant testified he described his injury to Mr. Slaughter and was told to use his own insurance. The ALJ infers Claimant was distinguishing between neck/shoulder pain, which he experienced intermittently and his shoulder injury.

24. On August 25, 2015, Claimant was referred to HealthONE and signed an acknowledgment form. Claimant testified he was sent to Dr. Kohake, who told him the injury was work-related.

25. On August 26, 2015, Claimant was examined by George Kohake, M.D. at HealthONE, the ATP for Employer. Claimant indicated that on August 24, 2015 he was lifting a 55 pound barrel of ingredients when he felt pain in his left shoulder. Claimant complained of left arm and shoulder pain at a level of 8 out of 10. Claimant's left shoulder range of motion was significantly limited and Claimant had a positive supraspinatus testing. This was contrasted with the right shoulder which had full range of motion, good strength and was asymptomatic. Claimant reported his prior work-related neck injury, but did not think this injury involved his neck. Claimant denied prior shoulder problems. The ALJ infers Claimant was distinguishing between prior symptoms and the discrete injury suffered on 8/24/15.

26. Dr. Kohake's assessment was left shoulder injury and probable rotator cuff tear. Dr. Kohake ordered an MRI, issued work restrictions and referred Claimant for physical therapy. The ALJ notes Dr. Kohake's Physician's Report of Worker's Injury (M-164) specified Claimant left shoulder condition was work-related.

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[5] Exhibit K, pp. 59-61.

[6] Exhibit 6, pp.18-19.

27. An Employer's First Report of Injury (E-1) was filed on August 26, 2015, which listed the date of injury as August 24, 2015 at 3:00 p.m. The document was completed by Mr. Slaughter (Safety Coordinator), who noted a 55 lb pail of invert sugar injured Claimant. Mr. Slaughter also noted Claimant carried 10-15 pails of ingredients over to the kettle. Mr. Slaughter stated the injury was reported on 8/25/15.

28. Mr. Slaughter prepared written memoranda, one undated[7] and one dated September 2, 2015[8], documenting conversations he had with Claimant. He testified he thought the first document was created on Wednesday, August 26, 2015. In this memorandum (which was not signed and undated), Mr. Slaughter noted he found out about the new injury "the next day", which was August 26, 2015. This was directly contradicted by Mr. Slaughter's hearing testimony. The memo said Mr. Slaughter spoke to Peggy Allen, and then when testifying at hearing, he said he spoke to Deb Jonas.

29. In the 9/2/15 document, Mr. Slaughter recounted that Claimant told him he talked with Patty Richardson (identified as the adjuster on the Notice of Contest), who said someone in the Denver office said he wasn't hurt. Mr. Slaughter said he reminded Claimant of their prior conversation regarding reopening his claim. Claimant said he was not lying and "Jesus would judge us". Mr. Slaughter said they discussed the reference to Jesus because he was an "Ordain [sic] Elder and I don't take people throwing around false scriptures lightly". Although this statement was not completely clear, the ALJ infers Mr. Slaughter was upset by Claimant's statements. Mr. Slaughter testified Claimant was talking about his neck. Significantly, the 9/2/15 memo said the conversation with Claimant concerning reopening the claim occurred "Tuesday" (which would have been 8/25/15). This contradicted Mr. Slaughter's testimony at hearing when he said the conversation occurred on August 24th, which was Monday. Mr. Slaughter was less credible than Claimant regarding the chronology of events, including what was reported on 8/25/15.

30. On September 4, 2015, Insurer filed a Notice of Contest alleging the injury/illness was not work-related.

31. Claimant testified no one from Employer gave him an explanation for the denial. He said he tried to return to Health One for physical therapy, but was told his treatment was canceled because his claim was denied. Thereafter, Claimant received an invoice billed to him for the initial care provided by Health One, where his employer had sent him, as his employer and insurance carrier refused to pay for the care.

32. Claimant returned to New West on September 4, 2015 and was seen by Theresa Shieh, PA-C. PA-C Shieh stated she suspected the injury was work-related. She noted Claimant had several months of atraumatic left shoulder pain, which did not

[7] Exhibit K, p. 64.

[8] Exhibit K, p. 65.

keep him from doing his job as a chef. He then suffered an acute injury while lifting a heavy object on 8/24/15. Since then he had been unable to lift heavy objects. PA-C Shieh ordered x-rays of the shoulder and instructed Claimant to get a second opinion for the workers' compensation injury. The ALJ credited the opinions of PA-C Shieh and finds Claimant experienced symptoms in his left shoulder prior to 8/24/15. However, this does not obviate the fact that Claimant suffered a traumatic injury on 8/24/15 in which he tore his rotator cuff.

33. Dr. Helms evaluated Claimant on September 11, 2015. Claimant had left shoulder pain and weakness as result of an incident at work. Dr. Helms noted Claimant had underlying shoulder pain for which she had she had treated him in April, but was concerned about a rotator cuff/labral tear because there was a noise associated with the August 24th injury. The ALJ infers Dr. Helms was of the belief that the injury on 8/24 was a discrete event.

34. Dr. Helms found decreased ROM in the shoulder, including less than 45 degrees abduction and extension only to 60 degrees in the anterior direction. The ALJ notes the reduced ROM documented at this appointment was significantly worse than in Dr. Helms' prior evaluation. Pain and weakness were noted in the supraspinatus, infraspinatus, teres and subscapularis. Dr. Helms ordered an MRI, referred Claimant for an orthopedic evaluation and noted Claimant should continue tramadol at bedtime. Dr. Helms issued work restrictions which included a 5 lb. lifting restriction for Claimant and no reaching overhead or pushing away from the body.

35. On September 16, 2015, Michael Ellman, M.D. (orthopedic surgeon) examined Claimant. Dr. Ellman recorded Claimant was lifting 55 lb. of liquid sugar, pumping it into a kettle when he had the acute onset of pain and his shoulder gave way. Dr. Ellman found limitations in left shoulder range of motion, including active abduction and forward elevation compared to his contralateral side. Dr. Ellman noted the left shoulder radiographs were unremarkable and ordered an MRI.

36. Claimant returned to Dr. Ellman on September 23, 2015 for a review of his MRI. Dr. Ellman found Claimant had a full-thickness rotator cuff tear of the supraspinatus, high grade near-complete tear of the subscapularis, and tenosynovitis of the biceps with medial dislocation of the biceps from the biceps groove. Dr. Ellman opined: "Given that his rotator cuff musculature looks well preserved on the sagittal images, I do feel this is most likely an acute tear that occurred at the time of his injury four weeks ago. Given the full-thickness and acute nature of this tear, I have recommended surgical intervention." The ALJ was persuaded by Dr. Ellman's opinion that the rotator cuff tear was acute.

37. On October 2, 2015, Dr. Ellman sent a notification to Dr. Helms regarding his surgery recommendation. Claimant returned to Dr. Helms for a pre-operative appointment on October 19, 2015. Dr. Helms noted the surgery was rotator cuff repair and the only concern was hypertension. Dr. Helms referred Claimant for MR arthrogram and PT.

38. Claimant underwent surgery on October 26, 2015, which was performed by Dr. Ellman. Dr. Ellman's postoperative diagnoses were: left shoulder 2-tendon rotator cuff tear involving the supraspinatus and subscpularis; left shoulder subacromial bursitis and impingement; left shoulder SLAP type 2 tear; and left shoulder synovitis. Dr. Ellman drafted a letter dated December 2, 2015 which identified these work restrictions: no lifting over 5 lbs and no aggressive range of motion in his shoulder.

39. On December 15, 2015, Claimant was evaluated by Allison Fall, M.D. at the request of Respondents. Claimant told Dr. Fall that he injured his left shoulder on August 24, 2015 while lifting a 55 pound pail of ingredients. Claimant stated that he had pain in his left shoulder prior to August 24, 2015. After examining Claimant and reviewing his medical history, Dr. Fall opined Claimant had chronic neck and bilateral shoulder complaints predating 8/24/15. Dr. Fall opined the most probable scenario was that Claimant had progressive rotator cuff degeneration which was the most typical mechanism for a rotator cuff tear in Claimant's age group, given his chronic history of bilateral shoulder complaints. Dr. Fall concluded Claimant's need for surgery and subsequent treatment was not related to the alleged incident on 8/24/15.

40. Dr. Fall testified as an expert on behalf Respondents at hearing. She was board-certified in physical medicine and rehabilitation. She was Level II accredited pursuant to the W.C.R.P. Dr. Fall testified that lifting a pail to one's chest and pushing it out forward was not a mechanism of injury which would typically cause a rotator cuff tear. Dr. Fall further testified rotator cuff tears were most commonly caused by overhead lifting or traumatic injuries from falling on the shoulder. Dr. Fall's testimony did not specifically consider Claimant's action of lifting 55 lbs. above chest level, then lifting it to pour it in the kettle. Dr. Fall also did not discuss Dr. Ellman's characterization of the injury as "acute". Dr. Fall testified that Claimant's job duties were not repetitive to the point that it could cause a degenerative condition in this claim.

41. Dr. Fall was credible in many respects, including the general etiology of rotator cuff tears. However, Dr. Fall was less persuasive than Claimant's treating physicians, particularly Dr. Helms and Dr. Ellman on the question of whether this was an acute tear. Based upon the medical evidence, including opinions of the treating physicians and the MRI, the ALJ concluded the rotator cuff tear and biceps tear was an acute injury which occurred on August 24, 2015.

42. The ALJ finds Claimant suffered a compensable traumatic injury on August 24, 2015, crediting Claimant's testimony and based upon the medical evidence.

43. The ALJ concludes the medical treatment provided by Dr. Helms was reasonable and necessary to cure the effects of the 8/24/15 industrial injury.

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

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

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

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

Compensability

Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Clamant alleged he suffered an injury on 8/24/15, while lifting invert sugar into a kettle for a batch he was cooking. Claimant argued he suffered an acute injury that day, tearing his rotator cuff.

Respondents denied Claimant suffered a compensable injury and averred there was insufficient evidence to support a finding Claimant suffered a traumatic injury. Respondents focused on what they alleged to be Claimant's lack of credibility to dispute that Claimant was injured. Respondents also relied upon Dr. Fall's opinion to support the argument that Claimant's rotator cuff tear was the result of a degenerative process. Respondents also argued the medical evidence did not support a compensable occupational disease based upon overuse.

The ALJ considered these arguments and the totality of the evidence admitted at hearing. As found, Claimant sustained a traumatic injury on 8/24/15[9]. The ALJ's reasoning was two-fold. First, there was direct evidence of the injury provided by

[9] In light of this finding, the ALJ did not address whether Claimant suffered from an occupational disease.

Claimant and in Employer's records. Claimant testified he was lifting the invert sugar and pouring it into the kettle. This version of the injury was related to Claimant's health care providers immediately after the injury and Claimant was consistent in how he described the injury. There was also no dispute Claimant was making a batch of white chocolate on 8/24/15 at the time alleged.

When evaluating the evidence on whether an injury occurred, the ALJ considered one of Respondents' primary contentions that Claimant was not credible (as compared to Mr. Slaughter) in that he reported an injury after being told the 2012 injury would not be reopened. In fact, when his written memoranda were compared with his hearing testimony, Mr. Slaughter's credibility suffered. As found, Mr. Slaughter's hearing testimony conflicted with his written memoranda. (Finding of Fact Nos. 28 and 29). The ALJ found Claimant was a more credible witness when discussing what occurred on August 24-25, 2015. Therefore, even though Claimant and Mr. Slaughter had divergent recollections about the events of August 24 and 25, 2015, the ALJ credited Claimant's testimony, which supported the finding he suffered a compensable injury.

Moreover, the Employer records admitted at hearing supported the conclusion that Claimant suffered a traumatic injury that day. Even though Mr. Slaughter testified Claimant said nothing about an injury on August 25, 2015 when they spoke in the morning, Mr. Slaughter also recorded in the E-1 that Claimant reported an injury that day. Claimant's injury was also documented in the Injury Incident Report prepared by Mr. Liebler.

Second, there was direct medical evidence of a traumatic injury, specifically a rotator cuff tear and bicep damage, which was described as acute. This supported the ALJ's finding of a compensable injury. These records included:

> 8/26/15: Dr. Kohake's (ATP) concluded Claimant suffered a left shoulder injury and probable rotator cuff tear. Dr. Kohake noted the symptoms and mechanism of injury were work related.
>
> 9/4/15: PAC Shieh noted the previous shoulder pain described as "atraumatic", then an acute injury while lifting a heavy object on 8/24/15.
>
> 9/11/15: Dr. Helms (who had knowledge of Claimant's previous left shoulder treatment) offered her opinion that Claimant was injured on 8/254/15 and made an orthopedic referral.
>
> 9/23/15: Dr. Ellman stated "this is most likely an acute tear that occurred at the time of his injury four weeks ago. Given the full-thickness and acute nature of this tear, I have recommended surgical intervention".

The foregoing objective medical evidence led the ALJ to conclude that an injury occurred on 8/24/15. (Finding of Fact No. 42). Dr. Ellman's opinion was particularly convincing, as he reviewed the MRI films, saw Claimant on two occasions before the surgery and performed the arthroscopy. Furthermore, the ALJ found Claimant had a history of symptoms in his left shoulder before August 2015. However, this did not

preclude the occurrence of a traumatic injury on 8/24/15. (Finding of Fact No. 32). Indeed, the MRI findings, Dr. Ellman's opinions and the substantially reduced ROM in the left shoulder support this conclusion.

In this regard, The ALJ considered Dr. Fall's opinions, particularly those concerning the mechanism of injury. As found, Dr. Fall expressed a somewhat circumscribed view of how Claimant was lifting the sugar at the time of the injury. (Finding of Fact No. 40). In fact, Claimant lifted the sugar above his chest (above the sternum or higher) and the act of pouring it in the kettle put torque on the shoulder, specifically the rotator cuff. Considered as a whole, the medical evidence persuaded the ALJ that a traumatic injury occurred as alleged by Claimant.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether the Claimant proved a particular treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002) [upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures]. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). 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.

As found, Claimant required treatment to cure and relieve the effects of the 8/24/15 injury. This included the evaluations Claimant received at HealthONE and New West Physicians. The treatment provided by Dr. Helms, including the evaluations, diagnostic testing and referral to Dr. Ellman was reasonable and necessary. Respondents are liable for said treatment, including payment of those medical bills admitted at hearing. In addition, Claimant is entitled to continuing medical benefits to cure and relieve the effects of his industrial injury.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on 8/24/15.

2. Respondents shall pay reasonable and necessary medical benefits for treatment of Claimant's left shoulder, including treatment received at Health One.

3. Pursuant to the parties' stipulation, Respondents shall pay for the treatment rendered by Dr. Helms and referrals made by Dr. Helms (including Dr. Ellman), pursuant to the Worker's Compensation Fee Schedule.

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 9, 2016

Digital signature

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

STIPULATIONS

At the outset of the hearing, the parties stipulated to hold the determination of Claimant's average weekly wage (AWW) in abeyance until fringe benefit information could be obtained. It was further stipulated that the parties would destroy all medical records obtained in the case once the claim/issues had been determined and appeals exhausted. Respondents also elected to withdraw their claim for penalties for alleged late reporting pursuant to section 8-43-102(1)(a), C.R.S. The parties' stipulations are approved.

REMAINING ISSUES

The remaining issues addressed in this decision concern compensability, Claimant's entitlement to medical and temporary disability benefits, and Respondents' entitlement to offsets. The specific questions addressed are:

I. Whether Claimant established by a preponderance of the evidence that he sustained an occupational disease affecting his hips and pelvis, arising out of and in the course and scope of his employment.

II. Whether Claimant established by a preponderance of the evidence that the medical treatment he received from Colorado Springs Health Partners and its referrals was reasonable, necessary and causally related to his alleged occupational disease.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from May 29, 2015 to January 27, 2016.

IV. Whether Respondents are entitled, pursuant to C.R.S. § 8-42-103(1)(f), to offset any TTD benefits for unemployment insurance benefits received by Claimant, as well as for severance pay he received.

FINDINGS OF FACT

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

1. Claimant is a long time former employee of Employer having worked for Employer since his hire date on October 9, 1995. Claimant stopped working for Employer on March 5, 2015. Over the course of his employment, Claimant worked primarily as a laborer in the cooler, or "vault," which is refrigerated to a constant 35 degrees Fahrenheit. While working as a laborer, Claimant duties included handling, sorting, moving and processing various dairy products. Specifically, Claimant would lift,

carry, push, stack and un-stack crates of milk weighing 32 pounds each. Often the crates were stacked 5-6 high, meaning that the stack was as tall as or taller than Claimant. The concrete floors of the vault were purposely sprayed with water so that a thin layer of ice would form permitting crates of product to slide across the floor with greater ease. Claimant also loaded trucks which were iced to create a slick floor in order to slide the carts of product into the truck.

2. Based upon the evidence presented, the ALJ finds that Claimant's job as a laborer was physically demanding involving a considerable amount of bending, stooping, squatting, reaching, carrying, pushing and pulling. Claimant did not perform heavy, physical work or engage in such activities outside of the work place.

3. Claimant began experiencing pain in his left hip in late August, 2013. He presented to Colorado Springs Health Partners ("CSHP") on September 3, 2013 and was seen by Carmen Aguirre, PA-C. PA Aguirre reported; "…Patient is here for evaluation of left hip pain which started about 2 weeks ago.He does not recall any specific injury but thinks he might have slipped sideways causing a hip strain. He has been taking Ibuprofen 200mg every 3 hours, improves the pain. He states it is difficult to walk due to the pain. Pain is aggravated by lifting of the leg, flexing, climbing stairs and just putting weight on the leg hurts. The pain sometimes shoots down the leg from the groin and hip area…" Claimant was diagnosed with "sprain of the left hip." Ms. Aguirre administered injections of Toradol and Kenalog. She prescribed Ibuprofen and Flexeril. She provided hip exercises for Claimant to perform at home, and she took Claimant off work for four days. (Claimant's Exbs. pg. 97).

4. About the time Claimant developed hip pain, he had just experienced a change in job positions. He was working as an operator filler, in the cheese room, which consisted of lifting boxes which weighed 20 to 25 pounds. He had to take the boxes off a cart to the table and open the boxes, lifting a sleeve of ½ pint containers onto a table. He loaded the ½ pint containers onto a machine, pushing buttons to fill the containers with product. This required reaching to take the top boxes off the cart and squatting to take the last box off the cart. Claimant bid for and secured this position as he wanted "something different." Although, the position was easier than his position in the vault, it was, still physically demanding requiring frequently bending, squatting and lifting according to Claimant.

5. None of the positions held by Claimant involve job duties requiring high impact activities such as running and jumping.

6. On September 30, 2013, Claimant was seen at CSHP where he was again evaluated by PA Aguirre for left hip strain/sprain as well as right costochondritis persistent for 2 weeks. Claimant reported that he was having difficulty performing his work duties because he could not lift, twist, squat, bend or climb ladders secondary to hip pain. He brought FMLA paperwork to the appointment for completion as he felt he needed to "rest for a few weeks" to get his symptoms to improve. The record generated from this date of visit is devoid of any suggestion that Claimant's work duties were causing his symptoms; however, the record indicates that after a 12-13 hour work day

involving "repetitive lifting, twisting squatting, ect. His symptoms worsen." Claimant was diagnosed with a hip sprain, x-rays were ordered and Claimant was taken out of work from September 30, 2013 through October 31, 2013 during which time he was to participate in physical therapy per referral. Follow-up was set for one month. (Claimant's Exbs. pg. 89).

7. On October 3, 2013, x-rays were taken of the left hip and the right hip. At that time it was noted that Claimant had no abnormality of the left hip but increased sclerosis of the right humeral head. This is also partially noted in the lumbar spine series of November 4, 2010 and in the CT IVP of April 20, 2012, it appeared this may be deemed related to prior trauma.

8. Claimant was seen at CSHP on October 28, 2013, and Ms. Aguirre reviewed x-ray results with him. She noted, "…Left hip mild sclerosis of femur head discussed with patient. Advised [follow-up] if pain worsens or recurs. I don't believe his pain is due to this finding of sclerosis because his symptoms seem more consistent with ligament/muscle sprain." (Claimant's Exbs. pg. 81). Ms. Aguirre noted Claimant reported feeling better, and wanted to return to full duty work. (Id. at 82). Pa Aguirre also noted that Claimant suffered from moderately severe hyperlipidemia for which he was taking "Atorvastatin" 80 mg daily.

9. On January 6, 2015, Claimant was seen for complaints of a right rib cage pain, he denied trauma or injury. An x-ray performed on January 23, 2015 showed no acute rib fractures on the right, but a left rib fracture with sclerosis and periosteal reaction, likely chronic.

10. Claimant returned to CSHP on January 20, 2014 at which time PA Aguirre reported, "…The patient states recently his head (sic) pains have worsened. He is having left hop anterior muscle pain with abduction, squatting and bending activities. Patient states that because of this, his right hip is also hurting him now. Patient recently also noticed right mid back pain. He believes maybe at work he sprained his back while lifting or twisting. He cannot recall any exact injury of his back or hips at this time. Patient denies any fall or any blunt trauma…." (Claimant's Exbs. pg. 77). Ms. Aguirre referred Claimant to physical therapy, noting, "…47 y.o. male with bilateral hip pains, left worse than right ongoing for about 2.5 months, recurrent problem. Pt. has hx of left hip sprain and now also with right hip [pain] due to compensation…" (Id.)

11. On April 22, 2014, Linda Silveira, M.D., at CSHP reported, "…The patient is in for follow up from PT for left hip s/p x-ray. The patient's left hip x-ray was within normal limits as were the right hip are known to have a mild early DJD of the right hip. To [sic] the right hip is not bothering him but the left hip and some stable [sic] in the aftermath of physical therapy…" Dr. Silveira's diagnosis included "sprain of left hip." (Claimant's Exbs. pg. 73). The Atorvastatin Claimant taking for his hyperlipidemia was causing mild side effects so consideration was given to changing that medication at Claimant's next office visit. (Id.)

12. Dr. Silveira saw Claimant on July 30, 2014 documenting her continued belief that

Claimant's hip pain was emanating from a tendon problem. She noted, "…He's sore in the past couple of months. He's had a left hip tendon problem in the past 2 months and P.T. helped. He has been working in a milk processing plant, Borden's. He has been taking 600 mg of Ibuprofen taken 2-3 times daily with some help. Leg cramps in the aftermath of working intermittently on the left upper thigh near the sore tendon at the hip." (Claimant's Exbs. pg. 69). No change was made regarding Claimant's Atorvastatin, which he continued to take for hyperlipidemia.

13. Claimant was seen by Brian McIntyre, D.O., at CCOM on September 9, 2014. Dr. McIntyre reported, "…Michael Hanscom is a 47 year old male, employee of Sinton Dairy – COS, Laborer at Sinton dairy, where he has to lift 50 lbs, stand up to 8 hours, push and pull up to 300 pounds, reach overhead, kneel, squat." Dr. McIntyre noted Claimant's chief complaint was bilateral hip pain, accompanied by aching and that Claimant complained of; "…bad hip pain constant, without known incident other than repetitive lifting/squatting and carrying causing injury. He describes worsening gradually, for about 3+ weeks bad, but began prior to this, exact date unknown…He has noticed that it is made worse by standing, walking, bending, squatting…" (Claimant's Exbs. pg. 103.) Dr. McIntyre concluded that the objective findings associated with Claimant's examination were "not consistent with the history of a work related etiology." Consequently, Dr. McIntyre was unable to causally connect Claimant's complaints of hip pain to his work duties. To the contrary, Dr. McIntyre opined that Claimant's condition was related to "degenerative joint disease of both hips." Dr. McIntyre "[recommended] that [Claimant] follow with his PCP for further evaluation and treatment of this condition, which is likely being aggravated some recently…" (Id. at 104)

14. On January 6, 2015 claimant was seen for complaints of a right rib cage pain, he denied trauma or injury. An x-ray performed on January 23, 2015 showed no acute rib fractures on the right, but a left rib fracture with sclerosis and periosteal reaction, likely chronic.

15. Claimant was seen on February 17, 2015 complaining of chronic hip pain and costochondritis after he sneezed and pulled a muscle in his back. Concerning the ongoing pain in Claimant's hip, PA Aguirre noted: "…Patient continues to have left hip pain symptoms causing difficulty with walking activities and work activities. He works a very physical job walking and standing most of the time. Patient is recommended to discuss option to modify his job activities to prevent worsening injury and pain…Since his symptoms are recurring on the same hip, I feel it is important to check an MRI to further evaluate for soft tissue injury of the hip…" Claimant's Exbs. pg. 60).

16. Claimant testified he determined his work activities were causing his hip problems in approximately January, 2015. He testified he told a supervisor named Gerald Flowers that his hips were bothering him because of his work activities. In February, 2015, Claimant decided he should file a claim for workers' compensation benefits. Claimant testified that due to a change of ownership of the dairy, Employer's representatives advised Claimant he could not file a claim for workers' compensation benefits until his health insurance ran out. The ALJ finds it likely that Claimant reported that his hip condition/symptoms were caused by his work duties in February, 2015.

17. On March 2, 2015, an MRI of the hips were performed. The MRIs showed early changes consistent with avascular necrosis (AVN)[1] in the femoral heads bilaterally, bilateral incomplete subcapital stress fractures of the femurs, a fracture of the right superior acetabulum margin and a fracture of the inferior right sacral area extending to the SI joint. It was noted that all these fractures were somewhat sclerotic in appearance with minimum to no T2 signal. The underlying bone marrow was low on T1 and weighted imaging suggesting red marrow conversion. Other marrow pathology could not be excluded.

18. On March 5, 2015, Claimant was seen by Dr. Waskow. By history, it was noted that Claimant had recently returned from vacation with increasing left groin pain which was "slowly getting worse on the left side." It was noted Claimant stated he was unsure how he got his pain and he did not have an injury to his hip. His pain was 7/10 located in the groin and posterior side of the hip. Dr. Waskow noted that the stress fractures did not appear to be acute based upon the minimum of edema present on imaging study. His diagnosis included; "stress fracture of hip; AVN (avascular necrosis of bone); stress fracture femoral neck and bilateral appears to be not acute; stress fracture superior acetabulum right; inferior pubic rami stress fracture; small area avascular process superior femoral head bilateral." Dr. Waskow stated, "…He must quit his vigorous job right now..." (Claimant's Exbs. pg. 48).

19. PA Aguirre saw Claimant on March 10, 2015 and reported, "…Patient suffers with chronic hip pain symptoms ongoing since September 2013…was first evaluated in this office for left hip pain symptoms. Patient has been having intermittent left hip pain recently the pain worsened and an MRI of the hips was ordered, unfortunately it showed bilateral stress fractures and some [sign of] avascular necrosis. The results were communicated to the patient by phone last week Wed afternoon and he was instructed to avoid walking and lifting activities. He stopped working last week Thursday and the orthopedic specialist Dr. Waskow estimates his condition may take 2-3 months to heal. FMLA paperwork is being requested by this employer with his work restrictions and disability. At this time [patient] is totally disabled until his condition heals…Discussed with patient the fact that we cannot for sure tell if this condition was caused by his work activities, however, he is encouraged to discuss the issue with the specialist, Dr. Waskow…At this time no wheelchair rx will be provided since Dr. Waskow approved for patient to do some light walking, to prevent hip muscle atrophy and worse weakness…" (Claimant's Exbs. pg. 39). Based on the content of this report, the ALJ finds that PA Aguirre did not causally relate Claimant's bilateral hip condition to his work duties.

20. Dr. Waskow examined Claimant on March 26, 2015, and reported, "…Pt rates his aching pain level as a three after prolonged walking. Pt had x-rays taken today. 75% improvement, due to not working." (Claimant's Exbs. pgs. 35, 36). Dr. Waskow stated, "…Stress fracture can be caused/worsened by being a vault worker – warehouse…strongly encouraged him not to be returning back to physical work…" (Id. at 34). X-rays on March 26, 2015 revealed; "…stable healing stress changes within the left greater than right medial femoral head neck junctions." (Id. at 33).

[1] Also referred to as osteonecrosis.

21. On April 28, 2015, Dr. Waskow reported, "…Pt is f/uing up on his bilat hip stress fxs. Pt has no pain, no sharp shooting pains, stiffness or soreness. He just wants to make sure they are healing correctly. Pain scale 1/10…" (Claimant's Exbs. pg. 26) Dr. Waskow recommended; "…no physical work for another 3 months. Return to clinic in 2 ½ to 3 months for follow up with new x-rays. Pt to schedule bone density..." (Id. at 30).

22. Claimant was laid off from his employment on May 29, 2015. Claimant has looked for work, but has not returned to work due to the effects of his hip condition. Claimant received short term disability benefits prior to his lay off. (Respondents' Exbs. pgs. 139, 140).) After he was laid off, Claimant received severance pay of $1,458.40 for pay period ending June 13, 2015, and the same amount for pay period ending June 27, 2015. (Respondents' Exbs. pg. 139). Claimant received unemployment insurance benefits in the amount of $404.00 per week beginning August 14, 2015 and continuing through the date of hearing. (Respondents' Exbs. pg. 139).

23. The requested bone density study was completed on June 30, 2015. The diagnostic results of that study were consistent with osteoporosis[2] as Claimant had a low T score of -2.7. On July 9, 2015, Virginia Quiroz, NP, reported, "…I personally reviewed and interpreted BD [bone density] = osteoporosis." (Claimant's Exbs. pg. 12). She added osteoporosis to Claimant's diagnoses. (Id. at 10).

24. Repeat MRI and x-rays taken of the hips on July 13, 2015 showed a band of sclerosis in the medial femoral necks bilaterally compatible with the area stress fractures noted on the previous MRI, no lucent line identified and mild bilateral hip osteoarthritis.

25. Dr. Waskow has not seen the claimant since April 2015 and claimant has not been seen at CSHP since July 9, 2015. Claimant did not return to CSHP after July, 2015 because his health insurance expired after he was laid off, and he was unable to afford treatment. After Claimant's health insurance expired, he filed a claim for workers' compensation benefits on August 27, 2015. (Claimant's Exb. 6). In that form, Claimant indicated he notified the Employer of his work-related condition in February, 2015. As noted above, the ALJ finds that to be so.

26. Dr. Waskow responded to written questions from Claimant's counsel on September 22, 2015. Dr. Waskow reported his diagnosis was "stress fractures of hip & pelvis." He stated this condition was due to the repetitive duties of Claimant's job, as opposed to the aging process. He stated he was unsure of the definition of an occupational disease, "…but this medical problem was/is caused by his job." Dr. Waskow confirmed that Claimant's job duties accelerated, exacerbated, worsened, or aggravated his underlying degenerative condition. He added Claimant's prognosis was good, "…but probably not doing heavy work." (Claimant's Exbs. pgs. 6, 7).

[2] According to Dr. Piko, Claimant is at a high risk for suffering fracture.

27. On November 8, 2015, Dr. Piko, a board certified and fellowship trained musculoskeletal radiologist, reviewed Claimant's imaging films. He noted findings on the MRI from March 2, 2015 involving Claimant's hips to reveal bilateral femoral head avascular osteonecrosis (AVN). This involves cellular bone death, due to interruption or decrease in blood supply. AVN is associated with numerous medical risks. Some disease states and types of medication can increase the risk of developing AVN to include, excessive alcohol use, chemotherapy, HIV/AIDS, Cassion's disease, lupus, vasculitis, cancer, and marrow disorders including sickle cell anemia. In Claimant's case, Dr. Piko opined that Claimant had multiple fractures involving bilateral proximal femurs, acetabulum and sacrum. Minimum if any bone marrow edema was associated with the described fractures on MRI and this was an indication of fairly long-standing pathology, meaning months to years. These types and locations of fractures also have the characteristic appearance of insufficiency fractures according to Dr. Piko. Insufficiency fractures occur where normal stress is applied to abnormal bone. Typically, insufficiency fractures occur in older patients with osteoporosis. Claimant has been diagnosed with osteoporosis. It was Dr. Piko's opinion there were abnormal marrow signal changes on MRI of the pelvis, sacrum and lower lumbar spine, which is indicative of yellow marrow conversion and possible myeloproliferative disease. Chronic illnesses, such as anemia, HIV-positive patients and cancer therapies can produce hyperplasia of bone marrow also. It was his opinion that claimant's finding of the AVN and multiple insufficiency fractures could not be caused by an acute injury. Per Dr. Piko, the most likely cause of Claimant's AVN and insufficiency fractures were "due to normal stresses on abnormal bone, caused by an underlying disease state and associated osteoporosis and which were chronic, taking months to years to develop.

28. Claimant is HIV positive and has been since 1997. Claimant has been taking antiviral drugs for this condition since 1997. Claimant also has a history of alcohol abuse noted in 1999 for fifteen years, stopping alcohol use in approximately 2005. Further, in addition to his hyperlipidemia and osteoporosis, Claimant has a history of renal insufficiency, gout, and Vitamin D deficiency.

29. On December 17, 2015, Dr. Cynthia Kelly, a board certified orthopedic surgeon, with expertise in AVN, bone healing and infection completed an independent medical examination (IME) at the request of Respondents. As noted, Dr. Kelly testified at hearing. Dr. Kelly opined that Claimant has avascular necrosis as well as osteoporosis. Dr. Kelly opined Claimant's hip problems are the result of osteonecrosis and osteoporosis; pre-existing conditions that affect Claimant's bones. AVN or osteonecrosis results from loss of blood supply to bone, causing bone death. She testified the factors contributing to Claimant's osteonecrosis include high cholesterol (hyperlipidemia), a remote history of alcohol abuse, and taking of anti-viral drugs to treat HIV. The disease may cause degeneration of the cartilage on the surface of the femoral head which subsequently causes pain. However, it is a disease that is affected only by time. She noted the sclerosis observed in the 2012 films, already demonstrated that avascular necrosis of the femoral head was present on the right side. In Dr. Kelly's opinion Claimant has likely had evolving osteonecrosis since 2010. Dr. Kelly indicated that pain with activities may occur but does not change the underlying pathology of the

AVN. She did not believe the activities Claimant described at work would cause the AVN or accelerate the degenerative process.

30. Dr. Kelly testified that Claimant has osteoporosis based on his bone scan and low T scores. Dr. Kelly explained that osteoporosis results from low bone density and has nothing to do with osteonecrosis. She explained that it is a metabolic problem, and that HIV accelerates it by causing a decrease in the cells that maintain bone density. Dr. Kelly testified Claimant's bone density study yielded a score of -2.7, which she explained is unusually low for a 49 year old male. She opined that Claimant was at risk for the development of osteoporosis not only due to being HIV positive, but also due to his vitamin D deficiency and his chronic renal insufficiency. Although Dr. Kelly opined that it was impossible to pinpoint an exact age of the fractures in Claimant's hips and pelvis, it was her opinion that the MRIs noted no T2 signal which was indicative of older fractures that were sclerotic and likely up to 2 years old. Dr. Kelly opined that treatment for osteoporosis is weight bearing. Consequently, because Claimant's fractures healed despite his lifting, squatting, standing, walking and bending, those work activities would not have accelerated or aggravated Claimant's osteoporosis according to Dr. Kelly. Per Dr. Kelly, Claimant's progressing AVN and not the stress fractures were the cause of his pain and disability at the end of August and beginning of September 2013.

31. Neither diagnosis was impacted by Claimant's work activities according to Dr. Kelly. Rather, Dr. Kelly opined that only high impact activities, such as running and jumping would aggravate and accelerate Claimant's underlying degenerative condition, neither of which Claimant did to complete his work-related obligations.

32. Dr. Waskow opined that Claimant's diagnosis was stress fractures. He indicated that Claimant's repetitive duties caused this condition and aggravated the underlying degenerative condition, although it is unclear what condition he is specifically referring to.

33. After careful review of the conflicting causation opinions of Dr. Waskow, Dr. Piko and Dr. Kelly, the ALJ finds Dr. Waskow's opinions less persuasive than those of Dr. Piko and/or Dr. Kelly. The ALJ finds Claimant's work activities did not cause his underlying osteonecrosis or osteoarthritis. Furthermore, the ALJ finds that Claimant's work activities did not aggravate, exacerbate or accelerate those underlying conditions, leading to stress fractures, pain, disability, and the need for medical treatment. To the contrary, the ALJ credits the opinions of Drs. Piko and Kelly to find: 1. Claimant's pain and disability beginning at the end of August and beginning of September 2013 was, more probably than not, caused by the natural progression of his AVN and not the stress fractures observed on imaging study as those fractures were old. 2. Claimant's work duties did not accelerate or exacerbate Claimant's osteoporosis to cause his stress fractures, pain, disability and need for treatment.

34. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form stress fractures in his hips/pelvis as a consequence of his work duties.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-01, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. 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). As found, the opinions of Drs. Piko and Kelly are credible and more persuasive than the contrary opinions of Dr. Waskow.

C. 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).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's injuries arise out of his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of 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. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of*

Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that he suffered an occupational disease to his hips as a result of repeated lifting, bending, squatting and standing/walking of slippery concrete floors. According to Claimant, these repeated activities lead to stress fractures, pain, disability, and the need for medical treatment.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

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 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental 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. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. To the contrary, a claimant is entitled to recovery if he 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). Here, Claimant concedes that he has osteonecrosis and osteoporosis; pre-existing conditions that cause pain, disability and increase the likelihood of fractures. Nonetheless, Claimant asserts that his injuries (hip fractures) are compensable because they are fairly traced to the employment as a proximate cause, and they do not come from a hazard to which Claimant was equally exposed outside of the employment. Simply, Claimant asserts that the conditions under which his work was preformed aggravated, accelerated, and/or combined with his pre-existing conditions to cause fractures, his need for medical treatment and produce the disability for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

H. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work or

the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found here, the totality of the evidence, including the medical records and the testimony of Dr. Kelly establishes that Claimant has been treated for hip problems since 2013. The evidence shows that Claimant has pre-existing non-work related medical conditions which likely placed him at risk for and lead to his diagnosis of avascular necrosis; a disease unrelated to his work duties and neither aggravated nor accelerated by those duties. The avascular necrosis appears to have started in the right hip as early as 2012, possibly even 2010. ANV affects the cartilage covering the head (ball) of the femur and in Claimant's case is progressing according to the persuasive testimony of Dr. Kelly. Weight bearing or non-weight bearing activities do not affect the disease process. Consequently, the ALJ is persuaded that Claimant's work duties did not cause or aggravate Claimant's underlying AVN. Because AVN primarily results in degeneration of the cartilage over the femoral head and is not affected by the duties Claimant alleges ceased his hip fractures, the ALJ is not persuaded that Claimant's AVN caused or changed the underlying pathology of the stress fractures as they were healing while Claimant was working.

I. Claimant also has underlying osteoporosis and some abnormal bone marrow proliferation, which makes his bone insufficient. Both Dr. Piko and Dr. Kelly believe Claimant had insufficient bone structures which represents the likely cause of his stress fractures. However, Dr. Kelly testified that the stress fractures were old ranging from months to years because the T2 signal was not present indicating that they were not acute fractures. Dr. Piko also noted this in his report as well. In the two years preceding Claimant's alleged date of injury he was working, performing the same duties that he claims caused his injuries. Nonetheless, his fractures demonstrated evidence of healing per the x-rays and MRI scans in 2015. Further, Claimant appears to have fractures of his left rib of unknown duration, with sclerosing and a chronic appearance. Finally, weight bearing activities are encouraged for someone who suffers from osteoporosis. Here, the ALJ is convinced that Claimant has insufficient bones which failed under normal stressors as a consequence of his non-work related osteoporosis. His hip fractures likely represent the natural progression of his underlying disease process and predate his claim date of injury by months or years as evidenced by the healing fractures in his femur, pelvis and ribs. Consequently, the ALJ concludes that it is improbable that Claimant's stress fractures were caused, aggravated or exacerbated by Claimant's work activities as suggested.

J. As Claimant failed to prove by a preponderance of the evidence that he sustained a compensable occupational disease in the form stress fractures in his hips/pelvis as a consequence of his work duties, his remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

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

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

DATED: March 4, 2016

/s/ Richard M. Lamphere

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable occupational disease involving her left knee.

II. If Claimant sustained a compensable left knee injury, whether she established, by a preponderance of the evidence, that she entitled to a general award of any and all reasonable and necessary medical treatment related to that injury.

III. If Claimant sustained a compensable left knee injury, whether the right of selection to designate a provider to attend to that injury passed to Claimant.

IV. If Claimant sustained a compensable left knee injury, whether Claimant is entitled to TTD benefits beginning August 28, 2015 and continuing until terminated by operation of law.

Because the ALJ concludes that Claimant failed to prove by a preponderance of the evidence that she sustained a compensable occupational disease as a consequence of her work duties, the remaining claims concerning entitlement to medical and indemnity benefits are not addressed in this order.

STIPULATION

At the commencement of hearing, the parties advised the Court of the following stipulation, which was accepted and approved by the ALJ: Claimant's average weekly wage (AWW) for purposes of this claim is $675.33.

FINDINGS OF FACT

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

1. Claimant began working for Employer in 2009 as a Tortilla packager.

2. As a tortilla packager, Claimant would grab and bag tortillas as they would approach her on a variety of assembly lines. She worked four different production lines within her department. She stood on her feet at three of the lines; however, the work at the fourth line involves sealing bags of tortillas and affords the packager an opportunity to get off his/her feet as the sealing is performed from a seated position.

3. All of the lines are different in layout and the physical movements necessary to

complete the work at each line is also different. On some machines, Claimant demonstrated that she would bend and rotate slightly to the left and on others to the right, the direction dependent upon the layout of the line and which side the tortillas were coming from. On one line, tortillas came directly at Claimant from the front. As noted, Claimant worked all production lines, rotating between each line every hour.

4. Claimant testified that the summer months of the year are particularly busy at the factory and that during the summer of 2015, she worked 12 hours per day, 6 days per week. Claimant testified that her routine shift was eight hours but that all workers must be able to work up to 12 hours if necessary.[1] Claimant was paid a base wage of $12.21 per hour.

5. Claimant testified that she was able to sit down during three 15 minute and one 30 minute break per shift. The balance of the time, i.e. 10 hours 45 minutes were spent on her feet standing or walking according to Claimant.

6. Prior to June 2015, Employer imposed no requirement regarding the footwear to be worn by packagers such as Claimant. Claimant testified that she wore tennis shoes while performing her job duties prior to June 2015. Around the last week of June 2015, Employer mandated that packagers wear a steel toed shoe. Claimant testified that she immediately experienced fatigue in her legs/feet with having to use a steel toed shoe. Claimant complained about her leg/foot symptoms and asked if she could forego using the required steel toe. Her request was denied.

7. According to Claimant, she then developed a "pinching" sensation on the inside of her left knee around August 3, 2015. This symptom progressed to the outside of the knee and to the area below her knee as well. Claimant testified that her work activities and the need to wear steel toed shoes made her symptoms worse. Per Claimant's testimony her knee would be visibly swollen by the end of her shift.

8. On August 21, 2015 Claimant experienced increased pain and swelling in her left knee Claimant asserted that she reported her symptoms to her supervisor, "Megan", but Megan did not refer her to a physician. Consequently, Claimant testified that she elected to pursue treatment through her primary care physician (PCP) at Southern Colorado Family Medicine. Based on the evidence presented, the ALJ finds that Claimant saw her family practitioner, Dr. Aaron Shupp on August 28, 2015 before reporting to work.

9. According to Claimant, her PCP recommended reducing her work hours. This testimony is corroborated by Dr. Shupp's September 10, 2015 report. Claimant informed Employer of the need to reduce her work hours which prompted the completion of a "First Report of Injury" on August 28, 2015. The "First Report" contains an indication that Claimant had notified Employer of her alleged work-related knee condition on August 21, 2015.

[1] A fact confirmed by the testimony of Hubert Marias during his testimony.

10. Claimant was referred to the Southern Colorado Clinic where she was evaluated by Terry Schwartz, PAC on August 28, 2015. Ali Medina, Employers HR Representative, accompanied Claimant to this appointment. Ms. Medina is Spanish speaking and was present to act as an interpreter. PA Schwartz documented a history of symptoms beginning August 2, 2015. According to PA Schwartz, Claimant did not recall sustaining a specific injury, noting specifically: "Pt states no specific injury, doesn't operate foot peddles (sic), no pushing/shoving with foot/leg or knee. 'Stands at assembly line', rotating to new position on the line every hour."

11. PA Schwartz ordered x-rays, including weight bearing views of the knees bilaterally. The left knee x-rays revealed a small calcified cyst behind the knee along with "very minimal degenerative change." No acute fractures, dislocations, and no significant knee joint effusion were appreciable. There was narrowing of the medial aspects of both knees and the right knee x-ray demonstrated evidence of patellar chondromalasia (sic) according to PA Schwartz' report from August 28, 2015.

12. As noted in paragraph 8 and 9 above, the ALJ finds that Claimant saw her PCP on August 28, 2015 prior to reporting to work and prior to being seen by PA Schwartz with Ms. Medina being present. In a record dated September 10, 2015, Aaron Shupp, M.D., a family medicine physician, noted that Claimant had first visited him regarding osteoarthritis knee pain on August 28, 2015. PA Schwartz' record from his August 28, 2015 appointment notes that Claimant's "private physician sent her to SMC for xrays of her knee due to pain in the knee." These x-rays were available to PA Schwartz according to his report and demonstrated "[m]oderate tricompartmental osteoarthritis is present on the right with mild tricompartmental osteoarthritis present on Lt. No effusions. No acute boney or joint abnormalities." The ALJ finds the reference to "Lt." likely means "left."

13. Regarding the cause of Claimant's left knee pain, PA Schwartz note from August 28, 2015 indicates:

> No clear cause as to relate pain to work situation: no injury, no activity other than standing that may affect the knee. Pt notes that the pain started after she had to start wearing steel toed shoes. Notes that there is not a height difference between her tennis shoes and work boots."

14. In a Physician's Report of Worker's Compensation Injury, PA Schwartz concluded that Claimant's condition was not work related, that there was "no clear cause and effect for work comp injury", and that there was a "clear diagnosis of osteoarthritis per radiologist of both knees".

15. Claimant was released to return to full duty effective August 28, 2015.

16. Terrance Lakin, D.O. works closely with and supervises PA Schwartz. As part of

his supervision, Dr. Lakin reviews all of PA Schwartz' notes and signs them, provided that they are accurate. Dr. Lakin signed PA Schwartz' August 28, 2015 report on August 30, 2015.

17. Claimant testifed that she met with a "man", which the ALJ finds from the evidence presented was likely PA Schwartz, at the Southern Colorado Clinic on August 28, 2015. Per Claimant's testimony, PA Schwartz spent little more than 30 minutes with her. Claimant testified that PA Schwartz asked no questions about her work or the duties of her job. Claimant asserts that Mr. Schwartz did not analyze whether the work exposure could have aggravated the pre-existing asymptomatic arthritis. Given the content of PA Schwartz' August 28, 2015 report, the ALJ is not persuaded by Claimant's assertion.

18. PA Schwartz assessed Claimant with "left knee pain" at her August 28, 2015 appointment. Based upon the evidence presented, the ALJ finds that Claimant's left knee pain is, more probably than not, emanating from osteoarthritis as demonstrated on x-ray studies. Osteoarthritis is a wearing and tearing of the articular surfaces of the knee which is usually age related, but could also be caused by mild trauma. A patient's weight could also be a factor in the development of osteoarthritis.

19. On November 24, 2015 Claimant was evaluated by Michael Dallenbach, M.D. at her request. According to Claimant, Dr. Dallenbach spent more than an hour with her during completion of his independent medical examination (IME). Claimant presented to Dr. Dallenbach's office with her daughter who acted as an interpreter. Dr. Dallenbach reviewed the available medical records and performed an examination of Claimant's left knee.

20. Regarding the left knee, Dr. Dallenbach obtained a history from Claimant that she worked 6-7 days per week, 12 hours per day; that her shift involved standing for 10 hours and walking two hours and that she began to experience pain on August 3, 2015, but did not report the injury until August 24th. Dr. Dallenbach diagnosed Claimant with mild degenerative joint disease of the left knee.

21. In addressing causation, Dr. Dallenbach stated that the medical treatment guidelines for "accumulative (sic) trauma conditions" at "page 19" require the clinician to determine whether it was medically probably (sic) that the need for treatment was due to work related exposure and that treatment was "covered" when the work exposure caused a new condition, activated a previously asymptomatic condition, or if the work exposure "combines with, accelerates or aggravates the preexisting symptomatic condition".

22. In opining that Claimant's left wrist and left knee conditions were causally related to her work duties, Dr. Dallenbach stated:

> Maria Alcala's current clinical condition as it pertains to a left wrist ganglion cyst and her left knee pain, within a reasonable degree of medical probability

> it is work related and secondary to her 6 years of employment at Gruma as a tortilla packer in that the force, frequency, intensity and duration of the activities that she had to performs to fulfill her job requirements suggest causality as referenced above, i.e. constant gripping and grasping, pinching activities involving her left wrist; constant twisting or torque mechanism of injury in her left knee.

23. Dr. Dallenbach did not specifically attribute Claimant's left knee condition to prolonged standing or the use of steel-toed shoes.

24. Hubert Murias testified at hearing. Mr. Murias has been the human resources manager for Employer's Pueblo facility since July 2015. He is familiar with Claimant and has observed the movements/tasks occurring at the various lines which Claimant works.

25. Mr. Murias testified that Employer has black anti-fatigue mats around each machine.[2]

26. According to Mr. Murias, Claimant worked the in the "flour" department which consists of four production lines where packagers stand on one or both sides of the line and grab tortillas as they travel on a belt and place them into plastic bags. According to Mr. Murias, the tortillas are brought directly to the side or in front of the standing employees by the conveyor belt. At the end of the forth line, a person in a seated position would take the bagged tortillas and heat seal the bags before they were taken away for further processing. Employees rotated between the standing positions along the flour packaging lines and the seated sealer position on an hourly basis. As Claimant only worked the flour lines, she had the opportunity to sit for a quarter of her work shift.

27. Mr. Murias testified and demonstrated the manner in which the packager position is performed. According to Mr. Murias' testimony and demonstration, the lines are "belt" high and product is brought right up to the side or in front of the packagers so as to limit the amount of movement necessary to package the tortillas for efficiency sake. The ALJ finds from Mr. Murias' testimony that Claimant's description/demonstration of the movements involved in completion of her job duties was exaggerated. According to Mr. Murias the movements required to work as a packager on the flour lines placed little to no stress on the knees since twisting (pivoting), reaching and bending to grab the tortillas as they proceed down the line to the packagers is not required.

28. On rebuttal, Claimant adamantly testified that Mr. Murias' testimony regarding the movements necessary to perform as a packager were incorrect. According to Claimant's testimony, it was absolutely necessary to shift the weight to one leg and reach while pivoting back and forth on the feet because the tortillas did not end up directly in front of the packager except on one machine. The ALJ finds the

[2] This testimony was corroborated by the testimony of Dr. Lakin who has visited Employer's Pueblo production plant previously.

testimony/demonstration of Mr. Murias credible and convincing and credits it over the testimony/demonstration of Claimant.

29. Mr. Murias testified that the hours at the plant varied and the usual work schedule was 5-6 days per week. According to Mr. Murias Employer is a national company and there was no particularly busy time of the year. Rather, production was based upon supply and demand. Mr. Murias explained that the steel toed shoe requirement was instituted for operators and warehouse personnel before his arrival and was extended to all employees in late June or early July 2015. Per Mr. Murias there was no requirement for employees to wear steel toed boots. To the contrary, he testified that employees could wear steel caps over their tennis shoes and that the caps were available at the plant.

30. Dr. Lakin was deposed on February 2nd. He is a medical doctor and has been licensed to practice medicine in Colorado since 1993. He is board certified in occupational medicine. He is also level II accredited with the Division of Workers' Compensation.

31. Dr. Lakin has twice visited Employer's Pueblo facility. He has observed operation of the lines Claimant works. He would not classify the job as involving "a lot of knee bending". Dr. Lakin is "impressed" with the Employer's rotation of people and its program to "try and reduce a lot of the mechanisms that cause injuries". By rotation, he meant that people are shifted after a certain amount of time to "give them a break from repetitive type injuries." He agreed with PA Schwartz in that the x-ray findings of degenerative changes led to the conclusion that Claimant's condition was not work-related. He also opined that Claimant's weight likely played a causative role in the development of her arthritis. Claimant had weighed as much as 300 pounds during 2011, but weighed 189 pounds at the time of her August 28, 2015 appointment. Nonetheless, Dr. Lakin opined that she had a body mass index (BMI) of 32, placing her in the category of obese. He opined that with a person of Claimant's weight and body mass, weight would "very much" be a factor in the development of arthritis.

32. Dr. Lakin ruled out Claimant's use of steel-toed shoes as a cause or aggravating factor in Claimant's case. In part, his opinion was based on the fact that Claimant's osteoarthritis had developed over a lengthy period of time for perhaps 20 years or so before her reported complaints whereas the footwear requirement was only in place for a few weeks. Dr. Lakin also relied on the diagnosed presence of calcified cyst behind her left knee, an indication, according to Dr. Lakin that Claimant had "stuff" going on in the knee many years prior to August 2015.

33. Dr. Lakin reviewed Dr. Dallenbach's report. He found that the occupational history obtained or noted by Dr. Dallenbach in terms of walking and standing was inconsistent with his own observation of Employer's rotation policy. He observed that Dr. Dallenbach did not consider Claimant's weight, attempt to correlate Claimant's work activities with risk factors for arthritis, or determine a temporal association between workplace risk factors and the onset of symptoms. While Dr. Lakin agreed that a

potential hazard for leg disorders could be standing for prolonged periods on concrete floors, he noted that use of mitigation measures such as anti-fatigue mats and rotation between sitting and standing positions would make Claimant's standing less of a factor in the development of a leg disorder. According to Dr. Lakin, the lack of improvement in Claimant's condition following removal from work activities also made it less likely that work activities caused or aggravated Claimant's osteoarthritis.

34. During his deposition Dr. Lakin was asked if he was familiar with the "Medical Causation Assessment for Cumulative Trauma Conditions." Dr. Lakin stated that he was familiar with the guides but offered that he thought those guides were for cumulative trauma conditions of the upper extremity. Respondents' attorney questioned Dr. Lakin about whether Dr. Dallenbach had compared the risk factors discussed in the "Medical Causation Assessment for Cumulative Trauma Conditions" (for upper extremities) with the work performed by the Claimant which was alleged to have caused her left knee condition. Dr. Lakin opined that Dr. Dallenbach had not. While Claimant argues that such questions were absurd given that Claimant is asserting a left knee condition and not an upper extremity injury, the ALJ notes that Dr. Dallenbach raised the issue of a left hand/wrist injury in his IME report. Moreover, Claimant was seen at CCOM Pueblo for left hand complaints on September 15, 2015 for an "abscess due to repetitive work." Consequently, the ALJ is not convinced that Respondents were attempting to argue that the cumulative trauma guides, WCRP, Rule 17, Exhibit 5 (which only have risk factors and medical conditions dealing with the upper extremities), should apply to the claimant's left knee injury as suggested by Claimant.

35. To the extent that Claimant asserts that she sustained a cumulative trauma injury of the left hand on or about August 2, 2015, the ALJ finds that she has failed to establish the same by a preponderance of the evidence. The causation analysis which Dr. Dallenbach stated was at "page 19" of an exhibit which he did not identify is actually found at Exhibit 5, page 13 in a section marked "general principles of causation assessment". That analysis requires a specific diagnosis, a determination of whether the disorder was known to be or plausibly associated with work, an interview of the patient to determine whether the risk factors were present in sufficient degree and duration to cause or aggravate the condition, a matching of risk factors with the established diagnosis, determine the existence of a temporal connection, and identify non-occupational diagnoses such as obesity which can affect the work related causation decision. W.C.R.P. 17, Exhibit 5, p. 14.

36. On cross examination, Dr. Lakin was asked about whether he was familiar with the treatment guidelines for assessment/treatment of lower extremity injuries, particularly the section dealing with "aggravated osteoarthritis of the knee." Dr. Lakin noted that he was not familiar with these guides.

37. Per Claimant's request at hearing, the ALJ takes administrative notice of WCRP 17, Exhibits 5 and 6. Exhibit 5 addresses cumulative trauma generally and with respect to upper extremities and Exhibit 6 addresses lower extremity injuries, including

aggravated osteoarthritis of the knee. Page 47 of WCRP 17, Exhibit 6 specifically discusses osteoarthritis of the knee, stating:

> Description/Definition: Swelling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint. Age greater than 50 and morning stiffness lasting less than 30 minutes are frequently associated. The lifetime risk for symptomatic knee arthritis is probably around 45% and is higher among obese persons.

38. Per WCRP 17, Exhibit 6(E)(2)(a)(ii), the question of whether a claimed aggravation of osteoarthritis of the knee is causally related to work duties requires the provider to "establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to the work activities including but not limited to physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting.

39. Based upon the evidence presented, the ALJ finds Claimant's testimony that she worked 12 hours per day, six days per week unreliable. Claimant's payroll records with Employer were introduced into evidence. Those records reflect that Claimant worked 1,995.42 hours (of which 475.80 were overtime hours during 2014); an average of 38.37 hours per week. She worked 1,576.84 regular hours (of which 328.02 were overtime hours) through the end of August 2015 for an average of 45.80 hours per week. In the six weeks prior to her report of symptoms, she worked 342.55 hours or an average of 57.09 hours per week. In the three full weeks after she reported the development of symptoms, she worked 182.43 hours; an average of 60.81 hours. The payroll record evidence, fails to support Claimant's assertion that she worked 12 hours per day six days per week. To the contrary, the ALJ finds from her payroll records that at her peak, Claimant worked on average 10 hours per day, over a six day work week. Consequently Claimant's assertion that she was on her feet 10.75 hours per day during her work shifts is also suspect.

40. As part of his causation analysis, Dr. Dallenbach outlined the specific work exposures that Claimant asserts aggravated her pre-existing osteoarthritis. He also noted that he "assumed" the information provided by Claimant was correct. Based primarily on the history provided by Claimant, he made a causal connection between the work exposure and her current condition. As found above, Claimant's testimony regard the amount of time spent on her feet and the movements necessary to complete her work tasks is unconvincing. As the persuasive record evidence does not support the history Claimant provided to Dr. Dallenbach during his IME, the ALJ finds Dr. Dallenbach's opinion regarding causality unpursuasive. Furthermore, the ALJ is not persuaded that Dr. Dallenbach's opinions are entitled to "more weight than those of Dr. Lakin" simply because Dr. Lakin has not met or examined Claimant.

41. Claimant has failed to establish that she suffered a compensable left knee injury in the course and scope of her employment.

CONCLUSIONS OF LAW

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

General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. 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).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's left knee condition arises out of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of 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. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she suffered a compensable aggravation of her left knee osteoarthritis as a

consequence of prolonged standing, the required use of steel toed shoes, repeated knee twisting or flexion, or some combination of these activities. She did not allege the occurrence of a discrete injury. Rather, she is alleging that she sustained an occupational disease as a result prolonged exposure occasioned by her work activities for Employer.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

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 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental 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. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). The failure to satisfy each element by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Here, Claimant concedes that she has pre-existing osteoarthritis in the left knee; a condition that causes wear and tear to the articular surfaces of the knee resulting in pain and disability. Nonetheless, Claimant asserts that her left knee condition was asymptomatic until she was exposed to prolonged standing with the use of steel toed shoes while having to bend and twist her knee to complete the essential duties of her job. Consequently, Claimant argues that she aggravated her pre-existing condition making her claim for benefits, including medical treatment compensable because the aggravation is fairly traced to her employment as a proximate cause, and did not come from a hazard to which she was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which her work was preformed aggravated, accelerated, and/or combined with her pre-existing conditions to cause her symptoms, her disability and her need for medical treatment, for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

H. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial*

Claim Appeals Office, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). The totality of the evidence presented persuades the ALJ that Claimant's left knee symptoms, more probably than not, arose from the natural progression of her pre-existing degenerative left knee osteoarthritis rather than her work duties as she explained and demonstrated.

I. To the extent that Claimant asserts that prolonged standing caused her symptoms, her claim that she worked 12 hours per day, six days per week is not credible as noted above. Review of Claimant's payroll records reflects that she never worked that many hours (paid or otherwise). Moreover, Claimant's assertion that she stood for 10.75 hours per day, never sitting despite having symptoms for several weeks strains credulity. Mr. Murias testified that there was a rotation of employees from station to station and machine to machine on an hourly basis (a fact to which Claimant testified). Mr. Murias testified that the rotation included a shift from a standing bagging position to the seated sealer position. His testimony was supported by the deposition testimony of Dr. Lakin who observed both the periodic rotation and the rotation between sitting and standing. Given that Claimant became symptomatic around August 2 and did not report her symptoms until August 21 convinces the ALJ that Claimant's report that she did not sit during any part of her shift is incredible. Based upon the evidence presented, the ALJ finds that if Claimant's symptoms were as severe as she claims, she likely would have taken the opportunity to sit in an effort to rest her swollen knee and avoid what she now claims was an aggravating/symptom producing activity, i.e. standing. While standing for prolonged periods on concrete might contribute to lower extremity symptoms, the ALJ is not convinced that Claimant stood for the time periods she claims. Furthermore, the evidence presented persuades the ALJ that the risk of aggravation of her pre-existing condition was mitigated further by the use of anti-fatigue mats, which the ALJ finds were present around each machine on which Claimant worked. Even Dr. Dallenbach did not opine that the standing portion of Claimant's job caused, contributed or aggravated Claimant's osteoarthritis. Rather, he attributed Claimant's left knee symptoms to "constant" twisting or torquing of the left knee. Consequently, Claimant has not shown, by a preponderance of credible evidence, that standing constituted a hazard of her employment which would render her arthritis a compensable occupational disease. Compare, *Samake v. Transdev*, W.C. 4-956-998-03 (ICAO, July 31, 2015); *Bennai v. Shearton Denver Downtown Hotel*, W.C. 4-866-503-02 (ICAO, April 8, 2013); *Adams v. Loan-N-Jug*, W.C. 4-797-652 (IACO, July 16, 2010); and *Robinson v. J.C. Penney*, W.C. 4-151-232 (ICAO, June 30, 1995).

J. As to repetitive twisting of the knee, Claimant offered her own testimony and

Dr. Dallenbach's opinion. Neither is convincing. Claimant demonstrated the manner in which she allegedly performed her job duties. Claimant's demonstration included reaching way and to the side of the body, requiring her to shift her weight and twist slightly at the knee and waist. As found, Mr. Murias has observed the movements necessary to complete the tasks on the lines Claimant worked. Like Claimant, Mr. Murias demonstrated the movements necessary to grab and package the tortillas coming down the line to the packagers. In this case, the ALJ is convinced by Mr. Murias' testimony and demonstration as it involved very little wasted motion, a factor the ALJ finds important to a business with a high production quota. Moreover, as noted above, Claimant was not credible on other verifiable details, calling her testimony regarding the specific movements required to complete tasks on the line into doubt and rendering Dr. Dallenbach's opinion that twisting and torquing injured Claimant's knee equally unpursuasive.

K. Likewise, Claimant failed to meet her burden of proving, by a preponderance of credible evidence, that there is a causal connection between her osteoarthritis and the use of steel toed shoes. Dr. Lakin ruled out the shoes as a causative factor because there was no difference in elevation and that the policy regarding the need to wear steel toe protection had not been in place long enough to account for Claimant's osteoarthritis. Dr. Dallenbach also took a history of steel toed shoe use with reported discomfort, but did not include the shoes as a risk factor in the development or aggravation of Claimant's left knee osteoarthritis. No medical provider has commented on a causal connection and none is discussed in either treatment guideline exhibit for which administrative notice was taken.

L. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of the cause for aggravated osteoarthritis. While the MTGs provide for specific steps in analyzing whether there is sufficient proof to causally connect an aggravation of pre-existing osteoarthritis to a Claimant's need for additional treatment, the Court is not bound by the MTGs in deciding individual cases on the MTGs or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

M. Dr. Dallenbach purported to use the risk analysis contained in WCRP 17, Exhibit 5 and 6 when he concluded that Claimant's upper extremity and left knee conditions were causally related to her work duties. While he may have completed a causality assessment according to the MTGs, his assessment did not persuasively account for non-occupational factors such as age and obesity in the development of osteoarthritis and Claimant's current symptoms. More importantly, neither the history Claimant gave Dr. Dallenbach regarding the amount of time spent on her feet nor the testimony she provided at hearing regarding the movements required to complete her job duties while standing are credible as found above. Consequently, Dr. Dallenbach's causation opinions are neither credible nor persuasive. Accordingly, the ALJ concludes it proper to consider the entire record, including the deposition opinions of Dr. Lakin, despite the fact that Dr. Lakin did not conduct a causality assessment according to the MTGs, in determining whether Claimant sustained a compensable injury to her left hand and/or left knee arising out of her employment. In considering the record evidence presented as a whole, the ALJ concludes that Claimant has failed to prove the requisite casual connection between her work duties and the condition of her left knee. Consequently, her claim is denied and dismissed and the claims for medical and temporary disability benefits not addressed further.

ORDER

It is therefore ordered that:

1. Claimant's August 2, 2015 claim for work related injuries to her left knee is denied and dismissed.

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

DATED: March 15, 2016

/s/ Richard M. Lamphere

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on July 20, 2015.

2. Determination of Claimant's average weekly wage (AWW).

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits from July 20, 2015 and ongoing.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to an increase in compensation or benefits of 50% pursuant to § 8-43-408(1), C.R.S

5. Whether Claimant has established by a preponderance of the evidence an entitlement to penalties for Respondent's failure to timely admit or deny the claim pursuant to § 8-43-203(2), C.R.S.

PROCEDURAL HISTORY

This matter was set for hearing initially on January 7, 2016. At hearing, Claimant was present and represented by Mr. Cohen. Respondent was not present at the start of hearing and a record was made that Respondent had proper notice of the hearing and of all the case filings in the matter and that Respondent had not filed any documents or responses throughout the course of the claim. The hearing commenced and Claimant presented his case in chief. At the close of Claimant's case, Respondent appeared in court and made a statement that he believed he had counsel and thought his attorney would appear to request a continuance. Respondent was advised that no attorney had made an entry of appearance in the case and the ALJ treated Respondent's statement as a request for continuance which was granted, in part.

On January 7, 2016 the ALJ entered a procedural order allowing Respondent a continued hearing date to present Respondent's case. The ALJ allowed Respondent one week to contact the court to reschedule the matter and the ALJ required that the matter be reset within 60 days.

The matter was reset for a continued hearing to be held on March 7, 2016. Notice of the March 7, 2016 hearing was sent to all parties on January 22, 2016 and notice was properly mailed and emailed to Respondent. The matter proceeded to the continued hearing on March 7, 2016 and Respondent failed to appear. The Respondent has not filed any pleadings or correspondence with the court in this matter. At the continued hearing, Claimant was allowed to make a closing argument, evidence was closed, and the matter became ripe for decision.

FINDINGS OF FACT

1. Claimant was hired by Employer on April 22, 2015 as a full time mover. Claimant began working for Employer on approximately May 10, 2015 and received his first paycheck for 43.48 hours of work on May 22, 2015. *See* Exhibit 3.

2. On July 20, 2015 Claimant was loading a pallet that weighed approximately 250 pounds onto a moving truck with a co-worker. They lost control of the pallet and Claimant injured his lower back and groin region when the pallet fell. The injury occurred at Employer's warehouse and Claimant reported the injury to the warehouse supervisor. *See* Exhibit 1.

3. Prior to Claimant's injury, and on May 15, 2015, the workers' compensation insurance policy for Employer was cancelled by Pinnacol Assurance. Employer was not insured for workers' compensation on July 20, 2015. *See* Exhibit 2.

4. Claimant was paid by Employer for a two week period of work and was issued paychecks six days after the close of the pay period. The check issued to Claimant on May 22, 2015 was for work performed between May 10, 2015 and May 16, 2015. The check issued to Claimant on July 17, 2015 was for work performed between June 28, 2015 and July 11, 2015. The final check issued to Claimant on July 31, 2015 was for work performed between July 12, 2015 and Claimant's date of injury. *See* Exhibit 4.

5. For the 10 weeks that Claimant performed work for Employer prior to his injury and for work performed between May 10, 2015 and July 18, 2015, Claimant earned gross wages of $8,219.62. This was for a period of 10 weeks of work and comes out to an average weekly wage of $821.96. *See* Exhibits 3, 4.

6. On July 23, 2015 Michael Ladwig, M.D. received verbal authorization to treat Claimant for an on the job injury from Brian Light, and Light Speed Delivery. *See* Exhibit 5.

7. On July 24, 2015 Claimant was evaluated by Dr. Ladwig. Claimant reported that he was lifting a pallet to load into a truck that was top heavy when his partner started tipping and he fought it and threw his back. Claimant reported throbbing pain radiating into his right gluteus. Dr. Ladwig diagnosed lumbar strain and radiculopathy. Dr. Ladwig opined that there was a greater than 51% probability that the injury was work-related. Dr. Ladwig noted that Claimant was unable to work and scheduled a follow up appointment for x-rays and to consider an MRI on July 27, 2015. *See* Exhibit 7.

8. On July 27, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted the continued diagnosis of lumbar strain and radiculopathy and opined that Claimant could not work until an ultrasound and MRI were obtained. *See* Exhibit 7.

9. On August 3, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that Claimant had a return appointment on August 5, 2015 and could not work until return appointment. Dr. Ladwig noted that Claimant would need a valid company credit card in order to pay for the diagnostic work up and medical services going forward. *See* Exhibit 7.

10. On August 10, 2015 Claimant was evaluated by Dr. Ladwig. Claimant was referred to Ergo Med and Dr. Ladwig noted Claimant was unable to work until a return appointment on August 24, 2015. Dr. Ladwig diagnosed lumbar strain with radiculopathy and groin strain. *See* Exhibit 7.

11. On August 11, 2015 Gigi Henry, Controller for Employer, sent an email to Alan Anderson at Ergo Med that approved Claimant for recommended physical therapy and attached a direct pay billing agreement. *See* Exhibit 6.

12. On August 12, 2015 Ms. Henry emailed Claimant's attorney's office and indicated that Employer had been in constant contact with Claimant's doctor at Aviation & Occupational Medicine and indicated that Employer had provided payment for any and all charges for treatment at Aviation & Occupational Medicine. *See* Exhibit 6.

13. On August 24, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig continued the diagnoses of lumbar strain with radiculopathy and groin strain. Dr. Ladwig noted that Claimant was able to return to modified duty on August 24, 2015 with a restriction of lifting maximum of 5-10 pounds. *See* Exhibit 7.

14. On August 27, 2015 Claimant was evaluated by Hector Brignoni, M.D. Dr. Brignoni diagnosed lumbar strain with radiculopathy and groin strain. Dr. Brignoni noted than an L-S MRI was done on August 6, 2015. Dr. Brignoni continued work restrictions of lifting maximum weight of 5-10 pounds and added restrictions of walking 2 hours per day, standing 2 hours per day, and sitting 3 hours per day. Dr. Brignoni referred Claimant for a physiatrist consultation. *See* Exhibit 7.

15. On September 14, 2015 Claimant was evaluated by Dr. Ladwig. The diagnoses continued. Dr. Ladwig listed the work restrictions of maximum lifting weight of 5 pounds. *See* Exhibit 7.

16. On September 29, 2015 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig continued the diagnoses and work restrictions of 5 pounds lifting. Dr. Ladwig noted that chiropractic and acupuncture had not been helpful and that Claimant was probably looking at injections with Dr. Olsen. *See* Exhibit 7.

17. On October 27, 2015 Claimant was evaluated by Dr. Ladwig. The diagnoses and work restrictions were continued. Claimant reported to Dr. Ladwig that his pain was constant and that he had an appointment that day for injections but that Employer denied. Dr. Ladwig noted that Claimant would discuss the denial issue with

his attorney and then proceed forward. It was checked at that appointment that Claimant was "not working." *See* Exhibit 7.

18. On November 3, 2015 Ms. Henry sent an email to Tony Baker at Aviation & Occupational Medicine. Ms. Henry asked for a statement regarding Claimant's account and noted that Employer was no longer approving any future visits for Claimant. *See* Exhibit 9.

19. Claimant did not testify at hearing. Respondents did not present any testimony or evidence at hearing.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *See* § 8-41-301(1)(b), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant has established by a preponderance of the evidence that he sustained a compensable injury on July 20, 2015 that arose out of and occurred in the course of his employment. The evidence establishes consistent reports of lifting a pallet at Employer’s warehouse when Claimant was injured. Dr. Ladwig opined that the injury was more likely than not work related. Dr. Ladwig consistently provided work related diagnoses at each medical appointment noting injury to Claimant’s lumbar spine and groin.

Average weekly wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation

of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The wage records in evidence establish that for the 10 weeks that Claimant performed work for Employer prior to his injury and for work performed between May 10, 2015 and July 18, 2015, Claimant earned gross wages of $8,219.62. This was for a period of 10 weeks of work and comes out to an average weekly wage of $821.96. Claimant has established this as his average weekly wage. Claimant's argument that his average weekly wage is $907.29 is rejected after reviewing the evidence. Claimant failed to account for the full number of weeks Claimant worked for Employer in calculating the average weekly wage.

Temporary disability benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant has established an entitlement to TTD benefits in this matter. The evidence and medical records show that as of his first appointment Claimant was placed on work restrictions that did not allow him to work for the first month following his injury. In approximately late August of 2015 Claimant was placed on work restrictions that allowed him to work with a maximum lifting restriction of 5-10 pounds. These restrictions continued throughout his treatment and through his last medical appointment on October 27, 2015. The medical records repeatedly note that Claimant was "not working" during his three months of treatment. Claimant has established an initial entitlement to TTD benefits and there has been no showing that TTD should be stopped. The evidence does not show Claimant is at maximum medical improvement,

does not show that he has returned to regular or modified employment, does not show that he has been given a written release by his attending physician to return to regular employment, and does not show that he was given a written release to return to modified employment such employment was offered to him in writing and he failed to begin such employment. Further, the restrictions imposed on Claimant of maximum lifting of 5-10 pounds make it highly unlikely that Claimant would be able to return to his job and effectively and properly perform his regular employment duties as a full time mover. Claimant has established that his temporary total disability lasted more than three regular working days' duration and that he is entitled to sixty-six and two-thirds percent of his average weekly wages from July 21, 2015 through the hearing date of March 7, 2016 and ongoing until terminated by statute. Claimant has established that through the date of hearing, he is entitled to TTD benefits of $18,083.01 for the 33 week period between July 21, 2015 and March 7, 2016.

50% increase in benefits

Section 8-43-408(1), C.R.S. provides that in any case where the employer is subject to the provisions of the workers' compensation act and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured…may claim the compensation and benefits provided in said articles, and in any such case the amounts of compensation or benefits provided in said articles shall be increased by fifty percent.

Here, Claimant has established that he suffered a compensable injury while working for Employer. Employer is subject to the provisions of the workers' compensation act. Claimant has also established that at the time of his injury, Employer did not have workers' compensation insurance as required by statute. Therefore, Claimant has established that the amount of compensation and benefits due to him shall be increased by fifty percent. The TTD owed to Claimant through the date of hearing in the amount of $18,083.01 thus shall be increased to $27,124.52.

Penalties

§ 8-43-101(1), C.R.S. requires that within ten days after notice of a lost-time injury to an employee, the employer shall, upon forms prescribed by the division for that purpose, report said lost-time injury. After a report is or should have been filed with the division, the employer is then required to notify in writing the division and the injured employee within twenty days as to whether liability is admitted or contested. *See* § 8-43-203(1)(a), C.R.S. If employer does not file such notice, then the employer may become liable to the claimant if the claimant is successful on the claim for compensation for up to one day's compensation for each day's failure to so notify. *See* § 8-43-203(2)(a), C.R.S.

Claimant has established that notice was provided to Employer in this case that Claimant had suffered a lost-time injury. Claimant reported his July 20, 2015 injury immediately to his supervisor and was taken off work at his first medical appointment a

few days later. Employer failed to report the lost-time injury within ten days of receiving notice of the injury and did not report the injury by July 30, 2016. Further, Employer was required within twenty days of July 30, 2016 to either admit or contest liability. Employer also failed to do so.

On January 7, 2016 Respondent appeared at the hearing where Claimant was seeking an award of benefits and compensation. By appearing at hearing and requesting a continuance and indicating he had sought out legal counsel, the ALJ makes a reasonable inference that Respondent was contesting liability. Although not filed formally in writing with the division, the ALJ treats the January 7, 2016 date as the date that Respondent contested liability for the purpose of determining an appropriate penalty. As of that date, the violation period would have been 136 days (8/24/15-1/7/16). Under statute, the ALJ may assess a penalty of up to one day's compensation for each day's failure to notify the division of whether the claim is admitted or contested. In this matter, the ALJ finds a penalty of $25.00 per day to be appropriate. Therefore, the accrued penalty during this time period is found to be $3,400.00. As required by statute, fifty percent of the penalty shall be paid to the subsequent injury fund and fifty percent to the Claimant. *See* § 8-43-203(2)(a), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show he suffered a compensable injury on July 20, 2015 while an employee of Respondent.

2. Claimant's average weekly wage at the time of his injury was $821.96.

3. Respondent is ordered to pay benefits and compensation to Claimant for temporary total disability in the amount of $27,124.52. (accounting for $18,083.01 plus a 50 % increase due to failure to be insured).

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

5. Respondent shall also pay a penalty to Claimant in the amount of $1,700.00.

6. Respondent shall pay a penalty of $1,700.00 to the workers' compensation cash fund. Respondent shall pay the Director of the Division of Workers' Compensation on behalf of the Workers' Compensation Cash Fund as follows: Respondent shall issue any check payable to "Cash Fund" and shall mail the check to: Brenda Carrillo, SIF Penalty Coordinator, Revenue Assessment Officer, DOWC Special Funds Unit, P.O. Box 300009, Denver, Colorado 80203-0009.

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

8. In lieu of payment of the above compensation and benefits to the Claimant, Respondent shall either:

a. Within ten (10) days of the date of service of this order, deposit the sum of $28,824.52 (amount due to Claimant for TTD benefits and compensation plus the amount due to Claimant for penalty) with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $28,824.52 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order AND that the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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, 2016 /s/ Michelle E. Jones

_____

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

ISSUE

Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is employed by Employer as cab driver and has been so employed for approximately 2.5 years. Her duties include driving passengers to/from different locations. She primarily drives Medicare and Medicaid patients to appointments for which she receives voucher payments, but she also drives regular fare clients who pay by either cash or credit card.

2. On September 19, 2015 Claimant sustained an admitted injury when she fell off the loading ramp on the handicap van she was driving.

3. In the General Admission of Liability (GAL) filed on October 14, 2015 Respondents admitted to an AWW of $340.15. Respondents used Claimant's 2014 Schedule C net income listed in her 2014 tax returns to generate the AWW amount. *See* Exhibit B.

4. On October 28, 2015 Claimant filed an application for hearing on the issues of AWW and temporary total disability benefits from September 19, 2015 and onward. A hearing was set for February 12, 2016 in Greeley, Colorado.

5. At the outset of hearing, the parties identified the only issue for determination to be AWW.

6. The majority of Claimant's work is done with Medicare and Medicaid patients. When Claimant drives a patient to and from a medical appointment, she receives a completed voucher. Claimant submits the completed vouchers to Employer, and Employer places the amounts owed to Claimant from the vouchers (after debiting expenses) onto a driver card payable to Claimant. Employer debits expenses that include the cost of leasing Employer's vehicle, and the cost of workers' compensation insurance. The amount placed on the driver card is the net revenue Claimant generates minus the expenses that were debited.

7. Employer does not debit fuel expenses from the payment provided to Claimant on the driver card. Claimant pays for fuel separately and from her own checking account.

8. In addition to the voucher payments that Employer pays to Claimant through the driver card, Claimant also accepts credit card payments that are processed

through Employer, cash payments, and payments through Apple Square which is a smart phone application that processes credit card transactions. Claimant pays a processing fee when she uses Apple Square and the amount she is paid for a fare minus the processing fee charged by Apple Square is directly deposited into her checking account and does not go through Employer. Claimant also accepts and runs credit card payments through Employer, and Employer also charges a processing fee and deposits the remaining amount on the driver card.

9. Employer issues cashier receipts to its drivers that reflect the total revenue generated by the driver minus the expenses debited by Employer. The cashier receipts show the amount deposited weekly onto Claimant's driver card.

10. On her 2014 U.S. Individual Income Tax Return (1040), Claimant reported a total of $17,688.00 in business income. Claimant reported $47,200 in gross receipts or sales minus $29,512 in total expenses to arrive at this figure. Respondents divided $17,688.00 by 52 weeks to arrive at the admitted AWW of $340.15. *See* Exhibit B.

11. From January 1, 2014 through December 31, 2014 Employer computed Claimants gross receipts or sales to be $60,911.98 which included voucher payments to her in the amount of $59,858.36, and credit card sales that were run through Employer in the amount of $1,053.62. See Exhibit F.

12. The $60,911.98 in gross receipts or sales for 2014 that was computed by Employer did not include any cash payments Claimant received in 2014 and did not include any credit card payments that Claimant processed through Apple Square in 2014 as Employer would not be aware of those transactions or the amounts of those transactions.

13. From January 1, 2015 through September 18, 2015 (the day prior to Claimant's injury), Claimant's gross receipts or sales computed by Employer were $65,182.13 for an average weekly gross amount of $1,755.04. This amount included all vouchers and credit card payments processed through Employer. This amount did not include any cash payments or credit card payments run through Apple Square. Employer did not calculate or run the expenses deducted during this period nor did they calculate or run the net amount paid to Claimant during this time period.

14. For the 12 weeks prior to Claimant's injury and from cashier receipts for work performed between June 22, 2015 and September 14, 2015 Claimant's gross receipts or sales from Employer were $20,875.96 for an average weekly gross amount of $1,739.66. The net amount paid to Claimant during this time period after Employer deducted expenses including the vehicle lease fee, voucher and credit card processing fees, and workers' compensation insurance was $15,222.18 for an average weekly net amount of $1,268.52. The total expenses deducted by Employer during this 12 week period were $5,653.78 for an average weekly deduction of $471.15. *See* Exhibit 1.

15. Claimant's Exhibit 4 has an error in the date listed on the first line of the chart prepared by Claimant summarizing Exhibit 1. The date listed for the gross

payment of 1,903.72 is June 4, 2015 when Exhibit 1 shows that the date of the gross payment of $1,903.72 was in fact June 29, 2015. This payment was for work performed from June 22, 2015 through June 29, 2015.

16. Claimant's earnings in the 12 weeks prior to her injury are consistent with her earnings for the entire year of 2015. From the amounts processed through Employer, Claimant had earned more in the first three quarters of 2015 than she earned in the entire year 2014. Using her 2014 earnings, whether the amount arguably underreported by her on her 2014 tax return or the amount calculated by Employer would not determine a fair approximation of her AWW at the time of her injury as she earned more in 2015 than in 2014.

17. For the 12 weeks prior to Claimant's injury and from June 22, 2015 through September 14, 2015 Claimant spent $1,231.78 in fuel costs related to her employment, for an average weekly fuel cost of $102.65.

18. From January 1, 2015 through September 30, 2015 Claimant had gross sales through Apple Square of $6,996.13. Claimant's net sales through Apple Square after processing fees were deducted for this time period were $6,803.15. The net sales over the course of the 38.86 weeks in which Claimant earned the income, amounts to average weekly net sales of $175.07.

19. The average net amount paid to Claimant through Employer for the 12 weeks prior to her injury was $1,268.52 per week. The average weekly net amount paid to Claimant through Apple Square for the 2015 year was $175.07. Thus, Claimant's total average weekly net pay was $1,443.59. Claimant's average weekly fuel cost during the 12 weeks prior to her injury was $102.65. After subtracting out the average weekly fuel cost, Claimant had an average weekly net wage of $1,340.94.

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. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) 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. *See* § 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).

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*.

After reviewing the evidence in this case, the ALJ determines that Claimant's AWW at the time of her injury was $1,340.94.

Claimant's net earnings calculated by Employer for the entire year of 2015 leading up to her injury were consistent with her earnings in the 12 weeks prior to her injury. Claimant had earned more in 2015 at the time of her injury than she had earned in the entire year 2014. Although Respondents established a discrepancy between Claimant's 2014 earnings processed through them and the earnings she reported on her 2014 tax return, any earnings in 2014 are not determinative to a fair calculation of her average weekly wage at the time of her injury as she earned significantly more in 2015 and in the 9 months prior to her injury than she had in 2014.

Respondents argument that Claimant's award of AWW should be reduced by a percentage equal to what they believe is the percentage Claimant under-reported on her 2014 tax return is not persuasive. The ALJ is required to fairly determine a Claimant's AWW at the time of her injury. Here, the evidence and records establish the wages Claimant was earning at the time of her injury. Whether or not Claimant under-reported her actual wages on her 2014 tax return is not an issue for determination and the ALJ is not inclined to determine Claimant's AWW was less at the time of her injury because Claimant may have under-reported income in her prior year's tax returns.

Additionally, Respondent's argument bases their calculation of AWW on a summary chart (Exhibit 4) prepared by Claimant that includes an error in date on the first line of the income chart. The first line lists June 4, 2015 when the amounts reported and date matching the 12 weeks prior to injury show that the date listed should have been June 29, 2015. By using the June 4, 2015 date instead of the correct June 29, 2015 date, Respondents calculated the AWW based on a period of time that is 25 days longer than the actual period of wages established by evidence in Exhibit 1. The calculation of AWW offered by Respondents is thus not a fair calculation of Claimant's wages at the time of her injury.

Similarly, Claimant's argument that the ALJ should award Claimant a maximum AWW amount because her income is close to the maximum amount and because alternative calculations might place her AWW at or above a maximum compensation rate is also not persuasive. The determination on AWW is based on evidence and actual wages earned by Claimant at the time of her injury. Just as the ALJ will not reduce the AWW due to under-reporting of income in a past tax return, the ALJ also will not round up or increase the AWW because Claimant is "close" to a maximum award or because an alternative calculation would place her at a higher AWW.

Claimant's net AWW, as shown by her earnings through Employer, through Apple Square, and after deducting expenses is $1,340.94.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wages is $1,340.94.

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 14, 2016

/s/ Michelle E. Jones

_____

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