ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a left shoulder injury proximately caused by the performance of service arising out of and in the course of his employment?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 6 were admitted into evidence. Respondents' hearing exhibits A through P were admitted into evidence with the exception of Exhibit G, p. 15, which Respondents withdrew.

2. Claimant alleges that on August 12, 2014 he sustained a compensable injury to his lefty shoulder while performing his duties at the Employer's transmission repair shop. Claimant credibly testified that on the date of the alleged injury he had been working for the employer for about 1 month.

3. Claimant was involved in a serious motor vehicle accident (MVA) in July 2012, approximately two years prior to the alleged injury in this case. As a result of the MVA Claimant sustained multiple injuries including rib fractures, a broken sternum and a torn labrum of the left shoulder.

4. On October 19, 2012 Claimant underwent surgical repair of the left shoulder. The surgery was described as "arthroscopy of the left shoulder, repair anterior capsule and labrum."

5. Robert Winfield, M.D., examined the Claimant on March 13, 2013 for "shoulder pain and rib/sternal pain". Claimant reported "occasional" pain that was present "1/4 to ½ of the time." Claimant rated this pain as 5 on a scale of 10 (5/10). In his treatment plan, Dr. Winfield noted the Claimant was "using quite a bit of narcotics [8-9 Dilaudid a day] for his pain … [and that the doctors] need to get him weaned down off the narcotics quickly."

6. On April 24, 2013 Dr. Winfield again examined the Claimant for left chest wall and left shoulder pain. Dr. Winfield noted Claimant was 6 months out from surgery and about 9 months out from the MVA. Claimant reported increasing pain. He advised that his current pain level with the pain medication program was 8/10 and his pain level without medication was 10/10. However, Dr. Winfield noted the Claimant did not exhibit "pain behaviors." Claimant advised Dr. Winfield that he preferred Dilaudid to Percocet. A drug screen was positive for marihuana. Dr. Winfield continued Claimant's work

restrictions and prescribed Percocet 5-325 mg tabs 1 po every six hours and a Butrans 10 MCG/HR patch to be changed every seven days.

7. Claimant credibly explained that when he underwent treatment by Dr. Winfield in April 2013 he had a "dependency problem" with narcotic medication and this problem led him to report high pain levels. Claimant's testimony is corroborated by Dr. Winfield's March 13, 2013 report in which he noted Claimant should quickly be weaned off narcotics.

8. Claimant credibly testified that after the spring of 2013 he did not undergo any further medical treatment for his left shoulder and that his treating physicians "green lighted" him to return to work. Claimant's testimony is corroborated by the absence of any medical documentation showing that he sought medical treatment for his shoulder between the spring of 2013 and August 2014. Claimant's testimony is further corroborated by witness Robert Femyer. Femyer credibly testified that on Claimant's first day of work for the Employer that he went out to lunch with Claimant. During the lunch Claimant described the 2012 MVA and consequent injury to his left shoulder. However, Femyer recalled that Claimant stated he was "okay" afterwards and everything was good.

9. Claimant's duties at the Employer's business included cleaning the shop, driving or pushing cars in and out of the shop and acting as "a kind of apprentice" in the transmission repair business.

10. Claimant credibly testified as follows. On August 12, 2014 John Hanson (Hanson), a supervisor, directed Claimant to remove the transmission pan on a Dodge truck. Claimant drove the truck onto a lift that raised the truck overhead. He held a 20 pound transmission pan over his head with his left hand while removing bolts with his right hand. His left hand and arm were held overhead for approximately 30 minutes. After Claimant showed the contents of the transmission pan to Hanson Claimant was instructed to replace the pan in preparation for removing the entire transmission. Claimant again held the pan overhead with his left arm while tightening bolts with the "impact" in his right hand. While performing this activity he began to experience "a problem in the back of the shoulder and down the arm." He did not immediately report an injury to Mr. Hanson because he "hoped it was just a simple sprain" and that it would pass.

11. Claimant's testimony that he experienced the onset of pain while holding the transmission pan overhead is corroborated by Hanson's testimony. Hanson stated he was Claimant's supervisor and was working with Claimant on August 12, 2014. Hanson recalled that Claimant took a transmission pan off of a vehicle and then was instructed to put it back on. Claimant then tried to hold the pan with one hand and reattach it to the vehicle with the other hand. Claimant then came to Hanson and said he couldn't get the pan back on because it was too heavy. Hanson recalled the Claimant said "he could not support the pan; that his shoulder was hurting." As a result Hanson showed Claimant how to use a "transmission jack" to raise the pan into position. Claimant then completed reattachment of the pan and continued work.

12. Claimant testified that on August 14, 2014 he told Hanson that he was having pain in his shoulder form working on the Dodge truck and wanted to see a doctor. According to Claimant he told Hanson that if "it" was "something small like a strain" he would use his own health insurance but if "it" required x-rays or specialist treatment he "would use Workers' Comp."

13. Hanson testified that on August 14, 2014 Claimant advised him he was going to have his shoulder looked at "on his own dime" but never mentioned workers' compensation. Hanson said he would not have agreed to a workers' compensation claim because he was aware of Claimant's prior shoulder injury and he knew no injury occurred while Claimant was working for Employer. Hanson explained he knew there was no "injury" at work because "no traumatic event" happened such as something falling and striking the Claimant. Hanson said he did not learn claimant was going to file a claim until sometime later when an MRI was requested.

14. On August 14, 2012 Claimant reported to UCHealth Longmont Clinic where he was examined by Marie Bush, M.D. Claimant gave a history of injuring his shoulder "48 hours ago" when he was working overhead and developed a "sharp pain in the left shoulder." Claimant advised Dr. Bush that he then "dropped the transmission pan that weighed about 30 pounds." Claimant told Dr. Bush about the 2012 MVA and that he underwent a left labral repair. Claimant reported that his current pain was similar to the pain he experienced after the MVA. Claimant expressed fear he would lose his job if was unable to work. On examination Dr. Bush noted Claimant could abduct his shoulder to 90 degrees and that external rotation was poor. There was tenderness over the posterior aspect of the left shoulder. Dr. Bush assessed a "left rotator cuff sprain" and she restricted Claimant to no use of the left arm at work. Dr. Bush prescribed ibuprofen and ice.

15. On August 18, 2014 Dr. Bush again examined Claimant. Dr. Bush maintained the diagnosis of "left rotator cuff strain" and referred Claimant for an orthopedic evaluation by "Dr. Wood." Dr. Bush restricted Claimant to no reaching above shoulder level with the left arm and no lifting greater than 15 pounds with the left hand.

16. Orthopedist Peter Wood, M.D., examined Claimant on August 20, 2014. Claimant gave a history of the 2012 MVA and produced medical records detailing the consequent arthroscopic surgery to his left shoulder. Claimant also reported that on August 12, 2012 he was lifting a heavy "oil pan with his left hand and bolting it back with his right." Claimant reported he "slowly developed discomfort in his shoulder following this work" and the pain became "much worse over the past week." Dr. Wood assessed "left shoulder pain of unclear etiology" and referred Claimant for an MRI.

17. On August 29, 2012 Dr. Wood reviewed the MRI and assessed "shoulder joint pain" and "derangement of shoulder joint." Dr. Wood opined it "would be prudent to proceed with a trial of physical therapy." Dr. Wood opined that not all of Claimant's pain was related to the small labral tear.

18. On September 16, 2014 Dr. Bush examined Claimant. She noted tenderness over the "anterior shoulder joint" with rood but painful range of motion. Dr. Bush stated Claimant's workers' compensation claim had been denied by Employer and that he was paying for physical therapy (PT) and the MRI out of his own pocket. Dr. Bush referred Claimant for 8 additional PT sessions. Dr. Bush also transferred Claimant's care to Mindy Gehrs, M.D.

19. On September 19, 2014 Dr. Gehrs, a specialist in physical medicine and rehabilitation, examined Claimant. Claimant gave a history that on August 12, 2014 he was at work and "having to put force up above his head for a long period of time and he started to develop tightness and discomfort in his shoulder." Claimant also advised Dr. Gehrs of the 2012 MVA and consequent surgical repair of the labrum in October 2012. Claimant told Dr. Gehrs that after the surgery he lost about "10% of his motion" and he would "occasionally" experience "some soreness, tightness, grinding and popping, but generally he just needed to use ibuprofen once or twice a week." Claimant further advised that when he was released from the 2012 injury "he was told that he could really do anything and did not have any significant restrictions." Dr. Gehrs assessed the following: (1) Left shoulder pain, prior labral tear with current MRI revealing new or residual superior labral tear; (2) Myofascial shoulder pain; (3) Possible central sensitization. Dr. Gehrs prescribed tramadol, cyclobenzaprine and continued PT. Dr. Gehrs opined there is a myofascial component to Claimant's pain and opined he might benefit from trigger point injections.

20. On October 22, 2014 Dr. Gehrs again examined Claimant. Claimant reported that a majority of his pain was gone and he was not using medications. On examination Dr. Gehrs found no significant tenderness and normal range of motion in the left shoulder. She assessed "left shoulder pain and impingement with history of previous labral tear." Dr. Ghers "suspected" Claimant "just had flare in his shoulder from the past, likely related to overhead activity, which does put more stress on the shoulder." Dr. Gehrs predicted Claimant would be "at MMI in about a month and recommended that he do one physical therapy a week for the next four weeks and continue with his home exercise program."

21. Claimant proved it is more probably true than not that on August 12, 2014 he sustained a compensable injury to his left shoulder. The credible and persuasive evidence establishes that it is more probably true than not that Claimant sustained an injury to his left shoulder arising out of and in the course of his employment. Specifically, Claimant proved that although he had a pre-existing left shoulder condition that condition was aggravated by holding a transmission pan overhead with his left arm for approximately 30 minutes. Further, Claimant proved it is more probably true than not that the aggravation caused a need for medical treatment.

22. In reaching these conclusions the ALJ credits Claimant's testimony that he did not need or obtain any treatment for the 2012 shoulder injury after April 2013 until August 2014. The record contains no credible or persuasive medical records showing that Claimant ever sought treatment for the left shoulder from April 2013 to August 2014. Further, claimant's testimony is corroborated by the testimony of Mr. Femyer and

is consistent with the history he gave to Dr. Gehrs. In this regard the ALJ notes Claimant never sought to conceal the 2012 MVA or the resulting left shoulder injury. Rather, he consistently reported the MVA and surgery to his providers.

23. Claimant credibly testified he experienced the onset of discomfort and pain in his left shoulder while holding the 20 pound transmission pan overhead with his left arm and tightening bolts with his right hand. Claimant's testimony is corroborated by Mr. Hanson's testimony that on August 12, 2014 he was working with Claimant and Claimant told him he had trouble holding the pan overhead and experienced pain in his shoulder. As a result Hanson assisted Claimant by demonstrating use of the transmission jack.

24. Respondents' argument notwithstanding, Claimant's testimony is also largely, albeit not entirely, consistent with the histories he provided to Dr. Bush, Dr. Wood and Dr. Gehrs. Generally Claimant related to these physicians that he experienced the onset of left shoulder pain and discomfort while holding the transmission pan overhead on August 12, 2014. The ALJ is not persuaded that a few inconsistencies in the histories provided to these physicians are so significant that they discredit the Claimant's overall testimony concerning the events of August 12, 2014.

25. The opinions of Dr. Gehrs are credible and given substantial weight. The ALJ interprets Dr. Gehrs's opinion to be that Claimant's activity in performing overhead activity at work on August 12, 2014 caused an aggravation of his pre-existing shoulder condition. Further, Dr. Gehrs is of the opinion that this aggravation warranted medical treatment including medication and physical therapy. The opinion of Dr. Ghers is corroborated by the credible opinion of Dr. Bush. Dr. Bush was aware of Claimant's pertinent history including the 2012 MVA and subsequent labral repair. Despite Claimant's history, on August 14, 2014 Dr. Bush diagnosed a "left rotator cuff sprain" and prescribed treatment and restrictions.

26. Respondents did not present nor do they cite any credible or persuasive medical opinion sufficient to refute the opinions of Dr. Gehrs and Dr. Bush. Only Dr. Wood questioned the etiology of Claimant's shoulder symptoms and he never offered a clear and well reasoned opinion sufficient to refute Dr. Ghers and Dr. Bush.

27. 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

Claimant contends that a preponderance of the evidence establishes it is more probably true than not that he sustained a left shoulder injury arising out of and in the course of his employment and that the injury was proximately caused by the performance of the employment. Respondents argue the evidence fails to establish that Claimant sustained an aggravation or acceleration of his preexisting left shoulder condition. In connection with this argument Respondents assert Claimant's testimony is not credible and that the opinions of his providers are not credible because they are based on an inaccurate history. The ALJ agrees with Claimant.

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. 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). The question of whether Claimant met the burden of proof to establish a compensable injury 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).

An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires Claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is

sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Pain is a "typical symptom" caused by the aggravation of a pre-existing condition. However, an "incident that merely elicits symptoms caused by a pre-existing condition does not compel a finding that the clamant sustained a compensable aggravation." *Miranda v. Best Western Rio Grande Inn,* WC 4-663169 (ICAO April 11, 2007).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As determined in Findings of Fact 21 through 26. Claimant proved it is more probably true than not that he sustained an injury arising out of and in the course of his employment, and that the injury was proximately caused by the performance of his duties. The ALJ credits Claimant's testimony that he experienced an onset of discomfort and pain while holding the transmission over his head while at work on August 12, 2014. The ALJ infers from Claimant's testimony and the credible opinion of Dr. Gehrs that the injury consisted of an aggravation of Claimant's pre-existing shoulder condition resulting from the 2012 MVA. As found, Dr. Ghers credibly opined that overhead activity puts stress on the shoulder and in this case probably aggravated Claimant's preexisting condition so as to increase his pain and necessitate medical treatment. The opinions of Dr. Gehrs are corroborated by credible opinions of Dr. Bush.

The issue presented to the ALJ was limited to "compensability" of the claim. No award of specific medical or indemnity benefits was requested. Consequently the award of specific benefits is not addressed by this order and is reserved for future determination.

ORDER

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

1. On August 12, 2014 Claimant sustained a compensable injury proximately caused by the performance of service arising out of and in the course of his employment.

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: July 30, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

1. Whether the ongoing medical maintenance care being provided by Byron Jones, M.D. consisting of ongoing trigger point injections, opioids, and a muscle relaxant constitutes reasonable and necessary medical maintenance care for the Claimant's January 7, 2002 industrial injury.

2. Whether the Respondents' request to change physicians should be granted.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Claimant sustained a compensable industrial low back injury on January 6, 2002 when he slipped and fell at work (Respondents' Exhibit I, p. 152).

2. The Claimant was placed at maximum medical improvement on September 15, 2004 by the Division Independent Medical Examiner, Erasmus Morfe, M.D. (Respondents' Exhibit G).

3. The Claimant had sustained a prior low back injury in 1992 and has been under the care of Byron Jones, M.D. for approximately 23 years total. Dr. Jones has also been the primary treating physician for the last 13 years for the January 7, 2002 industrial injury.

4. The Claimant failed conservative care management and underwent an L-5 decompression with fusion at L5-S1 with Dr. Jatana on October 16, 2003. Dr. Jones testified credibly and persuasively that, although the surgical intervention was appropriate, ultimately, the Claimant did not have a good result overall.

5. Dr. Jones testified at hearing that he has been treating the Claimant for chronic pain since the Claimant was placed at maximum medical improvement in 2004. He testified that the Claimant would have some periods of improvement, but also times when the Claimant was essentially bedridden. He testified that over the course of treatment, many different modalities have been tried with the overriding concern of achieving a better level of function for the Claimant. He testified that he attempts to reach a balance with the Claimant's medication and treatment so that the Claimant is not under-medicated nor over-medicated and the follow-up focuses on what the Claimant is able to do function-wise in his activities of daily living.

6. Dr. Jones is not Level II accredited, but testified that he is aware of the Colorado Medical Treatment Guidelines. He testified that the Claimant's care was initially within the Medical Treatment Guidelines, but after a certain point in this case, he found it necessary to exceed the Guidelines in terms of the numbers of trigger point injections provided and the sites injected. Over the course of care, Dr. Jones testified that, at times, he has tried to decrease the frequency of injections but this has resulted in increased pain and significantly decreased function for the Claimant. Dr. Jones further testified that the trigger point injections are combined with an active exercise approach, self-directed pain management and medical management of opioid prescriptions.

7. Dr. Jones acknowledged that under the Medical Treatment Guidelines, the maintenance duration for injection therapy is not more than four injections per session, not to exceed four sessions per 12 month period (Respondents' Exhibit J, p. 263). Dr. Jones disagrees with this recommendation in this case and believes the Claimant is a "unique" case and requires eight injection sites every six weeks. Under the Medical Treatment Guidelines, if patients are provided with trigger point injections they should be reassessed after each injection session for an 80% improvement in pain and evidence of functional improvement for three months. Dr. Jones acknowledged that there is no documentation in the medical records of 80% improvement in pain or functional improvement for three months as the injections are provided every six weeks (Respondents' Exhibit J, p. 201).

8. Dr. Jones specifically acknowledged that his care and treatment for the Claimant exceeds the recommended treatment under the Medical Treatment Guidelines, but argues that, in this case, the treatment beyond the Guidelines boundaries is warranted. Dr. Jones performs trigger point injections on the Claimant every six weeks and when these injections are performed he injects eight sites. Over the course of care in this case, Dr. Jones has determined that the Claimant gets 6 weeks of good relief, after which the Claimant has a significant increase in pain and would come in to the office "writhing in pain."

9. Dr. Jones opined that the trigger point injections provided in excess of the Medical Treatment Guidelines is reducing the need for opioid medications and the potential need for having to increase the dosage of these medications. He believes that the Claimant is "not addicted" to the injections, but is physically dependent on such injections. The Claimant's level of opiates have not changed in the last 11 years and his use of opiates has not decreased with the ongoing trigger point injections being provided by Dr. Jones. However the use of opiates has not increased significantly either.

10. Dr. Jones does not follow Rule 16 or the Medical Treatment Guidelines in providing trigger point injections. He does not request preauthorization for the injections. According to Dr. Jones, he provides his office notes to the insurance company and he felt that this was a way that the insurance carrier would be apprised of his medical treatment of the Claimant. Dr. Jones also testified that "when Claimant comes in he is likely going to need trigger point injections."

11. An MRI was performed on January 20, 2015 (Respondents' Exhibit B). Dr. Jones opined that this showed a "worsening" at the L4-5 segment. His office notes reflect a potential referral to a surgeon but Dr. Jones has not made any referral for a surgical evaluation since January of 2015. The ALJ finds that the Respondents have not denied any written request from Dr. Jones for a surgical referral.

12. Dr. Jones has prescribed Skelaxin, a muscle relaxant, for over 13 years. He has opined that the Claimant obtains "functional benefit" from such medication and that since this is not a scheduled drug, it has a far lower risk than opiates. Dr. Jones specifically opined that he prefers Skelaxin to Flexeril because it is less sedating and allows for increased function.

13. According to Dr. Jones, the Claimant follows instructions and has been extremely compliant. However, Dr. Jones acknowledged that the Claimant utilizes marijuana and that Dr. Jones does not agree with this. `

14. Dr. Jones testified that the Claimant does not receive long-term, lasting relief from the injections. If the Claimant is not a surgical candidate, Dr. Jones intends to continue the same treatment program consisting of trigger point injections, opiates, muscle relaxant, and physical therapy. In the future Claimant may be referred for stem cell therapy or a spinal stimulator. Dr. Jones testified that he does not like to perform trigger point injections every six weeks because he is aware of the risks. However, Dr. Jones testified that, at the current time, this is the best treatment option for the Claimant of which he is aware.

15. The Claimant was evaluated by Joel L. Cohen, Ph.D. on July 22, 2013. Dr. Cohen's clinical impressions and recommendations were:

> Diagnostically, the information rendered thus far would suggest: Pain Disorder with a General Medical Condition and Psychological Factors (307.89) and Adjustment Reaction with Depressed Mood (309.00). I consider both to be injury related. More broadly, [the Claimant's] presentation now 11 years post-injury is also consistent with what we see as a behavioral chronic pain syndrome in the fact of significant injury and substantial ongoing pathophysiology. Clearly, much of the medical care he receives at this point is supportive and it is unclear to the extent that it increases his level of function. He has certainly not had psychological care since the injury and I think 8-10 behaviorally based psychotherapy would be beneficial if only to introduce cognitive behavioral techniques to stabilize his mood, diminish his depression and also address the possibility that he might engage in avoidant pain behavior (Respondents' Exhibit E, pp. 130-131).

16. The Claimant has been evaluated by John J. Aschberger, M.D. on numerous occasions since he was placed at maximum medical improvement. On March

25, 2013 Dr. Aschberger noted that there had been continued utilization of trigger point injections by Dr. Jones with no clear justification regarding the necessity of the injections for maintenance purposes other than from the Claimant regarding deterioration in his condition with attempts at tapering out the injections. Dr. Aschberger indicated that "there may be a pain avoidance/fear issue going on, and some psychological support and intervention may be helpful in terms of further weaning of treatment. It is unlikely that Mr. Sanchez will willingly taper down." (Respondents' Exhibit F, p. 133).

17. From November 20, 2013 to January 27, 2014, the Claimant treated with Amy Milkavich, Psy.D., and, per Dr. Cebrian's October 13, 2014 report, the Claimant's mood was significantly improved and he was more socially engaged over the course of the psychological treatment. There was no discharge summary provided, it was simply noted that the last note available was from January 27, 2014 (Respondents' Exhibit D, p. 109).

18. Dr. Carlos Cebrian evaluated the Claimant on August 28, 2014 and issued a detailed report dated October 13, 2014 (Respondents' Exhibit D). Dr. Cebrian is Level II accredited. Dr. Cebrian testified at hearing that, subsequent to his independent medical examination, he had also had the opportunity to review the updated medical records and hear the testimony of Byron Jones, M.D.

19. Dr. Cebrian testified that he agrees that the Claimant does require long-term care and medications. However, he testified that the ongoing care and treatment provided by Dr. Jones consisting of trigger point injections, ongoing physical therapy, and use of a muscle relaxant, is not reasonable and necessary medical care under the Medical Treatment Guidelines.

20. According to Dr. Cebrian, chronic use of any muscle relaxant, including Skelaxin, is not recommended under the Medical Treatment Guidelines due to their habit-forming potential, seizure risk following abrupt withdrawal, and documented contribution to deaths of patients on chronic opioids due to respiratory depression. In this case, the Claimant has been on chronic opioids for over 20 years. Therefore, he believes that Skelaxin is an inappropriate medication for the Claimant in combination with sedating opioids. Dr. Cebrian believes that the opiates are more beneficial than the Skelaxin and that the combination of medications creates a dangerous situation. Dr. Cebrian testified that muscle relaxants should only be used for acute situations and never for chronic pain. He recommended that the Claimant be weaned from the Skelaxin over a 30 day period under the supervision of a physician. Dr. Cebrian recommended Flexeril instead of Skelaxin, that, over time, would be tapered down.

21. Dr. Cebrian has reviewed the complete medical records in this matter dating back to 1994. He testified that these records reflect that the Claimant has been receiving trigger point injections to his thoracic and lumbar spine since 1994. Under Medical Treatment Guidelines Rule 17 regarding trigger point injections, Dr. Cebrian testified that there are certain guidelines that must be followed in terms of trigger point injections. Patients should be reassessed after each injection section for an 80%

improvement in pain as well as evidence of functional improvement for three months. The Claimant has not had an 80% improvement in evidence of functional improvement for three months from the trigger point injections. Not only has he not returned to baseline function or had any increased activities, the trigger point injections have not decreased the use of the opioid medications in Dr. Cebrian's opinion. Dr. Cebrian notes that the injections have been going on since 1996 and do not constitute a recent phenomenon to maintain Claimant's condition. In addition, there is no documentation in Dr. Jones' records that he has ever attempted to increase the periods of time between injections. Dr. Cebrian has opined that it is not medically probable that the need for trigger point injections in the thoracic and lumbar spine is related to the January 7, 2002 industrial injury. Dr. Cebrian indicated that under the Medical Treatment Guidelines, a patient should never receive injections to more than four areas. Under maintenance care, trigger point injections should only be provided four times per year with four injection sites. Dr. Jones has been injecting eight sites at one time, every six weeks. Dr. Cebrian indicated that this is not appropriate nor reasonable and necessary maintenance care.

22. In terms of other potential treatment modalities, Dr. Cebrian testified that he agrees with Dr. Aschberger that the continued trigger point injections and use of passive treatments is creating reliance in the Claimant. He opined that physical therapy can be appropriate in maintenance care, but it is not in this case. Dr. Cebrian testified that regular, self-directed exercise is the best form of therapy for chronic pain, including specific exercises to achieve a sustained, elevated heart rate. Dr. Cebrian testified that the new MRI findings were not unexpected and he was surprised the changes were not worse. However, he does not recommend a surgical consult and does not believe the changes are significant to necessitate a second surgery, especially as the first surgery was not successful.

23. In rebuttal testimony, Dr. Jones addressed some of the points discussed by Dr. Cebrian. He opines that a surgical consult is appropriate as there are objective findings and indicators of discogenic pain. In terms of the Claimant's exercise regimen, Dr. Jones testified that spine specific stability exercises are addressed but the Claimant is not yet at a point to receive benefit from aerobic exercises.

24. Rule 17-2(A) provides that all healthcare providers shall use the Medical Treatment Guidelines adopted by the Division. Rule 17-2(B) provides that payers shall routinely and regularly review claims to ensure that care is consistent with the Division's Medical Treatment Guidelines.

25. Rule 16-5(A) provides that in cases where treatment falls within the purview of a Medical Treatment Guideline, prior authorization for payment is unnecessary. However, in cases in which the treatment deviates from the Guidelines, the provider must request care and follow the procedures for prior authorization in Rule 16-9. Dr. Jones testified that he has not requested preauthorization for the treatment or the medication usage, although he is aware his treatment exceeds the recommendations in the Medical Treatment Guidelines.

26. C.R.S. § 8-43-501(2)(a) provides that, “an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider.” Per C.R.S. § 8-43-501(2)(b), “prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) “when an insurer, self-insured employer, or claimant requests utilization review, no other party shall request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate.

27. Rule 10-1(A) provides that “a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, “the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure.”

28. The ALJ finds that Dr. Jones has the Claimant’s best interests in mind and that Dr. Jones, as the physician who has treated the Claimant over many years, is in a strong position to understand the Claimant’s ongoing medical maintenance needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections beyond the recommendations in the Medical Treatment Guidelines is not optimal, but he reasonably believes that it is the best available option for the Claimant’s pain management at this time. However, Dr. Jones is not following the rules of the workers’ compensation system. His treatment is beyond the Medical Treatment Guidelines recommendations and yet he is not seeking prior authorization for this treatment. By bypassing the prior authorization procedure, he is prohibiting additional input from other physicians.

29. The Respondents have not requested a review of services by Dr. Jones per the utilization review process authorized by the statute and the Rules. This is an avenue by which the Respondents could obtain additional input from other physicians as to whether the medical services provided by Dr. Jones are reasonably necessary as medical maintenance treatment and by which the Respondents’ request for change of physician (which is effectively seeking a de-authorization of Dr. Jones) could be addressed.

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.

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

Medical Benefits

Medical Maintenance Treatment after MMI and Respondents' Request for Change of Physician

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).

The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). 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).

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).

A change of physician can be requested by a claimant pursuant to C.R.S. 8-43-404(5)(a)(III) or (IV). However, nothing in these provisions authorizes Respondents to seek a change of physician. Rather, a medical utilization review is the process by which a medical provider's course of treatment of a claimant can be examined to determine its reasonableness. To the extent that Respondents seeks a "change of physician," Respondents are essentially seeking to de-authorize a treating physician and this would be governed by the medical utilization review process. *Franz v. Industrial Claim Appeals Office,* 250 P.3d 755 (Colo. App. 2010); *Garner v. Town of Ignacio,* W.C. 4-288-201 (ICAO October 5, 2001). C.R.S. § 8-43-501(2)(a) provides that, "an insurer, self-insured employer, or claimant may request a review of services rendered pursuant to this article by a health care provider." Per C.R.S. § 8-43-501(2)(b), "prior to submitting a request for a utilization review pursuant to this section, an insurer, self-insured employer, or claimant shall hire a licensed medical professional to review the services rendered in the case. A report of the review shall be submitted with all necessary medical records, reports, and the request for utilization review. Under § 8-43-501(2)(e) "when an insurer, self-insured employer, or claimant requests utilization review, no other party shall

request a hearing pursuant to C.R.S. § 8-43-207 until the utilization review proceedings have become final, if such hearing request concerns issues about a change of physician or whether treatment is medically necessary and appropriate. Rule 10-1(A) provides that "a party shall request a utilization review by filing the Request for Utilization Form (request form) with the Division Utilization Review Coordinator. The request form must be the one prescribed by the Division, but a duplicated or reproduced request form may be used as long as it is an exact version of the original in both appearance and content. Subsection (B) states, "the provider under review shall remain as an authorized provider for the associated claimant during the medical utilization review process. The provider shall continue to submit bills for services rendered to the associated claimant during the review period and the insurance carrier shall continue to pay the provider's bills as provided in these rules of procedure."

All medical providers in this matter agree that some degree and level of ongoing medical maintenance care is reasonable and necessary for the Claimant. Dr. Jones has expressed a level of frustration with the system and believes that the workers' compensation system hampers his treatment of the Claimant. However, the ALJ finds that the care that is being provided is under the workers' compensation system and this system holds the Respondents responsible for payment of the medical care but provides Respondents with the opportunity to challenge specific medical treatment, and the Claimant must prove that the treatment is reasonably necessary.

Over the course of his treatment of the Claimant, Dr. Jones has failed to comply with the Medical Treatment Guidelines and is not following the rules of the workers' compensation system and this has the effect of preventing the Respondents from one of the various avenues by which they can evaluate ongoing medical treatment to ensure it is appropriate. Physicians are required to use the Medical Treatment Guidelines per Rule 17-1(A). In cases that require deviation, the physicians should follow the request for preauthorization. The ALJ finds that this process would benefit all parties. Dr. Jones should follow the prior authorization process which will allow additional input on the care and treatment being provided to the Claimant.

While the ALJ finds that Dr. Cebrian performed a thorough and extensive review of the medical records and provided additional insight and guidance for the Claimant's medical treatment and the ALJ also finds that Dr. Jones' treatment has exceeded the Medical Treatment Guidelines, the ALJ declines to order a change in physician. The ALJ is uncomfortable making what is essentially a medical decision without the benefit of the utilization review process that the Respondents have not initiated. The Respondents have cited no legal authority to support a change of physician in the manner in which they are seeking, nor have Respondents provided any rationale for failing to comply with C.R.S. § 8-43-501(2)(a) and Rule 10-1(A) to seek a utilization review.

In weighing the conflicting evidence and opinions presented at the hearing, it was found that, as the physician who has treated the Claimant over many years, Dr. Jones is in a stronger position to understand the Claimant's ongoing medical maintenance

needs, as well as what treatments have worked and which have not. Dr. Jones clearly recognizes that the trigger point injections he is performing are beyond the recommendations in the Medical Treatment Guidelines and that this is not optimal. Nevertheless, he reasonably believes that this the best available option for the Claimant's pain management at this time, along with the prescription of Skelaxin as a muscle relaxant and he persuasively opined that these treatments are necessary for the Claimant to maintain his level of function. The Claimant has established that these ongoing medical treatments are reasonably necessary as ongoing maintenance care in this case.

Although the ALJ does not find that the Claimant's care and treatment should be changed at this time, the ALJ finds that the Claimant would benefit from other evaluations with respect to ongoing treatment. The ALJ finds that the Claimant would benefit from a psychiatric evaluation to determine if there are other factors and treatment that must be considered. The ALJ also finds that the Claimant should be provided with an independent medical examination by a chronic pain specialist or another physician to evaluate the modalities being provided by Dr. Jones. These doctors should weigh in on whether the treatment plan being provided by Dr. Jones constitutes reasonable and necessary medical care and recommend additional treatment modalities to consider.

ORDER

It is therefore ordered that:

1. The Respondents' request to change physicians is denied.

2. Respondents shall provide a list of three psychiatrists to perform an independent psychiatric evaluation of the Claimant. The Claimant shall choose a psychiatrist from the list and Respondents shall be responsible for the cost of the examination.

3. Respondents shall provide a list of three chronic pain specialists or other type of physician to perform an independent medical evaluation of the Claimant. Claimant shall choose a physician from the list and Respondents shall be responsible for the cost of the examination.

4. Dr. Jones shall comply with the Medical Treatment Guidelines and Rule 16 in requesting preauthorization for any medications or treatment outside of the Colorado Medical Treatment Guidelines.

5. Respondents shall be liable for the post-MMI medical treatment consisting of trigger point injections and muscle relaxants prescribed by Dr. Jones that is reasonably necessary to maintain the Claimant's MMI status, subject to the above limitations. Respondent shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation.

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, 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: August 27, 2015

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he is entitled to platelet-rich plasma (PRP) injections as a form of post maximum medical improvement (MMI) treatment.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to continued prescriptions for Horizant as a form of post MMI treatment.

FINDINGS OF FACT

1. On June 28, 2006 Claimant sustained an admitted industrial injury while working as a superintendant. Claimant was standing on a two story stone window ledge, holding onto a gutter with his right hand, when a piece of window frame gave way and caused him to fall to the ground.

2. Claimant blacked out. Claimant suffered many serious injuries as a result of the fall including: fractured skull/closed head injury, multi fracture of his right wrist, fracture of his left wrist, right eye injury, nasal fracture, cracked teeth, partial tear of right rotator cuff, and partial tear of left rotator cuff with impingement. Claimant also suffered psychological issues as a result of the injury, extensive treatment, and inability to work.

3. On August 30, 2006 Phillip Stull, M.D. evaluated Claimant. Dr. Stull noted Claimant had complaints of anterior pain in his left shoulder, worsened with overhead positions. Dr. Stull reviewed an MRI of Claimant's left upper extremity performed on August 16, 2006. Dr. Stull noted post traumatic bursitis, impingement, and tendonitis of the left shoulder and noted Claimant had a type II acromion and mild AC joint arthritis. *See* Exhibit 7.

4. On January 10, 2007 Dr. Stull evaluated Claimant. Dr. Stull noted that Claimant's left shoulder had mildly positive impingement signs. *See* Exhibit 7.

5. On July 27, 2007 Claimant underwent bilateral shoulder sonographic analysis performed by Scott Primack, D.O. Dr. Primack noted clinical limitations in strength in Claimant's bilateral shoulders. Dr. Primack opined that there was both clinical and sonographic evidence of bilateral partial thickness rotator cuff tears in both shoulders and of minimal bilateral impingement syndrome in both shoulders. *See* Exhibit 7.

6. On December 10, 2007 Claimant underwent right shoulder surgery that involved right shoulder arthroscopy with extensive debridement, open modified repair of the rotator cuff, acromioplasty and release of the CA ligament, and distal clavicle excision. *See* Exhibit 7.

7. On February 25, 2008 Claimant underwent an additional surgery on his right shoulder that involved right shoulder manipulation under anesthesia and arthroscopy with extensive debridement. *See* Exhibit 7.

8. On March 2, 2008 Felix Meza, M.D. evaluated Claimant. Claimant reported improved range of motion for his right shoulder and Dr. Meza advised Claimant to consider surgery for the left shoulder based on the outcome for the right shoulder. *See* Exhibit 7.

9. On October 21, 2008 Claimant was placed at MMI by Usama Ghazi, D.O. *See* Exhibit 7.

10. On June 17, 2009 Claimant underwent a Division Independent Medical Examination with Sander Orent, M.D. Dr. Orent agreed with the date of MMI and provided impairment ratings for Claimant's upper extremities, cervical spine, and psychological issues. *See* Exhibit 7.

11. On August 6, 2009 Dr. Meza evaluated Claimant. Claimant reported his left shoulder was stable with some discomfort and that he had the same amount of discomfort in his right shoulder as he did prior to surgery. *See* Exhibit 7.

12. From September 10, 2012 through November 5, 2012 Claimant was evaluated by PA Jennifer Voag and by Dr. Ghazi. Claimant reported his greatest pain was in his shoulders and that he was willing to consider surgery for his left shoulder. Claimant was referred again to Dr. Stull. *See* Exhibit 7.

13. On November 10, 2009 Respondents filed a Final Admission of Liability (FAL) admitting to an MMI date of November 6, 2008. The FAL admitted for medical maintenance care that was reasonable, necessary, and related.

14. On January 7, 2013 Dr. Stull evaluated Claimant for his bilateral shoulder pain. Dr. Stull noted Claimant's left shoulder had a painful arc and positive impingement signs. His impression was impingement, rule out rotator cuff tear. An X-ray of the left shoulder was performed and showed a large acromial spur. *See* Exhibit 7.

15. On February 11, 2013 Claimant was evaluated by PA Voag who noted Claimant had a partial tear of the left rotator cuff and a bone spur resulting in impingement. *See* Exhibit 7.

16. On June 24, 2014 Dr. Stull again evaluated Claimant for his left shoulder. Claimant reported continuing to have pain with overhead activities in the left shoulder. Dr. Stull noted that Claimant had a very long trial of conservative measures including injections and therapy in the left shoulder. Dr. Stull assessed partial cuff tear, impingement, and AC joint arthritis of the left shoulder. Dr. Stull discussed further conservative care versus surgical care. Claimant chose to pursue surgical care and Dr. Stull opined that surgical care was indicated due to persistent symptoms and the lack of definitive response to long-term conservative measures. *See* Exhibit 7.

17. On July 14, 2014 Jorje Klajnbart, D.O. performed a rule 16 assessment. Dr. Klajnbart opined that the request for left shoulder surgery was medically reasonable, necessary, and related to Claimant's June 28, 2006 injury. *See* Exhibit 7.

18. On December 9, 2014 Claimant was evaluated by Dr. Ghazi. Claimant reported he did not undergo left rotator cuff surgery with Dr. Stull because he was unable to take time off work and support his family. Dr. Ghazi discussed with Claimant the option of trialing platelet-rich plasma (PRP) injections to the left biceps tendon and left subacromial bursa/rotator cuff. Dr. Ghazi opined that between 1 or 2 sessions he should be able to significantly reduce and possibly fully alleviate Claimant's symptomatology forgoing the need for surgery.

19. Dr. Ghazi opined that the PRP injections could be done in office, would be far less expensive than surgery, and would only require 2 days off work versus surgery that would require 12 weeks off work. Dr. Ghazi noted that if the injections provide some relief, he could do a series of 2 or 3 PRP injection and that it was possible that would alleviate Claimant's symptomatology.

20. Dr. Ghazi also noted no scapular winging. Dr. Ghazi changed Claimant's prescription of gabapentin to horizant which he noted was a long acting gabapentin.

21. On December 16, 2014 Dr. Ghazi requested authorization for PRP injection under ultrasound to the left biceps tendon and subacromial bursa.

22. On December 18, 2014 the request was denied by Respondent. Carlos Cebrian, M.D. provided a Rule 16 assessment opinion supporting the denial. Dr. Cebrian noted that the utilization of PRP for shoulder pathology was not supported by scientific evidence at the time and that it was not addressed in the Colorado Division of Workers' Compensation Shoulder Injury Medical Treatment Guidelines. Dr. Cebrian thus opined that the PRP injection was not medically reasonable or necessary and should not be approved. *See* Exhibit 7.

23. On December 18, 2014 Dr. Cebrian also issued his report of an Independent Medical Examination (IME) that he performed on October 9, 2014. Dr. Cebrian opined that Claimant had sustained injuries to the bilateral shoulders, bilateral wrists, cervical spine, lumbar spine, and head and had also been treated for depression as part of the claim. Dr. Cebrian agreed with Dr. Klajnbart that surgery for Claimant's

left shoulder was medically reasonable, necessary, and related to the claim. Dr. Cebrian opined that there was evidence of a partial left rotator cuff tear with ongoing impingement syndrome. Dr. Cebrian noted that Claimant was on multiple medications that were sedating including gabapentin. Dr. Cebrian noted that Claimant was prescribed gabapentin for scapular neuritis in 2009 by Dr. Ghazi but that there was no current symptomatology of scapular neuritis or other post-traumatic neuropathy. Dr. Cebrian opined that gabapentin should be discontinued and that removing the sedative effects from gabapentin may assist in increasing Claimant's mood. Dr. Cebrian also again noted that PRP injections for shoulder pathology was not supported by scientific evidence, not addressed in the Colorado Division of Workers' Compensation Shoulder Medical treatment Guidelines, and was not medically reasonable or necessary. *See* Exhibit 7.

24. The Colorado Division of Workers' Compensation Shoulder Injury Medical Treatment Guidelines, Rule 17, Exhibit 4 effective February 1, 2015 included a section addressing PRP injections for shoulder pathology. The Guidelines indicate there is some evidence that in the setting of supraspinatus tendinosis or partial thickness tears…an injection of 3 ml of PRP has clinical benefits lasting up to six months. The Guidelines indicate there is good evidence that in the setting of rotator cuff tendinopathy, a single dose of PRP provides no additional benefit over saline injection when the patients are enrolled in a program of active physical therapy. The Guidelines also indicate the preponderance of the evidence suggests that PRP is not likely to have long term beneficial effects and that PRP is not generally recommended.

25. The Guidelines indicate PRP may be considered in unusual circumstances in cases with tendon damage and where persons have not responded to appropriate conservative measures and where the next level of guideline-consistent therapy would involve an invasive procedure with risk of significant complications.

26. The Guidelines also indicate that they are in place to set forth care that is generally considered reasonable for most injured workers but that reasonable medical practice may include deviations from the guidelines as individual cases dictate. The Guidelines and recommendations are for pre-MMI care and are not intended to limit post-MMI treatment.

27. Dr. Cebrian testified at hearing. Dr. Cebrian explained that the idea behind the PRP injection in this case is the hope that the injected platelets with growth factors will cause re-growth, regeneration, and healing of the tendon. He opined that the medical evidence to support this theory was limited, inconsistent, and not shown to have long term benefits.

28. Dr. Cebrian opined that Claimant's left shoulder has impingement syndrome, partial rotator cuff tear, arthritis, and bone spurs. He noted that part of Dr. Stahl's proposed surgery would take out part of the clavicle and clear out the bone spurs to create more space in Claimant's shoulder to relieve Claimant's impingement.

Dr. Cebrian opined that the proposed surgery would improve Claimant's range of motion and pain.

29. Dr. Cebrian opined that Claimant's bone spurs at the AC joint were causing Claimant's tendon inflammation and impingement. Dr. Cebrian opined that even if the PRP injection helped the partially torn rotator cuff tendon regenerate and heal, it won't alleviate Claimant's impingement or create more space in the shoulder. Rather, he opined that the tendon will still be impinged because of the bone spurs.

30. Dr. Cebrian acknowledged that the Guidelines were not intended to limit post MMI treatment and that deviation from the Guidelines can be appropriate for some cases. However, Dr. Cebrian opined that in this case the injections will not alleviate Claimant's symptomatology and opined that the PRP injections were not reasonable or necessary treatment.

31. Dr. Cebrian also opined that Claimant currently has no objective evidence of neuropathy, that neuropathy can go away on its own after a period of time, and that it was reasonable to taper Claimant off the Horizant over a period of 4-6 weeks.

32. Dr. Cebrian is found credible and persuasive. His medical opinions are comprehensive, consistent with diagnostic studies noted throughout Claimant's treatment, and are consistent with recommendations made by Dr. Klajnbart and Dr. Stull.

33. The opinion of Dr. Ghazi is not as credible or persuasive. Dr. Ghazi does not provide a comprehensive analysis of the proposed PRP injections and how they will impact Claimant's specific left shoulder pathology, and do not provide sufficient support to show that PRP injections are reasonably needed.

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 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). An award for ongoing medical benefits after MMI 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. Thus an award of post-MMI 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).

PRP Injections

Claimant has failed to meet his burden of proof to establish an entitlement to PRP injections for his left shoulder. The PRP injections have not been shown to be reasonably needed to cure and relieve Claimant from the effects of his injury. The testimony of Dr. Cebrian is found credible and persuasive that the PRP injections will not relieve Claimant from his current symptoms nor will they, even if successful, cure or relieve the problems in Claimant's left shoulder. Dr. Cebrian credibly points to the bone spurs on the AC joint as a cause of Claimant's impingement and the large bone spurs were noted on diagnostic studies. The ALJ finds Dr. Cebrian credible that even if the PRP injection is successful in regeneration of the tendon, the regenerated tendon will still be impinged and Claimant's symptoms will not be cured or relieved by the PRP injection.

Further, Claimant has failed to show that PRP injections are reasonably needed in this case. The ALJ agrees with Claimant's arguments that the Medical Treatment Guidelines are not intended to limit post MMI maintenance care, nor are they required to be followed explicitly. However, the Guidelines do provide guidance on generally accepted medical practices. Although the Guidelines indicate that there is some evidence that with a partial thickness tear a PRP injection may have benefits lasting up to six months, the Guidelines note that a preponderance of the evidence suggests that PRP injections are not likely to have long term beneficial effects and that they are not generally recommended. Further, neither the guidelines nor any medical provider has indicated that PRP injections are likely to be successful when the shoulder pathology includes the type of impingement (bone spurs, type II acromion) that Claimant's pathology demonstrates in addition to his partial rotator cuff tear. The Guidelines do not indicate that PRP injections can cause relief of bone spurs, or create more space in the shoulder to relieve impingement, nor has a medical provider given such an opinion. Dr. Cebrian credibly opined that the PRP injections, given Claimant's shoulder pathology, will not cure and relieve his symptoms. Dr. Cebrian's opinion that Claimant actually needs surgery to cure and relieve the effects of his injury and to relieve his symptomatology is credible, persuasive, and supported by the recommendations of Dr. Stull and Dr. Klajnbart. Although the ALJ understands Claimant's hesitation to undergo left shoulder surgery given Claimant's past complications with right shoulder surgery and given his financial considerations, there is insufficient evidence to support that the less invasive PRP injections are a reasonable solution or that they will cure or relieve the effects of Claimant's injury.

Dr. Ghazi's request for PRP injections and his opinions do not support a conclusion that the injections are reasonable and necessary to relieve the effects of Claimant's injury. At the December 9, 2014 appointment, Dr. Ghazi initially noted that Claimant was unable to take time off work for left shoulder surgery. Dr. Ghazi then discussed trialing PRP injections. He indicated that he should be able to significantly reduce and possibly fully alleviate Claimant's symptomatology. Although he would like to trial the PRP injections and his opinion presents some evidence as to what the PRP injections should or possibly could do, his opinion is not as detailed or comprehensive as that of Dr. Cebrian. Dr. Ghazi's opinion fails to address the bone spurs and impingement shown by diagnostic studies or how the PRP injections would work despite

this pathology. Thus, after reviewing all the medical documentation, evidence, and testimony, the ALJ concludes that Claimant has failed to meet his burden. The opinion of Dr. Cebrian is found more credible and persuasive than that of Dr. Ghazi as Dr. Cebrian's opinion is more comprehensive, addresses the documented impingement and bone spurs, and is supported by the opinions of two other providers that Claimant truly needs surgery and not injections to cure and relieve the effects of his injury.

Horizant

Claimant has also failed to meet his burden of proof to establish an entitlement to continued prescriptions of gabapentin/Horizant. Gabapentin was initially prescribed in 2009 for neuropathy. The prescription was changed to long acting gabapentin (Horizant) more recently and Claimant continues to take Horizant. Although Claimant appears to be functioning while on this medication, the records fail to show that Claimant continues to have signs of neuropathy requiring this specific prescription. Claimant has failed to present sufficient evidence that he still suffers from neuropathy requiring the continued use of Horizant. Rather, the opinion of Dr. Cebrian is found credible and persuasive that Claimant currently has no objective evidence of neuropathy, that neuropathy can go away on its own after a period of time, and that it is reasonable to taper Claimant from the Horizant over a period of 4-6 weeks. Claimant argues that his current level of functioning is support for continued use of this medication, however it is noted that Claimant has had continued ongoing psychological issues and Dr. Cebrian has opined that the use of gabapentin has a sedative effect and that removing the sedative effects of the Horizant may assist in increasing Claimant's mood. Without current objective evidence of neuropathic pain requiring the use of Horizant and given its possible side effects, Claimant has failed to meet his burden to show that continued use of this drug is reasonable and necessary to relieve the effects of his injury. Claimant shall work with his authorized treating provider to taper off Horizant over the course of 4-6 weeks. If signs of neuropathy exist during the tapering period or shortly thereafter, the issue of Horizant will have to be revisited. However, at this point, Claimant has failed to establish that Horizant is reasonably necessary to cure and relieve the effects of his injury as Claimant has not established that he continues to have neuropathy.

ORDER

1. Claimant has failed to prove by a preponderance of the evidence that he is entitled to PRP injections. His request for PRP injections is denied and dismissed.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to continued prescriptions for Horizant at this time. Claimant shall work with his authorizing treating physician to taper off Horizant in a 4-6 week time period. If Claimant displays signs of neuropathy during the tapering or shortly thereafter, the issue of the necessity of Horizant may be revisited.

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: July 31, 2015

/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 overcome by clear and convincing evidence the Division-sponsored Independent Medical Examination physician's finding that Claimant reached maximum medical improvement on March 12, 2010?

- Are Respondents entitled to terminate Claimant's ongoing temporary total disability benefits until they recover a "credit" allegedly due them under the holding in *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995)?

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 46 were received in evidence. Respondents' Exhibits A through K and Respondents' Exhibit M were received into evidence.

2. On November 30, 2007 Claimant sustained numerous injuries when a pressurized lid weighing between 50 and 70 pounds blew off of a rail car and struck him in the head and face. As a result of this incident Claimant sustained numerous fractures to the bones of the face including the bilateral maxillary sinuses, the right orbit and the right mandible at the mandibular angle. On November 30 Claimant underwent open reduction and internal fixation of a right "ZMC fracture" and closed reduction of the mandibular right subcondyle.

3. Thereafter Claimant suffered headaches and facial pain that resulted in a prolonged course of treatment including the prescription of narcotic pain medication. On January 25, 2008 Claimant was examined by "Dr. Crane" who noted a malocclusion and opined Claimant would require orthodontic treatment to ready the teeth for surgery as well as "maxillary and mandibular surgery." (Respondents' Exhibit A p. 6). On August 25, 2008 Claimant underwent a consultation with "Dr. Doughty" concerning dental and orthodontic treatment. Dr. Doughty opined a reasonable treatment plan included removal of teeth, stage one orthodontic movement presurgery, one having maxillary osteotomy on the right side, stage two orthotic movement and finalization of occlusion. Dr. Doughty opined that maximum medical improvement (MMI) would occur at 3-1/2 years "after stage one orthodontic treatment." (Respondents' Exhibit A p. 6).

4. In September 2008 Jeffrey Wunder, M.D., became one of Claimant's authorized treating physicians (ATP). When Dr. Wunder examined Claimant on September 19, 2008 Claimant complained of facial pain, headaches, facial numbness

on the right side, difficulty with the sinuses on the right side and neck pain. Dr. Wunder prescribed numerous therapies and referred Claimant for an ENT consult to evaluate the sinus issues. (Respondents' Exhibit A p. 6).

5. On February 5, 2009 Sanjay Gupta M.D., of Front Range ENT performed surgery described as septoplasty, bilateral maxillary sinus endoscopic enterostomy with tissue removal and inferior turbinate partial submucosal resection coblation bilaterally. (Respondents' Exhibit A p. 7).

6. Thereafter Claimant underwent numerous other procedures including medial branch blocks, a trigeminal nerve block, a right C2 through C5 radiofrequency neurotomy, an occipital nerve block and the extraction of teeth. (Respondents' Exhibit A pp. 8-9).

7. On March 12, 2010 Dr. Wunder placed Claimant at MMI. Dr. Wunder assessed the following: (1) S/P facial trauma and fractures; (2) S/P sinus surgery; (3) Cervical facet disorder, improved S/P RF neurotomy; (4) Reactive myofascial pain syndrome; (5)Trigeminal neuralgia; (6) S/P trigeminal radiofrequency ablation; (7) Multifactorial headaches; (8) Mild traumatic brain injury; (9) Psychological factors, i.e. reactive depression. Dr. Wunder assessed 33% whole person impairment based on the combined value of 15% impairment of the cervical spine, 10% impairment for persistent trigeminal neuralgia, 10% impairment for mild traumatic brain injury with limitations in cerebral functioning and 4% for psychological impairment.

8. In his March 12, 2010 note Dr. Wunder stated the Claimant continued to wear orthodontic braces and was "awaiting orthognathic surgery to his jaw." Dr. Wunder wrote that the surgery might occur as "late as June, July, or even later." Dr. Wunder also stated that Claimant "will need to have his case reopened at the time of his surgery" and "will be seen on a regular basis for medication maintenance."

9. On April 10, 2010 Dr. Wunder noted that "next month" Claimant was scheduled to see his orthodontist (Dr. Crane) about whether to proceed with jaw surgery recommended by Dr. Orr. Claimant reported that he had a feeling of "fluid in his ears" that resulted in an increase in headaches. Dr. Wunder referred Claimant back to Dr. Gupta for an "ENT reevaluation."

10. On May 10, 2010 Dr. Wunder wrote that Claimant felt pressure in his head associated with popping ears. The Claimant had not heard from Dr. Gupta's office regarding the referral made by Dr. Wunder on April 10. The Claimant reported that his "orthodontist indicated that he probably would be in dental braces another five to six months before surgery could be considered." Dr. Wunder again referred Claimant to Dr. Gupta.

11. A division-sponsored independent medical examination (DIME) was requested to review Dr. Wunder's finding of MMI and his impairment rating.

12. On June 28, 2010 Gregory Reichhardt, M.D., conducted the DIME. In connection with the June 28 DIME report Dr. Reichhardt took a history form Claimant, performed a physical examination and reviewed pertinent medical records through May 21, 2010. Claimant reported right-sided neck pain, numbness of the right arm and hand, headaches with frontal and occipital components, pain in the distribution of the trigeminal nerve and facial pain. Dr. Reichhardt assessed the following (1) Facial fractures, right subcondylar mandibular fracture and right zygomatic arch fracture. Status post ORIF. Status post hardware removal. Status post orthodontic treatment; (2) Status post septoplasty and sinus surgery; (3) Depression, work-related; (4) Possible TBI, work-related; (5) Chronic headaches, work-related; (6) Trigeminal neuralgia post neurolysis, work-related; (7) Neck pain and right upper extremity paresthesias, non-work related.

13. Dr. Reichhardt agreed with Dr. Wunder that Claimant had reached MMI on March 12, 2010. Dr. Reichhardt also noted that the Claimant "will require orthognathic surgery under his Workers' Compensation Claim." Dr. Reichhardt stated Claimant's treatment for the work-related conditions had "been quite comprehensive and appropriate."

14. On July 12, 2010 Dr. Reichhardt submitted an addendum to his DIME report after he reviewed some additional medical records. The addendum did not alter the opinions he expressed in the June 28, 2010 DIME report.

15. In the June 28, 2010 DIME report Dr. Reichhardt assessed a 20% whole person impairment rating. This was based on the combined value of 16% whole person impairment and 5% psychological impairment. In so doing Dr. Reichhardt stated that he disagreed with Dr. Wunder that Claimant's cervical impairment was related to the 2007 industrial injury. Dr. Reichhardt explained this was the "primary reason" that his impairment rating was lower than Dr. Wunder's.

16. On July 7, 2010 Respondents filed a Final Admission of Liability (FAL) that admitted claimant reached MMI on March 12, 2010. The FAL admitted liability for temporary total disability (TTD) benefits through March 11, 2010. The FAL further admitted for permanent partial disability (PPD) benefits commencing March 12, 2010. The FAL admitted for a total amount of $38,282.12 in PPD benefits based on Dr. Reichhardt's physical and psychological impairment ratings.

17. On July 16, 2010 Dr. Wunder noted Claimant had "chronic jaw pain and headaches." The headaches had not improved. Dr. Wunder also stated that the Claimant's orthodontist was "tightening up his braces in preparation for orthognathic surgery previously mentioned."

18. Pursuant to Dr. Wunder's referral, Dr. Gupta evaluated Claimant on August 23, 2010. Claimant reported symptoms of aching and throbbing in both ears that had "been a problem for several months." Dr. Gupta noted this was "a recurrent problem characterized by intermittent otalgia" and the "first episode occurred three years prior to this visit." Dr. Gupta assessed bilateral otogenic pain, chronic bilateral maxillary

sinusitis, unspecified bilateral tinnitus, bilateral hearing loss and bilateral headaches. Dr. Gupta referred Claimant for a CT scan of the paranasal sinuses.

19. On September 17, 2010 Dr. Wunder noted Claimant was reporting "lots of sinus pain," posterior neck pain and headaches. Claimant also reported he was "anxious to get his jaw surgery done" and had encouraged his "orthodontist to try to crank up his braces so that he "could get surgery sooner." However, the orthodontist was reportedly hesitant to do so.

20. On September 23, 2010 Claimant underwent a CT scan of the sinuses. The radiologist assessed "moderate ethmoid and maxillary sinus disease" with postsurgical changes.

21. On September 29, 2010 Dr. Gupta examined Claimant and reviewed the CT scan results. Dr. Gupta assessed bilateral rhinitis, bilateral maxillary sinusitis and bilateral face pain. Dr. Gupta described these conditions as "unstable." He recommended that Claimant continue using Astepro and add a medrol dose pack and Augmentin. Claimant was to follow-up in 12 weeks.

22. On November 15, 2010 Dr. Wunder reported claimant had "increased right facial pain" that seemed to be related to his sinuses. The Claimant advised that the medications prescribed by Dr. Gupta had not "impacted" his symptoms. Dr. Wunder opined that the Claimant "needs ongoing evaluation and treatment" and that "his condition has worsened." Dr. Wunder recommended Claimant return to Dr. Gupta sooner than the visit scheduled for December 22, 2010. Dr. Wunder also stated that he lacked the expertise to treat Claimant's sinus problems. Consequently, Dr. Wunder referred Claimant to Scott Pace, M.D., for an allergy evaluation and treatment. Dr. Wunder stated the Claimant was "currently unable to work."

23. Claimant returned to Dr. Gupta on November 17, 2010. Dr. Gupta noted a history of facial pain that began "after trauma to face he sustained with subsequent sinus infections." Dr. Gupta noted Claimant had undergone "extensive evaluation and therapy including previous surgical intervention." Dr. Gupta stated that the CT scan documented "continued sinus infection" and that sinus disease can act as a "trigger for facial pain and headache." Dr. Gupta recommended additional surgery.

24. On November 18, 2010 Gary Zuehlsdorff, M.D., a specialist in occupational medicine, did a paper review of Dr. Wunder's request for an "allergy referral." Dr. Zuehlsdorff opined the "significant architectural damage to the [Claimant's] facial anatomy" resulting from the 2007 industrial injury may have caused any "preexisting allergic phenomenon to worsen and cause sinus infections." Thus, Dr. Zuehlsdorff recommended approval of a one-time visit to an allergist.

25. Claimant returned to Dr. Wunder on November 29, 2010 and reported his "right facial pain is much worse." Dr. Wunder noted that Dr. Gupta had recommended surgery. In light of this information Dr. Wunder opined the case should be "re-opened and surgical issues addressed."

26. On December 14, 2010 the Insurer filed a General Admission of Liability (GAL). The GAL stated the Respondents were "reopening" the claim based on Dr. Wunder's November 15, 2010 report. Specifically, the GAL remarked that the Claimant "has been taken off work and we therefore have a worsening of condition." The GAL reinstated TTD benefits commencing November 15, 2010. The GAL also stated the Claimant was "overpaid by $38,282.12 in benefits previously paid" and this amount would be "credited toward any future permanency." The GAL reserved the right to claim any and all offsets and recover any and all overpayments.

27. On December 30 2010 Dr. Gupta performed surgery described as bilateral frontal sinusotomy, bilateral ethmoidectomy, bilateral submucosal reduction of the inferior trubinates and resection of synechiae bilaterally.

28. On February 3, 2011 Dr. Wunder examined the Claimant. Claimant reported that his facial pain had worsened since the recent sinus surgery. Dr. Wunder referred Claimant to Ken Allan, M.D., for another radiofrequency ablation of the right trigeminal nerve. Claimant had also developed an inguinal hernia that Dr. Wunder thought was caused by constipation resulting from the use of Embeda (timed-release morphine).

29. On April 14, 2011 Dr. Wunder noted Claimant had undergone repair of the right inguinal hernia. Claimant also had undergone radiofrequency rhizotomy of the right trigeminal V2 branch. The rhizotomy resulted in only "mild improvement." The Claimant was still using dental orthotic devices but the orthognathic surgery was apparently "on hold until his sinus infections" could be alleviated. Dr. Wunder opined Claimant was "getting to the point where further treatment" was "unlikely to help him much." Dr. Wunder noted that the "only treatment remaining therefore would be the completion of his orthotic work as well as orthognathic surgery."

30. On September 9, 2011 Dr. Wunder recorded Claimant was still having "significant pain and pressure in the right sinus area." Claimant had recently been seen by Thomas Peterson, M.D., who thought there was "anatomic abnormality in the sinuses perhaps trapping fluid and resulting in recurrent infections." Dr. Peterson had recommended another sinus surgery. Dr. Wunder opined Claimant should undergo the surgery recommended by Dr. Peterson and then undergo "his other jaw surgery."

31. On November 18, 2011 Dr. Peterson, performed another sinus surgery described as a sphenoid and ethmoid sinoscopy with balloon sinoplasty. (Respondents' Exhibit M p. 12).

32. On February 22, 2012 Claimant underwent orthognathic surgery. (Respondents' Exhibit M p. 13).

33. On August 30, 2012 Dr. Wunder opined Claimant would probably need a dental implant for his right upper incisor but was probably at MMI for all other issues.

34. On September 24, 2012 Nicholas K. Olsen, M.D., performed an independent medical examination (IME) at the request of the Insurer. At that time Claimant reported severely painful right-sided headaches that flared up 4 to 5 times per month, "nerve pain" in the neck and face and depression. Dr. Olsen reviewed medical records and noted that in 2010 Claimant had complained of sinus pain and that Dr. Gupta performed sinus surgery on December 30, 2010. Dr. Olsen also noted that Claimant underwent sinus surgery on November 18, 2011 and orthognathic surgery in February 2012. Dr. Olsen was asked to opine whether Claimant had "again reached MMI." Dr. Olsen replied that Claimant considered the November 2011 sinus surgery to be a success. Dr. Olsen opined Claimant reached MMI in January 2012 when "he had realized the November surgery was a success." Dr. Olsen did not comment as to why the February 2012 "orthognathic surgery" did not affect the date of MMI. Dr. Olsen also noted Claimant was scheduled to see Dr. Orr and Dr. Crane regarding hardware removal. However, Dr. Olsen explained that he considered hardware removal to be "maintenance care."

35. On April 25, 2013 Dr. Wunder noted the Claimant stated he was "still having chronic sinusitis infection." Dr. Wunder opined that Claimant should be seen by another ENT specialist since Dr. Peterson had apparently left practice without a forwarding address. Claimant had also contacted Dr. Orr about removing "hardware from his right sinus fractures." Dr. Wunder opined Claimant should be approaching MMI once he "can see an ENT and see his oral surgeon about the fixation hardware."

36. On January 22, 2014 Dr. Orr performed surgery to "remove fixation hardware from the right maxillary area."

37. On March 21, 2014 Dr. Wunder noted that Claimant had undergone hardware removal for the right maxilla and that Dr. Orr indicated "there was nothing else to offer from his point of view." Dr. Wunder opined Claimant should return to an ENT specialist (Dr. Lipkin) to see "whether or not [Claimant] needs any further procedures done on sinuses." Dr. Wunder opined that if claimant did not need further procedures he would be approaching MMI.

38. On August 7, 2014 Dr. Wunder noted Claimant underwent additional surgery on his sinuses at the end of July. Claimant advised that after surgery his sinus infection returned.

39. On December 15, 2014 Dr. Wunder authored a letter to Claimant's counsel. Dr. Wunder noted the Claimant was placed at MMI on March 12, 2010, but continued to have "sinus difficulties and pressure." Dr. Wunder stated that these "ENT problems" required ongoing evaluation and treatment and Claimant "eventually had surgeries including sinus surgeries and orthognathic surgery." Dr. Wunder opined Claimant "never did really obtain MMI, as he had ongoing problems in an area in which I am not a specialist." Dr. Wunder also stated that Dr. Reichhardt is not an ENT specialist and opined that "neither one of us is really a specialist to determine whether or not [Claimant] had reached maximum medical improvement for ENT issues which appear to be the most prominent ongoing medical problems."

FINDINGS OF FACT CONCERNING MMI

40. It is highly probable and free from serious doubt that the DIME physician, Dr. Reichhardt, incorrectly found Claimant reached MMI on March 12, 2010. Claimant proved it is highly probable and free from serious doubt that on March 12, 2010 not all injury-related conditions were "stable" and he needed additional medical treatment to reach MMI.

41. The opinions expressed by Dr. Wunder in his letter of December 15, 2014 are highly credible and persuasive. Dr. Wunder explained that although he initially opined Claimant reached MMI on March 12, 2010, that opinion was proven to be incorrect by Claimant's subsequent course of treatment for "ENT" problems. Dr. Wunder persuasively explained that although he initially assigned an MMI date of March 12, 2010, Claimant "continued" to have sinus pain and pressure that necessitated additional treatment including surgeries. Additionally, Dr. Wunder persuasively explained that after March 12, 2010 Claimant required orthognathic (jaw) surgery to alleviate the effects of the industrial injury. The ALJ understands Dr. Wunder's opinion to be that events subsequent to March 12, 2010 proved Claimant's injury-related sinus and jaw problems were not stable on March 12 and that these conditions required additional treatment before Claimant reached MMI.

42. Dr. Wunder's opinion that Claimant did not reach MMI on March 12, 2010 is corroborated by medical evidence showing the course of Claimant's treatment for jaw problems. The medical records establish that as early as January 2008 Dr. Crane was considering mandibular surgery. On August 25, 2008 Dr. Doughty opined Claimant would not reach MMI until 3-1/2 years "after stage one orthodontic treatment." On March 12, 2010 Dr. Wunder himself noted Claimant was still "awaiting orthognathic surgery to his jaw" and remarked that the claim would need to be "reopened" when the orthognathic surgery was performed. The ALJ infers from Dr. Wunder's March 12 statement regarding "reopening" that it is was his belief the need for orthognathic surgery would be inconsistent with MMI. This inference is supported by Dr. Wunder's December 14, 2014 letter indicating that Claimant "never really did obtain MMI" in part because he needed and eventually underwent orthognathic surgery. The medical records demonstrate Claimant did not undergo the orthognathic surgery until February 2012.

43. Dr. Wunder's opinion that Claimant did not reach MMI on March 12, 2010 is also corroborated by persuasive medical documentation showing that after that date Claimant needed ongoing medical treatment for sinus problems. Claimant was diagnosed with sinus problems soon after the November 2007 injury and Dr. Gupta performed surgery on Claimant's sinuses in 2009. On April 10, 2010, less than a month after Dr. Wunder first opined Claimant had reached MMI, Dr. Wunder referred Claimant back to Dr. Gupta because of increased headaches. When Dr. Gupta examined

Claimant on August 23, 2010 he diagnosed otogenic pain, bilateral maxillary pain and tinnitus and immediately referred Claimant for a CT scan the sinuses. According to Dr. Gupta the CT scan showed recurrent sinus infections and he performed surgery for this condition on December 30, 2010. Subsequently Claimant would undergo additional sinus procedures in November 2011 and July 2014. This medical documentation persuasively supports Dr. Wunder's December 15, 2014 opinion that Claimant did not reach MMI on March 12, 2010 because he continued to have ongoing sinus problems that required additional treatment including surgeries.

44. Dr. Reichhardt's June and July 2010 DIME opinion that Claimant reached MMI on March 12, 2010 is not persuasive and is given much less weight than Dr. Wunder's December 15, 2014 opinion. Dr. Reichhardt did not credibly and persuasively explain his opinion that Claimant reached MMI on March 12, 2010 even though Dr. Reichhardt admitted Claimant still required orthognathic surgery as of that date. Dr. Reichhardt did not persuasively and credibly refute Dr. Dr. Wunder's December 2014 opinion that Claimant did not reach MMI on March 12, 2010 because Claimant still required treatment for ongoing sinus problems and underwent surgery for those problems. Indeed, there is no credible and persuasive evidence that Dr. Reichhardt was ever asked to reconsider his MMI opinion in light of Claimant's symptoms and course of treatment after May 2010.

FINDINGS OF FACT CONCERNING CLAIMED CREDIT AGAINST TTD BENEFITS

45. At hearing the parties stipulated that if Dr. Reichhardt's DIME opinion concerning MMI is upheld then the amount of the credit sought by Respondents is $38,282.12. The parties also stipulated that if Dr. Reichhardt's DIME opinion concerning MMI is overcome by Claimant and Claimant is awarded TTD benefits from March 12, 2010 through November 14, 2010, the amount of the credit sought by Respondents is $12,459.30.

46. As found above, the ALJ determines that Claimant proved by clear and convincing evidence that he did not reach MMI on March 12, 2010. Because Claimant has overcome the DIME physician's opinion concerning MMI the amount of the credit sought by Respondents is $12,459.30. The ALJ understands the $12,459.30 to represent the amount of money paid to Claimant by the Insurer in excess of the amount that would have been paid if the insurer had simply continued paying TTD benefits from March 12, 2010 through November 14, 2010.

CONCLUSIONS OF LAW

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

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

litigation. Section 8-40-102(1), C.R.S. Except as noted below, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

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

OVERCOMING DIME ON MMI

Claimant contends he proved by clear and convincing evidence that the DIME physician, Dr. Reichhardt, erred in finding that MMI was reached on March 12, 2010. Claimant argues his condition was not “stable” on March 12, 2010 and he needed additional treatment to reach MMI. Respondents argue that Claimant failed to overcome the DIME physician’s opinion by clear and convincing evidence. They reason that Claimant reached MMI on March 12, 2010 and suffered a subsequent “worsening of condition” that caused them to voluntarily reopen the claim as of November 15, 2010. The ALJ agrees with Claimant.

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. MMI is not divisible among the various components of an industrial injury. Rather, MMI does not occur until the claimant reaches MMI for all components of the industrial injury. *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010).

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 is that quantum and quality of evidence that 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).

A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000).

As determined in Findings of Fact 40 through 44, it is highly probable and free from serious doubt that the DIME physician incorrectly found Claimant reached MMI on March 12, 2010. As found, Dr. Wunder's December 15, 2014 opinions concerning MMI are highly credible and persuasive. Indeed, Dr. Wunder's opinions constitute clear and convincing evidence that the DIME physician's opinion was incorrect. Specifically, the ALJ is persuaded Dr. Wunder's opinion that on March 12, 2010 Claimant's injury-related jaw condition was not stable because it still required surgical treatment. That surgery was contemplated as early as 2008 and did not occur until February 2012. The DIME physician offered no credible and persuasive explanation as to why he believed Claimant reached MMI on March 12, 2010 even though the required orthognathic surgery had not yet occurred.

The ALJ is also persuaded that it is highly probable and free from serious doubt that on March 12, 2010 Claimant's sinus condition was not stable and that he needed additional medical treatment, including surgeries, to reach MMI. Once again, Dr. Wunder's December 15, 2014 opinion is highly credible and persuasive. Specifically, Dr. Wunder credibly opined that Claimant's symptoms and course of treatment after March 12, 2010 demonstrate Claimant had not reached MMI for the sinus condition. To the contrary, Dr. Wunder's opinion and the credible medical documentation establish Claimant's sinus condition was not stable on March 12, 2010 and he continued to need several surgeries to treat it. As found, the DIME physician did not offer any credible and persuasive refutation of Dr. Wunder's opinion concerning the need for treatment of Claimant's sinus condition after March 12, 2010.

Once a claimant establishes a right to receive TTD benefits they must ordinarily continue until the occurrence of one of the events listed in § 8-42-105(3), C.R.S. Here, as shown by the FAL, Respondents sought to terminate Claimant's TTD benefits solely on the basis that he reached MMI on March 12, 2010. However, the ALJ has found the DIME physician's opinion that claimant reached MMI on March 12, 2010 has been overcome by clear and convincing evidence. Consequently, Claimant's TTD benefits must be reinstated March 12, 2010 and paid in full until Respondents began paying TTD benefits on November 14, 2010.

RESPONDENTS' REQUEST FOR CREDIT AGAINST TTD BENEFITS

Relying on *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995), and the $150,000 benefits cap contained in § 8-42-107.5, C.R.S. Respondents argue they are entitled to a "credit" in the amount of $12,459.30 based on the "PPD benefits" they paid to Claimant after March 12, 2010 and before they voluntarily "reopened" the claim on November 15, 2010. Respondents argue *Donald B. Murphy Contractors v. Industrial Claim Appeals Office, supra* entitles them to recover the "credit" by discontinuing Claimant's TTD benefits "until the credit has been recovered in full." However, the ALJ concludes the "credit" created by the *Murphy Contractors* court does not apply to this case because Claimant has never reached MMI.

Section 8-42-107.5 provides as follows:

> No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payment and permanent partial disability payments."

Donald B. Murphy Contractors v. Industrial Claim Appeals Office, *supra*, concerns a case in which a claimant had reached MMI and was assigned an impairment rating of seventeen percent. The respondents then paid the claimant $28,491.12 in TTD benefits and $31,508.88 in PPD benefits to reach the $60,000 benefits cap then specified in § 8-42-107.5, C.R.S. The claimant's condition subsequently worsened and he sought an award of additional TTD benefits and medical benefits. The respondents argued the claimant was not entitled to additional TTD benefits because he had already reached the statutory cap of combined TTD and PPD benefits. The court ruled that application of the statutory benefits cap was "premature" because the claimant was not at MMI. Therefore his impairment rating could not be determined. However, the *Murphy Contractors* court also held that the respondents were entitled to "a credit for permanent partial disability benefits already paid against temporary total disability benefits, subject to claimant's right to seek further benefits available under § 8-42-107.5." 916 P.2d at 614-615. The court reasoned that fashioning this "credit" maintains the "incentive" for employers and insurers to settle and provide PPD benefits, allows claimants to obtain additional benefits to which they may be entitled under the cap and eliminates the need to seek recovery of overpayments in the event no further benefits are available.

In *Leprino Foods v. Industrial Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005), the respondents sought application of the *Murphy Contractors* credit in a case where an ATP placed the claimant at MMI and assigned a 27% upper extremity impairment rating. The respondents filed an FAL consistent with the ATP's rating and paid PPD benefits including a lump sum. However, the claimant timely contested the MMI determination and the DIME physician found the claimant was not at MMI. The

respondents did not timely contest the DIME physician's finding regarding MMI but sought the *Murphy Contractors* credit against their liability for additional TTD benefits.

The court in *Leprino Foods v. Industrial Claim Appeals Office, supra*, held the respondents were not entitled to reduce the claimant's TTD benefits by the amount of money that they previously paid as PPD benefits under the FAL. The court noted that "MMI is a predicate to a determination of claimant's medical impairment rating" and that the claimant's impairment rating could not yet be determined because she had "not yet reached MMI." 134 P.3d at 480; *see also Laabs v. Integrated Communication Service, Inc.,* WC 4-890-061-02 (ICAO March 19, 2015). The *Leprino Foods* court stated the following:

> We note the decision in *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, *supra*, was reached by applying the plain language of the statute, which clearly provides that application of the benefits cap depends on the impairment rating. Accordingly, it is equally clear that the General Assembly intended to require employers to continue paying benefits without application of the cap until such time as a claimant reaches MMI. 134 P.3d at 480.

Similarly, in *United Airlines v. Industrial Claim Appeals Office,* 312 P.3d 235 (Colo. App. 2013), the respondents sought to recover an alleged "overpayment" of TTD benefits that exceeded the $75,000 cap contained in § 8-42-107.5. The claimant received $99,483.14 in TTD benefits until she was released to return to work. After reaching MMI she received a 5% whole person impairment rating from the DIME physician. The respondents argued that the TTD benefits paid in excess of the $75,000 cap constituted an "overpayment" that the claimant was obligated to repay.

However, the *United Airlines* court held there was no "overpayment" within the meaning of § 8-40-201(15.5), C.R.S. The court noted that § 8-40-201(15.5) defines "overpayment" as the claimant's receipt of money that "exceeds the amount that should have been paid." The court reasoned that the claimant did not receive money in excess of the amount that should have been paid because that the Act does not permit termination of TTD benefits except under the circumstances set forth in § 8-42-105(3), C.R.S., and that section does not refer to the cap. Conversely, § 8-42-107.5 does not "cross-reference" § 8-42-105(3). Therefore, all of the money the claimant received prior to returning to work was properly paid as TTD benefits and was not in excess of the amount of money that should have been paid. The court also concluded that the cap requires the payment of "combined" TTD and PPD benefits, and because the claimant exceeded the cap before her temporary benefits were terminated "none of the benefits paid to her was compensation for permanent impairment." The *United Airlines* court also distinguished *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, *supra* because *Murphy Contractors* does not address whether claimants would "be entitled to additional TTD benefits if, as here, those benefits, when calculated exclusive of their permanent benefits, reached the statutory cap."

Here, the ALJ finds Claimant overcame by clear and convincing evidence the DIME physician's opinion that MMI was reached on March 12, 2010. Consequently, Claimant has never reached MMI and his impairment rating has never been legally determined. It follows that application of the cap is "premature" and the "credit" discussed in *Donald B. Murphy Contractors v. Industrial Claim Appeals Office*, *supra*, is not applicable. In these circumstances Respondents are not entitled to terminate Claimant's TTD benefits until the alleged "credit" is fully recovered. *United Airlines v. Industrial Claim Appeals Office, supra*; *Leprino Foods v. Industrial Claim Appeals Office, supra; Laabs v. Integrated Communication Service, Inc., supra.*

In reaching this result the ALJ does not address the question of whether the $12,459.30 that Respondents seek might be recoverable as a form of "overpayment" under § 8-40-201(15.5). At the commencement of the hearing Respondents' counsel limited the issue to recovery of a "credit" under the authority of *Donald B.* Murphy Contractors *v. Industrial Claim Appeals Office*, *supra*. Respondents' counsel did not raise any argument that the $12,459.30 constituted a statutory "overpayment" subject to recovery under the Act. Further, Respondents' position statement limits the issue to recovery of the *Murphy Contractors* "credit" and does not argue that there has been a statutory "overpayment."

Because Respondents have not raised the issue of statutory "overpayment" the ALJ need not address Claimant's argument that recovery of an "overpayment" would be barred by the statute of limitations contained in § 8-42-113.5(b.5)(I), C.R.S. Similarly, the ALJ need not address the proper rate for recovery of any hypothetical overpayment.

ORDER

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

1. Insurer shall pay Claimant temporary total disability benefits at the admitted rate for the period March 12, 2010 through November 14, 2010.

2. Respondents' request to terminate Claimant's ongoing TTD benefits until they recover a "credit" of $38,282.12 or $12,459.30 is denied.

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

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

DATED: August 24, 2015

DIGITAL SIGNATURE:

David P. Cain

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-792-212-01

ISSUES

1. Whether the claim closed by operation of law when Claimant failed to object to the Final Admission of Liability (FAL) within 30 days.

2. If the claim is closed, whether Claimant has established that the claim should be reopened based upon change of medical condition.

3. If the claim is closed, whether Claimant has established that the claim should be reopened based upon mistake or error.

4. Whether Claimant has established that he is entitled to temporary total disability (TTD) benefits from December 16, 2014 and ongoing.

5. Determination of Claimant's average weekly wage.

6. Whether Claimant has established that treatment provided by Memorial Emergency Department and Memorial Urgent Care on April 20, 2009, January 8, 2015, and January 17, 2015 is reasonable, necessary, and causally related to his March 31, 2009 industrial injury.

7. Whether Claimant is entitled to a change of physician based upon the authorized treating physician's refusal to provide medical treatment for non medical reasons.

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction worker building custom homes and performed various duties in this position. The number of hours per week that Claimant worked varied throughout his employment.

2. On March 31, 2009 while so employed, Claimant suffered an industrial injury when he was working on a wooded peak area on the top of a roof. Claimant fell, and a truss landed on his chest. Claimant was sent to Concentra for medical treatment.

3. At the time of his injury Claimant was earning $13.00 per hour. His pay also included insurance benefits for himself, his wife, and his six children. From January 1, 2009 through March 26, 2009 Claimant earned $4,838.47. The monthly value of continuing Claimant's health insurance was $431.79. *See* Exhibit 15, Exhibit 16.

4. On the date of injury Claimant was evaluated at Concentra by Daniel Peterson, M.D. Claimant reported he was moving trusses, picking up a girder, and slipped backwards. Claimant reported he hit the ground the girder fell on his chest. He complained of chest, upper back, and neck pain. *See* Exhibit 5, Exhibit D.

5. Dr. Peterson noted on physical exam that Claimant's cervical range of motion was decreased in all planes with pain and that palpation of the cervical spine was positive for tenderness C2 to T4. Dr. Peterson also noted that Claimant's range of motion of the trunk was decreased in all planes with pain and that palpation of the spine was positive for pain at C6 through T10. *See* Exhibit 5, Exhibit D.

6. Thoracic Spine, Cervical Spine, Chest, and Rib X-rays were performed and were unremarkable with no abnormalities shown. *See* Exhibit 5, Exhibit D.

7. Dr. Peterson assessed chest wall contusion, cervical strain, and thoracic strain with no sign of fractures. Dr. Peterson took Claimant off work for the rest of the day, and indicated Claimant should return the following day for evaluation. *See* Exhibit 5, Exhibit D.

8. On April 1, 2009 Dr. Peterson evaluated Claimant. Claimant reported that he felt better and had improved range of motion. Dr. Peterson noted Claimant's range of motion in the cervical spine was improved, and that Claimant's range of motion in the trunk was normal with pain. He assessed cervical strain, thoracic strain, and chest wall contusion. He recommended physical therapy and home exercise and placed Claimant on work restrictions. Dr. Peterson anticipated Claimant would reach maximum medical improvement (MMI) in two to four weeks. *See* Exhibit 5, Exhibit D.

9. On April 10, 2009 Dr. Peterson evaluated Claimant. Claimant had been working within the work restrictions and reported feeling worse. Claimant indicated his neck was still very stiff, he was having severe headaches, and could not stand straight up in full extension, and reported marked pain from C7 to T9. Dr. Peterson was concerned with the severity of Claimant's headaches and opined that Claimant's progress had been too slow. Dr. Peterson requested MRIs of the brain, cervical spine, and thoracic spine to be certain the injury was not more serious than it initially appeared. Dr. Peterson noted the anticipated MMI date would depend on the MRI findings. *See* Exhibit 5, Exhibit D.

10. On April 14, 2009 Dr. Peterson evaluated Claimant. Dr. Peterson noted that Claimant's brain, cervical spine, and thoracic spine MRI results were completely normal. Claimant reported improving and feeling better and that he had not been taking medications because his condition was improved. Dr. Peterson reported the range of motion in Claimant's cervical and thoracic regions was markedly improved. Claimant had been working and Dr. Peterson increased the lifting weight allowed by Claimant on Claimant's work restrictions. Dr. Peterson anticipated Claimant would reach MMI in two weeks. *See* Exhibit 5, Exhibit D.

11. On April 20, 2014 at approximately 8:40 a.m. Dr. Peterson evaluated Claimant. Claimant reported worsening symptoms and that he had been working within his work restrictions. Claimant reported the decrease in work restrictions made his chest hurt and reported that he fell off the back porch stoop at home while trying to get in the back door with his arms full of groceries. Claimant reported pain in his chest, cervical spine, and thoracic spine was worse. Dr. Peterson increased Claimant's work restrictions and again anticipated that MMI would be in two weeks. *See* Exhibit 5, Exhibit D.

12. On April 20, 2009 at approximately 9:30 a.m. Claimant underwent physical therapy. Claimant also reported at physical therapy that his pain had increased. *See* Exhibit D.

13. On April 20, 2009 at approximately 2:12 p.m. Claimant went to the Emergency Room at Memorial Health Systems and was evaluated by Michael Bowen, M.D. Claimant reported neck pain, headaches, neck stiffness, and tightness around and soreness in the occiput area as well as occasional paresthesias of his right arm and a stinging sensation in his right anterior chest. Dr. Bowen noted Claimant was very uncomfortable. Dr. Bowen performed a head CT and cervical spine CT that were both normal. Dr. Bowen discharged Claimant with instructions to follow up with his worker's compensation physician. Dr. Bowen diagnosed acute neck and back strain and chronic neck and back pain, status post injury. *See* Exhibit F.

14. Claimant testified that on April 20, 2009 after his physical therapy appointment he was in extreme pain. Claimant attempted to schedule an appointment to go back to Concentra and Dr. Peterson that day, but they were unable to see him. Concentra advised him to go to the emergency room if in severe pain. Claimant was in extreme pain and decided to go to the emergency room since Concentra was unable to treat him. This testimony is found credible, consistent with the report of increased pain to Dr. Peterson and to his physical therapist that morning, and consistent with reports to the emergency room physician.

15. On April 29, 2009 Claimant was arrested. Claimant was incarcerated by the Colorado Department of Corrections until December 15, 2014 when he was released.

16. While Claimant was incarcerated and on June 5, 2009 Dr. Peterson closed Claimant's case for non-compliance and indicated that he was unable to determine MMI. Dr. Peterson filled out a closing physician's report of workers' compensation injury releasing Claimant to full duty work with no restrictions as of June 5, 2009. Dr. Peterson indicated that the MMI date was unknown due to Claimant's noncompliance. *See* Exhibit B, Exhibit 5.

17. On June 19, 2009, Respondents filed a General Admission of Liability (GAL) admitting liability for medical benefits. On the GAL it was noted that the admission was for "med only" and that there was no lost time in excess of 3 scheduled

work days. On January 5, 2010 Respondents filed a Final Admission of Liability (FAL). Respondents left the line for "Date of MMI" blank. The FAL admitted for no medical benefits after MMI and no temporary or permanent indemnity benefits. The FAL was mailed to Claimant at 7433 Colonial Drive, Dallas, TX 75252. *See* Exhibit 1, Exhibit 2.

18. Claimant has never lived in Dallas, TX. At the time the FAL was mailed, Claimant was incarcerated in the Department of Corrections (DOC). Claimant did not change his address on file with the Division from the address he lived at with his family prior to his incarceration to his DOC address. Claimant's home address prior to incarceration was on Colonial Drive in Fountain, Colorado.

19. Claimant did not receive the FAL and had no opportunity to review it or object to it.

20. On August 10, 2010 Claimant underwent prison intake procedures and reported that he had a present upper back problem. Claimant was prescribed medications for his reported pain and back symptoms. *See* Exhibit E.

21. On August 17, Kathleen Melloh, P.A.-C evaluated Claimant. Claimant reported to PA Melloh that he had an x-ray as well as an MRI done on his upper back prior to his incarceration and reported to her that he never received the results of those tests. Claimant reported that a doctor at Memorial Hospital told him there was something wrong with his back. *See* Exhibit E.

22. On September 10, 2010, while imprisoned, Claimant underwent radiographs of his cervical spine, thoracic spine, and lumbosacral spine that were interpreted by Christopher Klassen, M.D. Dr. Klassen opined that the findings were unremarkable. *See* Exhibit E.

23. On November 9, 2010 Claimant was evaluated by Joseph Fortunato, M.D. Claimant reported to Dr. Fortunato that he had a normal MRI on the outside prior to incarceration. Dr. Fortunato noted Clamant walked in a neck flexed posture and did not objectively appear to be in pain. Dr. Fortunato was doubtful of Claimant's reported pain and opined that Claimant's posturing led him to question the basis of Claimant's reported pain. *See* Exhibit E.

24. On February 10, 2011 Claimant was evaluated by Lindsey Fishdepena, M.D. Dr. Fishdepena noted that the etiology of Claimant's reported back pain was unclear, that Claimant's exam showed several inconsistencies, and that an extensive chart review showed Claimant was evaluated by multiple providers and that his pain/discomfort appeared out of proportion. *See* Exhibit E.

25. On January 29, 2012 Claimant was evaluated by Susan Tiona, M.D. Dr. Tiona noted Claimant walked hunched over dramatically. She opined that Claimant did not have a neurologic basis for his reported symptomatology based upon exam and other objective information. Dr. Tiona noted that several provider encounters indicate

that Claimant's reported pain and body posturing were not supported by objective findings. She, nonetheless, noted that Claimant was quite insistent that something was very wrong with his back and right leg and referred him for EMG testing. *See* Exhibit E.

26. On March 14, 2012 Claimant underwent EMG testing in Pueblo, Colorado. The testing was performed by Ashakiran Sunku, M.D. who noted a normal evaluation with no electrophysiological evidence of bilateral lumbosacral radiculopathies or large, fiber neuropathy. *See* Exhibit E.

27. While in DOC, Claimant used a cane for walking. In May of 2012 he was observed moving without difficulty and the decision was made that he did not require any accommodation and he was required to surrender his cane. *See* Exhibit E.

28. On July 9, 2014 Claimant was evaluated by Gisela Walker, M.D. Claimant reported he wanted an evaluation only and did not want any treatment or a cane. Claimant reported having an EMG but felt it was not done right. Claimant reported feeling he was not getting the treatment he needed in DOC. Dr. Walker noted that Claimant was difficult to assess musculoskeletally as Claimant's effort was questionable. Dr. Walker noted that Claimant resisted attempts at range of motion both passively and actively. *See* Exhibit E.

29. Upon release from incarceration in December of 2014 Claimant attempted to obtain an appointment for medical treatment at Concentra. Claimant was denied treatment by Concentra and was advised that his case was closed and that Insurer would not authorize further treatment.

30. A claim note from Insurer indicates that on January 5, 2015 Insurer denied reopening Claimant's claim and denied authorizing further treatment as it had been five years since Claimant treated. *See* Exhibit 9.

31. On January 8, 2015 Claimant sought treatment at Memorial Urgent Care and was evaluated by John Torrent, M.D. Claimant reported upper back pain due to a work accident 6 years prior. Claimant reported he was being evaluated at that time when he was sent to prison. Claimant reported he never really had further imaging or a trial of physical therapy. Dr. Torrent ordered thoracic spine X-rays which were performed and were normal. Dr. Torrent recommended Claimant see an occupational health provider or a primary care provider for further evaluation and possible physical therapy referral and provided Claimant with a prescription for medications. *See* Exhibit F.

32. On January 17, 2015 Claimant again sought treatment at Memorial Urgent Care and was evaluated by Darren Campbell, M.D. Claimant reported he was not yet able to see his primary care physician. Dr. Campbell authorized a refill of the prescriptions provided by Dr. Torrent and advised Claimant he needed to establish care with a primary provider. *See* Exhibit F.

33. On May 11, 2015 Claimant underwent an Independent Orthopedic Evaluation performed by orthopedic surgeon Ira Stephen Davis, M.D. Claimant reported to Dr. Davis that he had requested treatment during his five years in prison, but was denied care. Dr. Davis noted on clinical examination that Claimant appeared reasonably comfortable and that in physical examination testing procedures there was a marked discrepancy when compared to pre-examination observations. Dr. Davis noted Claimant permitted 5-10 degrees flexion and extension, lateral bending, and rotation in cervical spine motion and similar range in his lumbar spine range of motion. Dr. Davis noted guarding was excessive in comparison to observations made during the course of the interview. Dr. Davis opined that Claimant sustained a chest contusion and thoracic spine strain/sprain causally related to his March 31, 2009 injury which would be expected to heal within a period of 6-12 weeks following the trauma. Dr. Davis opined that Claimant's orthopedic examination was unremarkable, imaging studies were normal, and that Claimant's persistent pain complaints to date were not explained on the basis of objective findings related to the March 31, 2009 injury. *See* Exhibit A.

34. Dr. Davis testified at hearing consistent with his report. Dr. Davis testified that the imaging studies including all the MRIs, X-rays, and the EMG were normal. Dr. Davis opined that Claimant was at MMI with no work restrictions related to his March 31, 2009 injury. Dr. Davis opined that Claimant could return to full duty work. Dr. Davis opined that Claimant has never had any objective medical tests indicating anything is wrong with him and that Claimant's subjective symptoms are not supported by the medical evidence.

35. The opinions of Dr. Davis are found credible and persuasive and are supported by the extensive objective testing performed on Claimant prior to his incarceration, while incarcerated, and after his release. The opinions of Dr. Davis are consistent with multiple medical providers who have noted normal objective tests and who cannot explain the basis for Claimant's subjective complaints, including: Dr. Peterson; Dr. Klassen; Dr. Fortunato; Dr. Fishdepena; Dr. Tiona; Dr. Sunku; Dr. Walker; and Dr. Torrent.

36. Claimant's testimony, overall, is not found credible or persuasive. Claimant provided incorrect information to multiple medical providers surrounding whether or not he had prior testing, what the testing revealed, and whether or not he received prior treatment. Claimant also presented with exaggerated symptoms and limitations on movement.

37. Claimant has not been placed at MMI by an authorized treating physician. Dr. Davis was an IME doctor and not a treating physician. Claimant was never placed at MMI by Dr. Peterson with whom he treated in 2009 prior to his incarceration. Dr. Peterson indicated MMI could not be determined due to Claimant's non-compliance and failure to attend medical appointments. Claimant was never placed at MMI for medical reasons or because he did not require further treatment to treat his industrial injury. He was discharged from treatment solely for non-compliance.

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).

Final Admission of Liability

Section 8-43-203(2)(b)(II)(A), provides that a claim will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing, including selection of an independent medical examiner pursuant to section 8-42-107.2. Section 8-43-203(2)(d),

C.R.S., provides that once a case is closed under subsection (2) the issues closed may only be reopened pursuant to section 8-43-303." The automatic closure provisions contained in these statues are designed to "promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of formal administrative determination in cases not presenting a legitimate controversy." *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821 (Colo. App. 2001).

The provisions of § 8-43-203(2)(b)(II) affording the claimant 30 days after the date of the final admission to object to the FAL and file an application for hearing are designed to insure an opportunity for informed decision-making regarding the right to contest the FAL. *See Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Requiring that the claimant be mailed a copy of the FAL at her home address maximizes the probability the claimant will receive notice, and protects the claimant's due process right to be apprised of critical decisions in sufficient time to take necessary procedural steps to preserve her rights. *Bowlen v. Munford,* 921 P.2d 59 (Colo. App. 1996).

Here, Respondents failed to mail the FAL to Claimant's home address and to the address on file with the Division. Respondents sent the FAL to an address in Texas that had no connection whatsoever to Claimant. Although it was established that at the time of the mailing of the FAL Claimant was incarcerated in DOC, mailing the notice to Claimant's home address where he lived with his family prior to his incarceration would have maximized the likelihood and probability that the notice would have been received by Claimant apprising him of his rights. Here, by mailing to an address with no connection to Claimant, there was no likelihood that Claimant would have been notified at all of the closure of his claim or the process to dispute or contest the FAL. Claimant never received notice of the FAL in this case and had no opportunity to review it, contest it, or preserve his rights. By failing to mail it to Claimant's home address, Respondents erred and the FAL is determined to have been invalid due to this error. Respondents' argument that Claimant was incarcerated and therefore would not have received the notice even if it were mailed to the correct address is not persuasive. The FAL in this matter was invalid and therefore cannot operate to administratively close the present claim. The claim remains open under the GAL for medical benefits only that was filed by Respondents on June 19, 2009.

Petition to Reopen

As found above, the present claim did not administratively close because the FAL was invalid and mailed to an improper address. Claimant had no notice of the filing of the FAL or its contents within a timeframe to review and/or contest it. As the FAL failed to close the claim, the claim remains open and the issue of re-opening is moot and need not be further addressed.

Temporary Total Disability (TTD)

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*.

Claimant has failed to meet his burden to show an entitlement to TTD benefits from December 16, 2014 and ongoing. As found above, Claimant's industrial injury caused him to miss only the remainder of the day of his injury. He continued to work starting the day after his injury, earned full and regular wages, and missed no work while under work restrictions nor did he suffer any actual wage loss. Rather, Employer accommodated Claimant's work restrictions. Claimant only suffered subsequent wage loss due to his incarceration. But for his incarceration, the evidence establishes that it is more likely than not that Claimant would have remained employed by Employer with full wages. Further, it is noted that Claimant is required to establish a causal connection between his work related injury and subsequent wage loss. Claimant has failed to establish that at the current time he suffers from medical incapacitation caused by the March 31, 2009 work injury. Rather, the opinions of Dr. Davis, Dr. Walker, Dr. Torrent, Dr. Sunku, Dr. Tiona, Dr. Fishdepena, Dr. Fortunato, Dr. Klassen, and Dr. Peterson are persuasive that Claimant has had normal X-rays, normal MRI's, normal EMG testing, and inconsistent and unexplainable subjective symptoms. Claimant has failed to meet his burden to show that any inability to work after his release from incarceration is causally connected to his work related injury.

It is noted that Claimant was never placed at MMI by Dr. Peterson prior to Claimant's incarceration. Although Dr. Peterson anticipated MMI within a couple of weeks, Dr. Peterson closed Claimant's case for noncompliance and failure to attend medical appointments without ever opining or concluding that Claimant had reached MMI. On June 5, 2009 Dr. Peterson released Claimant to full duty work with no restrictions. This was despite not seeing Claimant on June 5, 2009 and having had Claimant on restrictions as of the last time Dr. Peterson evaluated Claimant. Although it is thus unclear as to whether or not Claimant is currently under work restrictions, Claimant has failed to show that even if he is under current work restrictions that the work restrictions have caused his inability to earn wages. Neither his injury nor any work restrictions have caused him wage loss. Rather, Claimant's wage loss and impairment of earning capacity was a direct result of the intervening act of being sent to

prison for a lengthy period of time. Claimant was working full time within his work restrictions earning full wages prior to his incarceration. After a review of the evidence, Claimant has failed to establish by a preponderance of the evidence that he is entitled to TTD benefits and that his inability to earn wages from December 16, 2014 until current is causally connected to his March 31, 2009 work injury.

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.* Pursuant to § 8-40-201(19)(b), C.R.S. the term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan.

Claimant's wages and the number of hours he worked per week varied during his course of employment with Employer. As his wages and number of hours per week varied greatly, the ALJ concludes that the using the discretionary authority of 8-42-102(3) to alter the statutory formula is the best way to calculate a fair approximation of Claimant's average weekly wage due to the varied hours per day and per week that Claimant worked. The ALJ reviewed the evidence and wage submissions and finds it appropriate to use the three months preceding the injury to average the number of hours worked and total wages earned during this 12 week period of time leading up to Claimant's injury. From January 1, 2009 and through Claimant's paycheck ending the week prior to his injury on March 26, 2009 Claimant earned $4,838.47. This was over a period of 12 weeks and equals an average weekly wage of $403.21. Additionally, Claimant testified credibly that while employed by Employer he and his family received health insurance under Employer's group plan including on the date of his injury. Thus, the inclusion of the continuing cost of health insurance is appropriate in this case. Based on the evidence submitted at hearing, the monthly value of continuing the same health insurance was $431.79, resulting in a weekly value of $99.64. As a result, this ALJ finds that a fair determination of Claimant's AWW is $502.85.

Medical Benefits

Respondents are liable for emergency and authorized treatment which is reasonably necessary to cure and 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). Section 8-43-404(5), C.R.S., affords the insurer the right, in the first instance, to select the authorized treating physician. Once selected, the claimant is not free to

change physicians except with permission from the respondent or the ALJ. *Gianetto Oil Co. v. Industrial Claim Appeals Office,* 931 P.2d 570 (Colo. App. 1996). However, § 8-43-404(5) implicitly contemplates that the respondent designates a physician who is willing to provide treatment. Therefore, if the physician selected by the respondent refuses to treat the claimant for non-medical reasons, and the respondent fails to appoint a new treating physician, the right of selection passes to the claimant. *Teledyne Water Pik v. Industrial Claim Appeals Office, W.C. No. 92CA0643 (December 24, 1992)*; *Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (November 4, 1996); *Ragan v Dominion Services, Inc.*, W.C. No. 4-127-475, (September 3, 1993). When medical treatment results from a referral by an authorized treating physician, such treatment is considered part of the normal progression of authorized treatment and the express consent of the employer or the Industrial Commission is not required. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo.App.1985).

April 20, 2009 treatment

In an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. *Sims v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 777 (Colo. App. 1990). As found above, after Claimant attended physical therapy on April 20, 2009 he experienced a significant increase in his work related pain symptoms. Claimant contacted his authorized treating provider Concentra, but they were unable to schedule an appointment for him that day and advised him to go to the emergency room. Claimant did so. Claimant's pain and the belief that medical treatment was emergent is supported by his attempts to be seen immediately by his treating provider Concentra. Concentra referred him to the emergency room and treatment in this case was not only emergent but was also upon referral by the authorized treating provider. The emergent treatment was for the injuries related to his March 31, 2009 work injury and the pain reported is consistent with treatment Claimant received earlier that day where he indicated to Dr. Peterson and to his physical therapist that his pain had been increasing. Following his physical therapy his pain increased to the point of requiring him to seek emergent treatment. Therefore, Claimant has established the treatment was reasonable, necessary, and related to his work injury. The treatment was both emergent and upon referral by his authorized treating provider. Therefore, Respondents are liable and shall pay, pursuant to fee schedule, for the April 20, 2009 treatment.

January 8, 2015 and January 17, 2015 treatment

As found above, Claimant attempted to obtain medical treatment from the ATP Concentra upon his release from incarceration but was not allowed to schedule an appointment. Concentra refused to treat Claimant after Insurer advised Concentra that the claim was closed and that they would not authorize treatment. This determination was a non-medical determination. Claimant was never discharged from treatment for

medical reasons and it was never determined by an authorized treating provider that Claimant was at MMI and required no further medical treatment to cure or relieve the effects of his industrial injury. At the time Concentra refused to treat Claimant, the claim was in effect under a general admission of liability for medical benefits. The FAL that had been filed was invalid. Therefore, Concentra should have treated Claimant when he contacted them to seek treatment. Concentra should have evaluated Claimant, placed Claimant at MMI if appropriate, and either treated or closed out Claimant's case. Instead, Claimant was denied treatment for the non-medical reason that they believed the case was closed by the FAL that Claimant had failed to object to. This was in error.

Claimant has shown by a preponderance of the evidence that the treatment he sought upon his release from incarceration at Memorial Urgent Care on January 8, 2015 and January 17, 2015 was reasonable, necessary, and related to the claim. Claimant, upon his release, required further treatment under his open claim to determine whether or not he was at MMI, to determine whether or not he still required the work restrictions provided by Dr. Peterson in April of 2009, and to either receive more treatment or close his claim. Concentra failed to treat Claimant and Claimant sought treatment at Memorial Urgent Care. Both doctors he saw at urgent care referred Claimant back to his workers' compensation doctor or primary care provider. Although the treatment at Memorial Urgent Care is found to be reasonable, necessary, and related the treatment of an Urgent Care center is not that of an authorized treating or regular treating provider. Claimant failed to treat with a primary physician or a physician of his choosing after Concentra refused him an appointment. Instead he sought Urgent Care treatment, and was referred both times at Urgent Care to seek out his workers' compensation provider or a primary care provider. Claimant has not yet done so.

Proper Treating Physician

After an individual's release from confinement, the individual shall be restored to the same position with respect to entitlement to benefits as the individual would otherwise have enjoyed at the point in time of such release from confinement. *See* §8-42-113(2), C.R.S. Upon release from prison, a claimant may again receive medical, benefits under the Workers' Compensation Act. *Landeros v. Indus. Claim Appeals Office,* 214 P.3d 544 (Colo. App. 2008). Here, upon release from prison, Claimant should have been restored to the same position and should have continued to be under the GAL for medical benefits with Concentra. The ALJ concludes here based on Claimant's treatment at Urgent Care and referral back to a workers' compensation provider or a primary care provider that Concentra should resume treatment as Claimant's ATP in this claim. Concentra should provide evaluation consistent with where the treatment and medical benefits left off when Claimant became incarcerated. Claimant has failed to show that a change of physician would be appropriate in this case. Although Claimant was denied medical treatment for a mistaken belief that his claim was closed, Claimant has not chosen a new ATP and has only sought urgent care treatment. Both urgent care physicians referred Claimant back to a workers' compensation provider or a primary care provider. Claimant has presented insufficient evidence that he has a primary care provider, that there is another provider able and

willing to treat him, or that he was dissatisfied with the prior treatment he received at Concentra. The ALJ concludes that the proper authorized treating physician continues to be Concentra and that it is appropriate to restore Claimant back to the same position he was in before incarcerated which includes continued treatment with Concentra to determine his status related to his March 31, 2013 injury, whether he is at MMI, whether he requires further medical treatment, and whether any work restrictions are appropriate at this time. Claimant's argument that he shall be allowed to choose any new treating provider he wishes at this time is not found persuasive. Claimant has failed to show by a preponderance of the evidence that he is entitled to a change of physician or that the referral of the Urgent Care physicians back to his workers' compensation provider was inappropriate. The administrative confusion surrounding whether or not his claim was closed was based on an unusual circumstance where Claimant was incarcerated and failed to receive a copy of the FAL. The ALJ concludes, after a review of the relevant statutes and case law, that Concentra is an appropriate ATP and that restoring Claimant to treatment with Concentra is appropriate.

ORDER

It is therefore ordered that:

1. The FAL filed on January 5, 2010 was invalid, and the claim remains open at this time.

2. Claimant's AWW is $502.85.

3. Claimant has failed to meet his burden to show entitlement to TTD. His claim for TTD from December 16, 2014 and ongoing is denied and dismissed.

4. Respondents shall pay all outstanding medical bills from Memorial Emergency Department and Memorial Urgent Care pursuant to the Colorado Workers' Compensation fee schedule for treatment received by Claimant on April 20, 2009, January 8, 2015, and January 17, 2015.

5. Claimant remains under a GAL for medical benefits. Claimant is entitled to further evaluation at Concentra to determine his current work related MMI status, work restrictions, and need or lack thereof for medical treatment. The ATP remains Concentra for this claim and Claimant is not entitled to a change of physician to any physician he chooses. Claimant is hereby restored to the position he was in prior to his incarceration and shall continue treatment with Concentra.

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: 08/07/2015

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician regarding the date of maximum medical improvement (MMI).

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from February 9, 2013 to May 3, 2013.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to permanent total disability (PTD) benefits.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to disfigurement benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a CNA with duties including assisting residents. Claimant bathed, dressed, and changed residents. She cleaned their rooms, took their vital signs, took them to the dining room, assisted them with eating, took food orders, delivered food to residents unable to make it to the dining room, and assisted residents with using the bathroom. Claimant also took vital signs and input information for the day about residents into a computer system.

2. Claimant performed most of her job duties in English. Claimant wrote patient notes, medical orders, and status reports in English. Claimant took food orders in English and conversed with residents in English. Employer was satisfied with Claimant's job performance.

3. While so employed and on September 25, 2009, Claimant suffered an injury. Claimant was transferring a patient when the patient fell and Claimant sustained an injury to her right knee and her lumbar spine.

4. On January 6, 2011 Respondents filed a general admission of liability for the claim. *See* Exhibit 1.

5. Claimant has undergone significant medical treatment related to this injury.

6. On May 3, 2010 Claimant underwent an L5 laminectomy with far lateral right-sided L5-S1 foraminotomy with a right L5-S1 TLIF performed by Brian Reiss, M.D. *See* Exhibit 6.

7. On October 4, 2011 Dr. Reiss evaluated Claimant. Claimant reported continued pain following surgery. Dr. Reis noted a CT myelogram study had been performed and that there was a definite possibility that Claimant had a nonunion at L5-S1, noted there was lucency around the L5 screws, and opined there was not convincing evidence of a complete fusion. Dr. Reis noted Claimant could consider further surgery to redo the fusion. Dr. Reis referred Claimant to David Wong, M.D. for a second opinion. *See* Exhibit 6.

8. On November 21, 2011 Dr. Wong evaluated Claimant and recommended a revision decompression and fusion surgery at L5-S1. *See* Exhibit 12.

9. On December 7, 2011 Claimant underwent a revision L5-S1 laminectomy performed by Dr. Wong. *See* Exhibit 14.

10. Claimant had delayed surgical treatment for her right knee injury until her back had healed from surgery. Following her second revision back surgery and on August 30, 2012 Claimant underwent right knee surgery to repair a medial meniscal tear. The surgery was performed by James Ferrari, M.D. At hearing, Claimant displayed two arthroscopic scars on her right knee from this surgery. The scars measured less than ¼ of an inch each in diameter and remained white and discolored form her normal skin tone. *See* Exhibit 15.

11. On November 16, 2012 Claimant was evaluated by Dr. Wong. Dr. Wong noted it had been almost one year since Claimant's revision decompression L5-S1. Claimant reported her residual back and lower extremity symptoms had plateaued but that she had continued back pain and lower extremity symptoms, left worse than right. Dr. Wong noted that her incision was well healed and that x-rays showed the fusion was solid. Based on Claimant's report of continued symptoms, Dr. Wong recommended an EMG and nerve conduction study of the lower extremities and also recommended a hardware block at L5-S1. *See* Exhibit 12.

12. On December 7, 2012 Claimant was evaluated by Ronald Hattin, M.D. Claimant reported persistent low back pain following her revision surgery. Dr. Hattin noted that imaging studies revealed a solid fusion at the L5-S1 level with good screw placement. Dr. Hattin noted Claimant was tender bilaterally in the region of the retained hardware. Dr. Hattin noted Claimant likely had mechanical back pain due to retained hardware and that she could be having some radicular irritation into the left lower extremity. He noted EMG studies had been performed but he did not have the results. He performed a diagnostic lumbar hardware block to determine what portion of Claimant's mechanical back pain was coming from the retained hardware with an eye toward possible hardware removal. He noted the EMG studies would ultimately show if any further decompression was required. Dr. Hattin noted that he would base any

further treatment considerations such as hardware removal based upon her response to the blocks. *See* Exhibit 14.

13. On December 11, 2012 Claimant was evaluated by Barry Ogin, M.D. Claimant reported pain across her back and down both legs. Dr. Ogin noted her complaints were of fairly diffuse discomfort, but that her examination was fairly benign and her electrodiagnostic examination had been negative. Claimant reported to Dr. Ogin that she had injections last Friday that provided her no relief and that she actually felt worse after the injections. Dr. Ogin opined that Claimant was a very poor candidate for any further surgery. He opined that hardware removal would not necessarily significantly improve her back or bilateral leg pain unless there was objective evidence of nerve root compromise based on the hardware. He noted that Claimant was approaching MMI. *See* Exhibit I.

14. On January 7, 2013 Claimant was evaluated by Dr. Ogin. Dr. Ogin noted that Claimant was over one year out from her revision lumbar fusion and that she continued to have pain. Dr. Ogin noted he had planned to place Claimant at MMI and provide an impairment rating. He noted, however, that Claimant was seeing Dr. Wong and that Dr. Wong had recommended hardware removal surgery. Claimant was unsure whether she wanted to pursue hardware removal surgery. Dr. Ogin held off on formally placing Claimant at MMI. He opined that if she was not going to proceed with the hardware removal then she would be at MMI. He noted that if Claimant decided to proceed with hardware removal then MMI would need to be deferred until after the surgery had been performed. *See* Exhibit I.

15. On February 4, 2013 Claimant was evaluated by Bryan Castro, M.D. Dr. Castro noted Claimant had buttock, back, and leg pain with poor response to prior surgical intervention. He opined that it was not clear that the hardware itself was the source of Claimant's symptoms. He opined that hardware removal would not appreciably alter her symptoms and he did not think that further intervention would relieve Claimant's pain. He recommended a CT scan to evaluate the healed nature of the fusion and opined that even if fully healed he would not favor hardware removal as a treatment option for Claimant's ongoing low back pain. *See* Exhibit K.

16. On February 8, 2013 Claimant was again evaluated by Dr. Ogin. Claimant reported she was scheduled to have her hardware removed despite no improvement following hardware blocks. Dr. Ogin opined that Claimant did not appear to be in significant distress with casual observation, but continued to complain of back and leg pain. Dr. Ogin opined that Claimant had a non-physiologic distribution and that it would be very unlikely that she would get relief with hardware removal. He noted her pain was diffuse in nature, across her back and down both of her legs. He opined that if the hardware was indeed irritating a nerve root or causing pressure on a structure, he would expect more focal symptoms. Dr. Ogin placed Claimant at MMI and provided an impairment rating. He noted that if Claimant pursues hardware removal down the road then an impairment rating may need to be recalculated, but reiterated that she was a

poor candidate for hardware removal and that she was unlikely to get significant relief from the hardware removal procedure. *See* Exhibit I.

17. On February 19, 2013 Claimant underwent a CT scan of her lumbar spine that was interpreted by Steven Karsh, M.D. Dr. Karsh concluded there was no evidence of nerve root impingement. *See* Exhibit F.

18. On February 22, 2013 Claimant was evaluated by Dr. Castro. Dr. Castro noted the CT scan showed Claimant had a solid fusion posteriolaterally at L5-S1. Dr. Castro noted back pain as Claimant's predominant complaint but opined there was no indication for hardware removal and that the hardware appeared stable. Dr. Castro opined that the hardware removal procedure would not predictably relieve back pain and recommended only expectant management. *See* Exhibit K.

19. On February 27, 2013 Claimant was evaluated by John Sanidas, M.D. Claimant reported pain in her low back going down both posterior legs. Dr. Sanidas explained to Claimant that since her spine had completely healed, she could have the hardware removed surgically, but he opined it would not change her status or pain. Dr. Sanidas noted that Claimant had done a certain amount of "double speak" when asked if she wanted hardware removal surgery or not. Claimant advised Dr. Sanidas that she wanted surgery. Claimant was advised that if she did not want the surgery her case would be closed and that she needed to make a decision. Dr. Sanidas noted he did not want any more delays, deliberate or otherwise, from Claimant. *See* Exhibit N.

20. On March 6, 2013 Claimant was evaluated by Dr. Sanidas. Dr. Sanidas again advised Claimant that he, Dr. Ogin, and Dr. Castro were of the opinion that she would not have much significant difference or improvement in her back pain with hardware removal. *See* Exhibit N

21. On March 7, 2013 Claimant was evaluated by Dr. Wong. Dr. Wong discussed the pros and cons of hardware removal and exploration surgery. Dr. Wong noted that Claimant had normal EMG testing and that he doubted any additional decompression would be of significant clinical benefit. He opined that Claimant might get partial improvement in her symptoms with the hardware removal but have persistent right lower extremity symptoms. Claimant indicated she wanted to proceed with arrangements for surgery. *See* Exhibit 12.

22. On March 8, 2013 Claimant was evaluated by Dr. Ogin. Claimant reported she had no significant benefit after the hardware blocks, but felt better one week later. Claimant also, however, reported her pain level was going up and that everything made it worse and that her pain was extreme at a level of 9/10. Dr. Ogin opined that Claimant remained at MMI and that she was a poor surgical candidate. He noted he had nothing further to offer claimant and would continue with medication management. *See* Exhibit 16.

23. On March 13, 2013 Claimant was evaluated by Dr. Sanidas. Dr. Sanidas again informed Claimant that the chances of her having pain relief following surgery was quite minimal considering the pain she had at that time. He opined that Claimant had a non physiological distribution of her pain and it was unlikely she would have significant relief with hardware removal. He noted Claimant was aware of the opinions that had been discussed many times and still wanted to go ahead with the surgery knowing there may be side effects and possible complications. Dr. Sanidas noted that while Claimant was trying to make up her mind on the hardware removal surgery, Dr. Ogin recommended an impairment rating. Dr. Sanidas noted the impairment rating should be put on hold since Claimant was having surgery and that Claimant was not at MMI. *See* Exhibit N.

24. On March 22, 2013 Claimant underwent a third back surgery that was performed by Dr. Wong. Dr. Wong removed the spinal pedicle screw instrumentation at L5-S1 and noted that Claimant had a solid intertransverse L5-S1 fusion. At hearing, Claimant displayed scarring from this surgery and her two prior back surgeries. Claimant had a raised scar on her lower back approximately 4 inches long and ¼ of an inch wide. The scar was discolored, raised, and uneven with her normal skin tone. *See* Exhibit 17.

25. On April 3, 2013 Claimant was evaluated by Dr. Sanidas. Claimant reported she was still having pain in her low back that was the same as she had pre-operatively with radiation into both buttocks. *See* Exhibit N.

26. On April 25, 2013 Claimant was evaluated by Dr. Sanidas. At this appointment Claimant reported she was doing slightly better since the lumbar hardware removal surgery. *See* Exhibit N.

27. On May 3, 2013 Claimant was evaluated by Dr. Ogin. Dr. Ogin noted he had placed Claimant at MMI on February 8, 2013 and that she subsequently underwent hardware removal surgery. He noted thus that he needed to recalculate her impairment rating. Claimant reported to Dr. Ogin that the hardware removal was minimally helpful. Dr. Ogin noted Claimant did not appear to be in significant distress and ambulated around the room without difficulty. He noted a sharp contrast on formal examination when Claimant exhibited quite a bit of grimacing and pain behavior. He noted that when he just held his hands on her to place an inclinometer on her back, she cried out that he should not push on her. He opined that she had negative electrodiagnostic studies and that she had noted pain behaviors and subjective complaints. He opined that her condition was stable and was really unchanged from prior to her hardware removal surgery. *See* Exhibit 16.

28. On May 15, 2013 Dr. Sanidas provided a response to a question regarding Claimant's MMI date. The question asked was whether he agreed with Dr. Ogin that Claimant was at MMI as of May 3, 2013. Dr. Sanidas circled "no" and indicated he anticipated MMI at the next visit and on May 23, 2013. *See* Exhibit N.

29. On May 23, 2013 Claimant was evaluated by Dr. Sanidas. Dr. Sanidas noted Claimant was noncompliant with her pain medication, and asked him for more pain medication. Dr. Sanidas advised Claimant her contract for opioid use was with Dr. Ogin and only he could legally prescribe her the medication. Claimant reported Dr. Ogin was rude to her and hurt her during measurements of her back. Claimant reported she did not want to return to Dr. Ogin. Dr. Sanidas agreed with the 22% whole person rating that Dr. Ogin provided and with permanent work restrictions. The work restrictions Dr. Sanidas agreed with were: walking and standing to tolerance, alternated as needed; avoiding repetitive bending at the waist; no crawling, kneeling, squatting, or climbing ladders; and pushing, pulling, and carrying no more than five to ten pounds. Dr. Sanidas discharged Claimant from his care and advised Claimant he would take care of any emergencies within the next 30 days and that she had 30 days to find another physician. *See* Exhibit N.

30. On August 28, 2013 Kristin Mason, M.D. took over Claimant's care. Claimant reported low back pain that was constant and on both sides worse with sitting, standing, or walking for a prolonged period of time. *See* Exhibit H.

31. On September 24, 2013 Claimant was evaluated by Dr. Wong. Dr. Wong noted that Claimant had partial improvement in the back symptoms with the hardware removal surgery. *See* Exhibit O.

32. On October 10, 2013 Claimant underwent a Division Independent Medical Examination (DIME) performed by John Ogrodnick, M.D. Dr. Ogrodnick opined that Claimant had reached MMI on February 8, 2013. Dr. Ogrodnick found no anatomic or physiological reason for Claimant's examination or her worse range of motion during the DIME as compared to prior testing performed by Dr. Ogin. *See* Exhibit C.

33. On November 25, 2013 Respondents filed a Final Admission of Liability (FAL) consistent with the DIME physician's MMI date and rating. *See* Exhibit B.

34. On March 10, 2014 John Raschbacher, M.D. performed an independent medical examination. At the examination Claimant presented with very slow and deliberate movement. Dr. Raschbacher opined that Claimant displayed odd behavior when she was asked to do a lumbar extension. Claimant groaned then jerked her body forward. Claimant displayed virtually nil or nothing on lumbar extension and Dr. Raschbacher opined that her exhibition was not the result of anything physical or physiologic. *See* Exhibit Q.

35. Dr. Raschbacher noted that Claimant did not display the pain behaviors displayed at hearing with grunting and heavy breathing, but that she did show other types of pain behaviors during his examination. He agreed with Dr. Ogrodnick's assessment that Claimant had pain behaviors and a non physiologic presentation.

36. Dr. Raschbacher opined that Claimant certainly was not permanently and totally disabled by any means. He opined that her subjective reports were not likely

reliable. He indicated his belief after the IME that she could work with a 40 pound restriction which would be more reasonable and effective and would still be pretty conservative. He did not have much doubt that Claimant could lift up to 40 pounds and that she could probably lift more.

37. On December 20, 2014 surveillance video of the Claimant shows her taking care of six children. Claimant walks, bends, and climbs into a vehicle without apparent difficulty. Claimant arrives at a store with the children and pushes a cart with a child sitting in the cart in the store for approximately 1.5 hours. While in the store, Claimant reaches on shelves for items, bends, and continues to push the child in the cart. Claimant then pushes the cart out of the store, with two children sitting inside the cart. Claimant lifts a child over the cart and bends with the child in her arms to place the child into the backseat of her car. Claimant then drives the six children to a park. At the park she walks, throws a ball and plays baseball with the children, bends over, squats, lifts the youngest child with her arms, and sits hunched over with the youngest child on her lap. Claimant lifts the youngest child with one arm and swings him around. Claimant speed-walks/jogs to get the baseball, bends over, and throws the ball. Claimant displays normal unrestricted movement throughout the surveillance. Claimant also pushes children on the swings and leans backward and forward as if to demonstrate to the children how to swing. Upon leaving the park, Claimant carries the youngest child down a hill to the vehicle. Claimant spent over three hours total out and about with the children with no visible problems in her movement. *See* Exhibit T.

38. Dr. Raschbacher noted that after his examination he had the opportunity to review the surveillance video of Claimant. He noted that the video showed Claimant could do a fair amount physically and that the video suggests that the lifting restrictions Dr. Mason had provided were unduly restrictive and not supported by the objective evidence in the video. He opined that the activities shown in the video were grossly inconsistent with Claimant's presentation at the examination he performed.

39. Dr. Raschbacher opined that Claimant had reached MMI on February 8, 2013 even though she had hardware removal surgery a month later. Dr. Raschbacher opined that hardware removal as maintenance treatment was appropriate in this case. Dr. Raschbacher noted that the actions shown on video surveillance of lifting, bending, moving, twisting, sitting, and walking are typically the function you would expect her to have after the type of surgery that was performed in this case.

40. On March 17, 2015 Dr. Mason reviewed surveillance video of Claimant. Dr. Mason opined that Claimant certainly exceeded a 5 to 10 pound lift and that she squatted on a couple of occasions. She opined that Claimant presented slightly different than Claimant had appeared in her office and did not appear to be in any discomfort in the video when she was in at least mild distress when seen in the office. Dr. Mason indicated she would alter Claimant's permanent work restrictions to a 15 to 20 pound occasional lifting but would keep the 5 to 10 pound limit for frequent lifting and that she would limit kneeling and squatting to rare as opposed to not at all. Dr. Mason

opined that Claimant has genuine chronic pain and that none of the activities on the videotape simulate an eight hour work day. *See* Exhibit H.

41. Prior to working for Employer, Claimant worked for Safeway for approximately five years as a deli clerk. Prior to her Safeway job, Claimant cleaned houses for many years.

42. Claimant studied for and passed a GED test in English in 1993. Claimant spoke English in her position as a deli clerk while assisting customers. As part of her deli clerk duties, she prepared food, cleaned displays, cut meats, and cashiered.

43. In 1999 Claimant took a certified nursing assistance (CNA) test in English and passed. Claimant also took and passed a CPR test and First Aid test in English. Claimant applied for her job with Employer in English.

44. Vocational experts Cynthia Bartman and Doris Shirver both assessed Claimant. They came to differing conclusions regarding Claimant's ability to obtain future employment.

45. On February 13, 2014, Cynthia Bartman performed an assessment of Claimant. Claimant reported that she was unable to vacuum or go grocery shopping due to the amount of push/pull/lift involved. Claimant also reported she could not do laundry as the clothes were too heavy for her to lift in and out of the laundry. Ms. Bartman opined after a review of Claimant's work restrictions and Claimant's prior employment that Claimant had marketable transferable skills in the area of cashiering, and that she had the ability to learn other unskilled to semi skilled positions. Ms. Bartman also contacted several employers in the local market. Ms. Bartman opined that there were a variety of career opportunities for Claimant that met her vocational skills and her work restrictions and firmly believed Claimant was able to work. Ms. Bartman further opined that Claimant's bilingual skills made her very marketable. *See* Exhibit R.

46. Ms. Bartman noted Claimant had passed the GED in English as well as the CNA test and had been successful both at the Safeway deli counter and at the residential home while assisting customers/patients in English. Ms. Bartman opined that Claimant was competitive and fully employable in the areas of cashiering and customer service and identified several positions suitable for Claimant such as: airport cashier; cashing checks; handing out towels at a YMCA; unarmed security guard; lobby attendant; room service order taker; and light production machine operator or package assembler. *See* Exhibit R.

47. On March 5, 2014 Ms. Shriver performed an assessment of Claimant. Claimant reported having three back surgeries with the most recent being hardware removal in March of 2013 because her hardware was too big for her body. Claimant reported receiving therapy after each surgery that did not help and that she has continued to get worse with more numbness and pain. Ms. Shriver noted Claimant's

permanent work restrictions and opined that the injury left Claimant with daily incapacitating chronic pain, limitations with sitting, standing, walking, lifting, climbing, balance, stooping, kneeling, crouching, crawling, reaching, fingering, handling, neck and trunk movements, with deficits in range of motion and strength, decreased motor coordination, sleep deprivation and mental challenges. Ms. Shriver opined that overall Claimant was at the 1st percentile compared with the average worker and that she could not compete in the general labor market. Ms. Shriver opined that unskilled work would require high hand use and/or proficient conversational English vocabulary, spelling, comprehension and math skills and that Claimant had none of these at a competitive level. *See* Exhibit 19.

48. Claimant reported to Ms. Shriver that she moved all of her clothing at home to waist height so she did not have to reach overhead or down low to get it. She reported with cooking that she also had everything at waist level so that she does not have to reach or bend. Claimant reported she no longer goes shopping alone and has to have people to push the cart and lift items. Claimant reported driving only when she had to and that she had increased pain when pushing the pedals. Claimant reported she used to be active with cleaning, walking, driving, and going to the park and carrying/playing with her grandchildren but that now she watched television, napped, and rested. *See* Exhibit 19.

49. On March 11, 2015 Ms. Bartman provided an updated employability evaluation. Ms. Bartman continued to opine that Claimant had marketable transferable skills in the area of cashiering and ability to learn other unskilled to semi skilled positions. Ms. Bartman concluded that Claimant was employable and capable of earning a wage. Ms. Bartman reviewed Ms. Shriver's report and had concerns that Ms. Shriver used limitations that did not come from treating physicians. Ms. Bartman also noted that Ms. Shriver used the McCarron-Dial Work Evaluation System to evaluate Claimant's employability and that the information entered into the system for the testing was an inaccurate description of Claimant's ability. Ms. Bartman noted Claimant clearly has vocational skills at a high school level as she was successful in obtaining a GED.

50. Ms. Bartman and Ms. Shriver both testified at hearing consistent with their prior reports.

51. Ms. Shriver opined that any work requiring standing, walking, lifting, stooping, crouching, reaching, or handling would be prohibitive for Claimant and that Claimant could not compete in the general labor market. She opined that Claimant does not have the stamina or ability to sustain work day to day for any job and would need to take unscheduled breaks and naps. She opined that Claimant would not do very well in an extreme or emergent situation. She opined that Claimant could sit for a maximum of 20 to 30 minutes at one time, stand for a maximum of 10 to 15 minutes at one time, and walk for a maximum of 1 to 15 minutes at one time.

52. Ms. Bartman opined that Claimant was capable of earning wages, that Colorado's manufacturing sector had a good job market for unskilled positions and that

the Colorado job market was the best it has been in six years. Ms. Bartman also noted that she had reviewed the surveillance video and that the surveillance was very inconsistent with Claimant's self-reported abilities. Ms. Bartman again noted that the scores on the testing performed by Ms. Shriver were inconsistent with everything else of Claimant that she reviewed, and that she couldn't utilize the test results because they were so inconsistent with Claimant's demonstrated abilities.

53. The opinions of Ms. Bartman are more persuasive and credible than the opinions of Ms. Shriver. Ms. Shriver bases her opinions on Claimant's work abilities mainly on an assessment test that depends on the effort of the test taker. Claimant has been noted by multiple physicians to exaggerate symptoms and complaints and to have a non physiologic presentation. Ms. Bartman's assessment is supported by surveillance video showing that Claimant is indeed capable of much more activity than she reports. Claimant overall lacks credibility and the assessment performed by Ms. Shriver in March of 2014 relied heavily on Claimant's incredible subjective reports of her limitations. Claimant's actual abilities are much greater than what is documented by Ms. Shriver. Further, after the surveillance, Dr. Mason provided increased lifting, squatting, and kneeling which would have opened Claimant up to even more job opportunities, yet Ms. Shriver maintained her opinion that Claimant still remained unable to be competitive in the job market. Ms. Shriver also made conclusions regarding Claimant's English language skills that were inconsistent with Claimant's demonstrated GED in English from 1993 and her subsequent work history over several years where Claimant successfully communicated with customers and patients in English. Ms. Bartman took into account all of the medical restrictions in place, Claimant's past work history, and the current job market and her opinions are overall found more persuasive.

54. Claimant's testimony overall is not found credible or persuasive. Claimant has presented with many inconsistencies throughout the claim, noted by physicians who document her non physiologic presentation and the gross inconsistency between examination and what is shown on video surveillance.

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*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

Overcoming the DIME

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." *See* § 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. *See* § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997. A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *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.

Here, Claimant has failed to meet her burden to show by clear and convincing evidence that the DIME physician's opinion concerning the date of MMI was incorrect. The DIME physician's opinion that Claimant reached MMI on February 8, 2013 was consistent with the opinions of Dr. Ogin, Dr. Castro, and Dr. Sanidas that hardware removal surgery was unlikely to improve Claimant's injury-related medical condition. In determining that Claimant's date of MMI was February 8, 2013 DIME physician Dr. Ogrodnick made a determination that as of February 8, 2013 there was no further treatment reasonably expected to improve Claimant's condition. This determination was consistent with multiple treating providers who also concluded that the hardware removal surgery recommended by Dr. Wong would not improve her function or reduce her pain. Claimant also provided varying reports to providers as to whether or not the diagnostic block provided her relief. Prior to the hardware removal surgery, Claimant had presented inconsistently and had a non physiologic presentation. Therefore, three different doctors opined that the hardware removal surgery was not reasonably expected to improve her condition. The DIME physician, in determining the MMI date was February 8, 2013, reached a consistent conclusion.

In addition to the opinions of Dr. Ogin, Dr. Castro, and Dr. Sanidas that the hardware removal surgery would unlikely improve Claimant's condition which support the DIME physician's conclusion, Dr. Raschbacher also agreed that Claimant had reached MMI as of February 8, 2013. Dr. Raschbacher opined that the hardware removal surgery after MMI was done as maintenance treatment and he agreed that as of February 8, 2013 there was no further treatment needed to improve Claimant's function or her pain. Although Claimant presents a difference of opinion between DIME physician Dr. Ogrodnick and the opinion of Dr. Wong, Claimant has failed to show more than a difference of opinion as to whether the hardware removal surgery was reasonably expected to improve her condition. Despite not recommending hardware removal surgery and believing it would not improve Claimant's condition, Dr. Sanidas indicated that Claimant's MMI date should be delayed until she recovered from the hardware removal surgery. Dr. Ogin recalculated her permanent impairment after the hardware removal surgery but did not change the date of MMI he had previously provided. Although there appears to be some confusion amongst the providers as to whether her MMI date should change following a surgery that they did not believe would improve her condition, the statutory definition of MMI clearly describes when MMI exists. Both Dr. Ogin and Dr. Sanidas concluded that the hardware removal surgery would not

be reasonably expected to improve Claimant's condition. These opinions are consistent with a date of MMI of February 8, 2013. Claimant has failed to show by clear and convincing evidence that DIME physician Dr. Ogrodnick was incorrect on MMI date. Rather, his opinion appears to be well founded and supported by three of Claimant's treating providers and an additional physician who performed an independent medical examination. Therefore, Claimant has failed to meet her burden to overcome the DIME physician's opinion on the date of MMI. Clamant reached MMI on February 8, 2013.

Temporary Total Disability

Temporary disability benefits are based on a worker's lost or impaired earning power and are designed to protect against actual loss of earnings as a result of an industrial injury. *Univ. Park Holiday Inn/Winegardner & Hammons, Inc. v. Brien*, 868 P.2d 1164 (Colo. App. 1994). To receive temporary disability benefits, a claimant must establish a causal connection between the injury and the loss of wages. *See* § 8-43-103(1)(a), C.R.S. Once a claimant attains MMI, she is no longer entitled to temporary indemnity. *Id.* The claimant bears the burden to prove any entitlement to temporary disability benefits. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant reached MMI on February 8, 2013 and she has failed to overcome DIME physician Dr. Ogrodnick's opinion of the date of MMI. As such, she is not entitled to temporary indemnity after the date of MMI. Therefore, Claimant has failed to prove an entitlement to TTD benefits from February 9, 2013 through May 3, 2013.

Permanent Total Disability

To prove her claim that she is permanently and totally disabled, the 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. *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 critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Id.* 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 show she is unable to earn any wages in the same or other employment. Ms. Bartman's vocational assessment is found credible and persuasive. Claimant is able to earn wages despite her industrial injury. The ALJ has considered Claimant's physical condition, mental ability, age, employment history, education, and the availability of work in the local job market that Claimant could perform and agrees with Ms. Bartman's assessment that employment exists that is reasonably available to claimant despite her work restrictions. Claimant has demonstrated in past employment her ability to speak and work with customers and residents in English, has a high school level education she obtained in English 22 years ago, and has passed CNA testing in English. Claimant has demonstrated the past use of her upper extremities in the deli counter job and ability to work in a customer service environment. Additionally, Claimant's subjective report of limitations cannot be relied upon. Surveillance video reviewed shows Claimant is capable of much more than she reports to medical providers and much more than she reported to the vocational experts who evaluated her. Claimant reported to the vocational experts that she was unable to bend to get her own clothing or to do her own grocery shopping as she couldn't push a cart. Claimant's activities in the surveillance video show walking, bending, climbing into a car, lifting a child into a car, pushing a grocery cart with two children inside the cart, playing baseball with grandchildren at the park, and pushing grandchildren on swings at the park. The video shows over three hours of active movements by Claimant that are grossly inconsistent with her presentation to medical providers and to the vocational experts. Many providers have noted Claimant's presentation at medical appointments as inconsistent and having no physiologic basis or explanation. Claimant is capable of more than she lets on. Relying on Claimant's subjective complaints or the results of testing that is based in any part on Claimant's efforts is not an adequate way to measure Claimant's ability to obtain future employment.

After surveillance video review, Claimant's provider Dr. Mason increased Claimant's work restrictions which would open her up to even more possible job opportunities. Ms. Shriver's opinion that Claimant is permanently and totally disabled and unable to obtain future employment is not persuasive. Ms. Shriver based her opinion, in part, on Claimant's subjective report of complaints, symptoms, and on the results of a test that rely on Claimant's effort. Relying on Claimant's subjective reports or efforts is not a valid way to determine her ability to obtain future employment as Claimant is not credible in her reporting. Ms. Bartman, in contrast, took into account multiple factors and restrictions from treating physicians as well as Claimant's past performance and her opinions are more persuasive. Claimant has thus failed to meet her burden to show she is incapable of earning any wages.

Disfigurement

As a result of her three back surgeries as well as her right knee surgery, Claimant has visible disfigurement to the body. Her disfigurement includes a raised 4 inch long scar on her back that is approximately ¼ of an inch wide, discolored, raised, and uneven with her normal skin tone. Claimant also has two arthroscopic scars on her right knee that measure less than ¼ of an inch in diameter. The scarring on her right

knee remains white and discolored form her normal skin tone despite adequate time for healing. Claimant has therefore sustained serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. §§ 8-42-108(1), C.R.S; 8-42-108(2), C.R.S. After viewing the scarring, the ALJ finds that a disfigurement award of $2,100.00 is appropriate.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME physician's opinion of MMI. Claimant reached MMI on February 8, 2013.

2. Claimant has failed to establish an entitlement to TTD benefits. Her claim for TTD from February 9, 2013 to May 3, 2013 is denied and dismissed.

3. Claimant has failed to establish that she is permanently and totally disabled. Her claim for PTD benefits is denied and dismissed.

4. Claimant has established she is entitled to disfigurement benefits. Insurer shall pay Claimant $2,100.00 for the disfigurement outlined above.

5. 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: August 19, 2015 /s/ Michelle E. Jones

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

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STIPULATIONS

1. The parties stipulated to an average week wage of $457.28.

2. The parties stipulated that the Claimant is receiving $643.00 a month in Social Security Disability which entitles Respondents to an offset in the amount of $74.19/week commencing March 1, 2011.

3. The parties stipulated that the authorized treating providers include Dr. Bert Furmansky, Dr. Robert Kawasaki, Dr. James Bachman and Dr. Ricardo Esparza.

4. The parties stipulated the issue of temporary disability benefits and permanent partial disability benefits are closed with prejudice, subject to reopening.

ISSUES

The issues presented for hearing are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she is permanently totally disabled.

2. Whether the Claimant has proved by a preponderance of the evidence that future medical benefits are reasonably necessary to relieve the effects of her injury or prevent deterioration of her condition and maintain maximum medical improvement

FINDINGS OF FACT

1. The Claimant was born in Zacatecas, Mexico and received her formal education through the second year of high school there. She came to the United States in 1997 and lived here for 3 years, then returned to Mexico for 3 years. Then, she moved back to the United States and has been here for the past 14-15 years (Hrg. Tr., May 13, 2014, pp. 30-31). She is 38 years old (Hrg. Tr., May 13, 2014, p. 49). On cross-examination, the Claimant admitted that she had told people that she had graduated from high school. She testified that when she started working, she took some courses in childcare at the community college working towards an associate degree and after she had already taken a number of classes, the Claimant discovered that high school

graduation was a prerequisite for the courses. So, when she was questioned about it, she told people that she had finished high school in Mexico (Hrg. Tr., May 13, 2014, pp. 50-51). Later, after taking a number of classes, she was asked to provide a certificate, she admitted she did not have one, but stated that she would work on it later after she finished the courses in which she was currently enrolled (Hrg. Tr., May 13, 2014, pp. 83-84). During an October 2012 IME, the Claimant told Dr. Judith Weingarten that she finished high school in Mexico and she took some classes at community college that were required for her job. She told Dr. Weingarten that the classes were in Spanish (Respondents' Exhibit B, p. 5).

2. The Claimant demonstrated at the hearing that she does understand some English and can speak in English. However, the Claimant testified that she doesn't completely understand everything when English is spoken. The Claimant testified that, at times, at work she would pretend to understand spoken English even though she hadn't really understood to demonstrate that she was prepared and capable of doing things. The Claimant also testified that she has had difficulty understanding and speaking with doctors and attorneys in this case (Hrg. Tr., May 13, 2014, pp. 31-33). On cross examination, the Claimant has taken a number of English classes, including classes designated at the intermediate/advanced level (Hrg. Tr., May 13, 2014, pp. 53-54; Respondents' Exhibit U). During the course of testifying at the hearing, the Claimant did answer a couple of questions before the interpreter translated them into Spanish for her (Hrg. Tr., May 13, 2014, p. 62).

3. The Claimant testified that she worked as a teacher's aide for Employer with the infants. She testified that her job duties consisted of meeting their basic needs (Hrg. Tr., May 13, 2014, p. 82). Mr. Brett Dabb, a supervisor of the Claimant provided conflicting testimony about the Claimant's position and job duties. Mr. Dabb was originally a prekindergarten teacher/group leader, who has worked at Employer since 2008. He testified that he was initially a coworker of the Claimant and that they both held the position of teacher/group leader. He testified that he was in the prekindergarten classroom and the Claimant was with the infants, but for a period of time they held the same position. In September of 2009, Mr. Dabb testified that he was promoted to Early Childhood Education Operations Manager and he became the Claimant's supervisor. He provided classroom support and conducted classroom observations (Hrg. Tr., May 13, 2014, pp. 90-91). Mr. Dabb testified that the Claimant's direct supervisor was Charlene Dicer, who was the infant supervisor. He testified that Ms. Dicer would move back and forth between two separate infant classrooms, with the Claimant about half of the time and in the other classroom about half of the time (Hrg. Tr., May 13, 2014, p. 91). Mr. Dabb testified that neither he nor Ms. Dicer are fluent in Spanish and they both communicated with the Claimant in English, when working on lesson planning, at staff meetings, during continuing education sessions held at work, and during performance evaluations (Hrg. Tr., May 13, 2014, pp. 92-96). Based on the Claimant's classroom scores in her evaluations, Mr. Dabb testified that the Claimant had good working knowledge of English and a command of the information she learned from the tools and training materials that were provided to employees in English only (Hrg. Tr., May 13, 2014, p. 98). Mr. Dabb also testified that as a classroom teacher, the Claimant would

complete the Observation Logs for the children in her classroom (Respondents' Exhibit T was discussed as an example of the type of log that the Claimant would complete although it was established that the Claimant was not the person who completed Exhibit T; also see Hrg. Tr., May 13, 2014, pp. 99-100).

4. The Claimant testified that on January 20, 2010, she tripped as she was going down outside concrete stairs. She testified that she grabbed the stair rail as she was falling, but still continued falling and she hit about 10 steps until she stopped. The Claimant testified that the first thing she remembered after her fall was that she was short of breath and it felt like her mouth was full of blood. She testified that people were trying to hold her head up but she was trying to signal them that she couldn't breathe and wanted them to set her on her side. The Claimant testified that after the accident, she went to the hospital and received treatment there (Hrg. Tr., May 13, 2014, p. 34).

5. The Claimant was transported to Rose Medical Center by ambulance. The location of the Claimant's injuries were listed as "head, face, neck and upper and mid back." The Claimant sustained a blow to the head but no loss of consciousness. The Claimant reported a headache and nausea, but no pain on weight bearing, no numbness, no dizziness, no loss of vision, no hearing loss, no chest pain, no difficulty breathing, no weakness, no vomiting and no abdominal pain. X-rays and a CT of the cervical spine and head were normal with no fractures and no acute findings. The Claimant was prescribed Vicodin and Valium and was advised to follow up with a Workers' Compensation doctor the following day (Claimant's Exhibit 28; Respondents' Exhibit V).

6. The day following the fall, the Claimant testified that the whole right side of her face was bruised and her eyes were shut they were so swollen. She testified that she was also bruised on her right shoulder. The Claimant did not remember any bruising on her hip or anywhere else (Hrg. Tr., May 13, 2014, p. 34-35).

7. The Claimant was seen the day after her injury, on January 21, 2010, by Dr. James Bachman. A translator was present at this visit (Claimant's Exhibit 29; Respondents' Exhibit W). The Claimant reported pain in her occiput, mid back, and lower back with her lower back described as her worst symptom. She denied coughing. She denied radiation of her neck and back pain into her extremities. She was feeling symptoms in her right knee, left hip and right shoulder. Dr. Bachman specifically noted "GU: no frequency, hematuria or change in urination" (Claimant's Exhibit 29; Respondents' Exhibit W, p. 247). He diagnosed cervical, thoracic and lumbar strains but Dr. Bachman did not report objective muscle spasms. He also identified strains/contusions in the Claimant's right shoulder, left wrist, left hip and right knee as well as a concussion.

8. The Claimant was seen on January 28, 2010 by Dr. Bachman with a translator. His report stated, "There is no history of bladder or bowel dysfunction. . . There is no saddle block anesthesia" (Claimant's Exhibit 29; Respondents' Exhibit X, p. 250). Dr. Bachman felt the Claimant's reflexes were symmetrical.

9. A cervical MRI and lumbar MRI occurred on February 12, 2010. There were minor disc bulges at C4/5 and L5/S1 but there was no nerve root compression, spinal cord compression, spinal canal stenosis nor foraminal stenosis (Claimant's Exhibits 31 and 32; Respondents' Exhibit Y).

10. On February 18, 2010, the Claimant was seen by Dr. Bachman with a translator. The Claimant's gait was reported as "very unsteady and she walks only with assistance" (Claimant's Exhibit 29; Respondents' Exhibit Z, p. 258). There was no physiologic explanation noted for a change in her gait 39 days after her accident. On this visit, the Claimant's MRI results were reviewed with her by Dr. Bachman and she was instructed to return to desk work 4 hours per day.

11. Four days later, on February 23, 2010, the Claimant presented to the emergency room at St. Joseph's Hospital (Respondents' Exhibit AA). The Claimant reported 10/10 low back pain which radiated down both legs. She denied bladder and bowel dysfunction to Christine Wright RN (KIWI) in triage, Dr. Alisha Garth (ALGA) and Genevieve Nation RN (EVE). It was noted the Claimant did not have any urine output changes, no dysuria, no urinary frequency, and no urinary urgency (Respondents' Exhibit AA, p. 261). The Claimant denied any headaches, paresthesias, focal weakness, or sensory changes. The Claimant denied neck pain and the medical providers noted her cervical spine was non-tender on exam and her range of motion of her neck was normal (Respondents' Exhibit AA, pp. 261- 262). Though the Claimant's stated her low back pain was 10/10, on physical exam of the low back there was "no CVA Tenderness, there is no tenderness to palpation, normal inspection" (Respondents' Exhibit AA, p. 261). The medical record noted "patient with steady gait" and "ambulates without assistance" (Respondents' Exhibit AA, p. 262). It was also reported "no gait changes" and on physical exam it was reported "gait normal" and "able to walk without difficulty" (Respondents' Exhibit AA, p.261). At discharge the Claimant was educated about bowel and bladder dysfunction and asked to return for such symptoms (Respondents' Exhibit AA, pp. 262- 264). This becomes pertinent in the Claimant's medical appointment the next day.

12. The Claimant met with Meghan Dukes, PT the following day on February 24, 2010 (Respondents' Exhibit BB, p. 265). On this visit, the Claimant reported numbness in both legs posteriorly on the left to the ankle and on the right to the back of the knee. The day before, the Claimant had denied paresthesias and sensory changes. The Claimant reported to Ms. Dukes she had incontinence of bladder but denied saddle anesthesia. At the ER, the Claimant had denied bladder changes to three providers. Ms. Dukes reported the Claimant required minimal assistance with position changes and her gait was antalgic and slow. The day before, the Claimant's gait was noted as normal by two medical providers at multiple points in the report.

13. The Claimant saw Dr. Bachman on February 25, 2010, two days after the emergency room visit and reported she was "losing urine" (Respondents' Exhibit CC). Dr. Bachman reported the Claimant's "Gait was very unsteady and she walks only with assistance." She was taken off of work and referred to Dr. Robert Kawasaki.

14. The Claimant met with Dr. Robert Kawasaki on March 9, 2010, which is approximately two months after her date of injury (Claimant's Exhibit 30; Respondents'' Exhibit DD). Dr. Kawasaki remains the Claimant's ATP to this day. The Claimant gave Dr. Kawasaki a medical history discrepant from the history she gave before at the Emergency Room and reported new symptoms to him never reported before. The Claimant reported to Dr. Kawasaki she had a loss of consciousness of a few seconds after her fall and reported an immediate onset of pain throughout her body including her head, neck and low back with numbness and tingling throughout her lower extremities. The Claimant advised Dr. Kawasaki she had numbness and tingling "into both of her legs in a diffuse pattern" (Claimant's Exhibit 30; Respondents' Exhibit DD, p. 269). The Claimant reported some incontinence including stress incontinence, occasional leaking and incomplete emptying, numbness in the perirectal region noticed when she is cleaning herself after a bowel movement, and numbness in her genitalia observed during intercourse (Claimant's Exhibit 30; Respondents' Exhibit DD, p. 270). The Claimant also reported to Dr. Kawasaki she had decreased sensation below the nipple line from T4 to the lower extremities. Dr. Kawasaki observed what he believed to be hyperreflexia with clonus and was concerned about a thoracic spinal cord lesion. He made a STAT referral for a thoracic MRI and a STAT referral to Michael Shen MD, orthopedic surgeon (Claimant's Exhibit 30; Respondents' Exhibit DD, pp. 271-272). Dr. Kawasaki noted the Claimant's newly reported loss of consciousness but noted the patient had no retrograde or anterograde amnesia. Dr. Kawasaki noted the Claimant was clear cognitively with him during history taking (Claimant's Exhibit 30; Respondents' Exhibit DD, p. 272).

15. The thoracic MRI occurred on March 12, 2010 was normal without evidence of stenosis, disc herniation or spinal cord lesion (Respondents' Exhibit EE, p. 273). The Claimant was referred for an EMG and to a urologist.

16. On March 25, 2010, the Claimant met with Dr. Bachman and reported that she was experiencing "forgetfulness" (Claimant's Exhibit 29; Respondents' Exhibit C, p. 49). Dr. Bachman recommended a brain MRI, which was normal (Respondents' Exhibit GG, p. 276).

17. On April 6, 2010, Dr. Kawasaki reported the EMG studies of her bilateral lower extremities were normal (Respondents' Exhibit HH, 278-280). On April 20, 2010, the Claimant reported to Dr. Kawasaki that her neck was feeling better although her headaches were increased and her low and mid back pain persisted with pain radiating into the bilateral lower extremities (Respondents' Exhibit II).

18. As of April 27, 2010, the Claimant had returned to light duty with the Employer. Despite cervical symptoms being reported as negative to two emergency room examiners on February 23, 2010, and neck pain being noted as improved on April 20, 2010 by Dr. Kawasaki, the Claimant's neck pain returned and she advised Dr. Kawasaki she was having "increasing discomfort." Dr. Kawasaki also noted the Claimant had a "significant antalgic gait, her gait was much more so than seen previously" (Claimant's Exhibit 30; Respondents' Exhibit JJ, p. 283).

19. The Claimant met with orthopedic surgeon Michael Shen, MD on April 28, 2010. On his physical exam, he reported the Claimant's gait was "non-antalgic nor broad based and the patient is able to heel-and-toe walk normally" (Respondents' Exhibit KK, p. 286). On Dr. Shen's exam, the Claimant's paraspinous muscle tone was normal and spasms were absent (Respondents' Exhibit KK, p. 286).

20. The Claimant was evaluated by urologist, Ferdinand Mueller MD starting on May 5, 2010. The Claimant advised Dr. Mueller she "first started noticing urine leaking in February" (Respondents' Exhibit LL, p. 290). The Claimant had detrusor overactivity on urodynamic study. Lisa Zwiers PA-C in Dr. Mueller's office reported the Claimant had failed improvement on medications at both high and low doses (Respondents' Exhibit FFF, p. 337).

21. The Claimant was seen by neurologist Dr. Joshua Renkin on June 9, 2010. On motor examination, Dr. Renkin reported "very limited effort with all strength testing, predominately in the legs. She cannot bring her ankles up, although there is no reason to think they are weak based on gait evaluation" (Respondents' Exhibit NN, p. 295). He noted Claimant had normal tone and marked antalgic gait without signs of motor weakness. Dr. Renken also evaluated her deep tendon reflexes and noted,

> unusual jerking movement of the ankles which I presume is what Dr. Kawasaki felt was clonus. This does not actually seem to be clonus and may be volitional in nature versus discomfort. She seems to push down, not allow me to dorsaflex her feet. [sic] I have evaluated this carefully several times, and also had Dr. Nitka, an office partner, and board certified neurologist for a second opinion. He agrees that this does not appear to be clonus (Respondents' Exhibit NN, p. 296).

Dr. Renkin concluded the Claimant's exam was inconsistent with atypical movement of the feet which was not clonus and she had no other upper motor neuron signs such as upgoing toes or increased tone or other significant type of reflexia. The following day, a repeat thoracic MRI was normal (Respondents' Exhibit OO, p. 297). Dr. Renkin reviewed the urology records and thoracic MRI and concluded, "No clinical evidence no radiograph evidence for spinal cord, brain or any central nervous system injury" (Respondents' Exhibit RR, p. 303).

22. The Claimant was seen by Dr. Bachman on June 24, 2010. The Claimant reported an increased pain episode and her "legs would not move." This happened with "stress" at home and Dr. Bachman noted that she cried and became upset talking about this (Claimant's Exhibit 29; Respondents' Exhibit PP, p. 298). Dr. Bachman noted that for the Claimant's "Long Term Plan" that the neuro urological evaluation was to be completed, he recommended a psychiatric refill and evaluation, and then after that, opined the Claimant would be at MMI (Claimant's Exhibit 29; Respondents' Exhibit PP, p. 299).

23. Dr. Bachman saw the Claimant again on August 16, 2010 and Dr. Bachman noted that in speaking with Dr. Kawasaki, they agreed the Claimant's case was approaching MMI. Dr. Bachman noted that the Claimant was referred to Dr. Furmansky for depression but had not yet seen him. The claimant complained of low back pain and Dr. Bachman noted a "very long" (40 min) conversation with the Claimant about her pending psych evaluation, MMI, impairment ratings and maintenance care (Respondents' Exhibit SS, p. 304).

24. Dr. Kawasaki met with the Claimant on August 17, 2010. He recorded "the patient has pain behaviors" and was "stiff and guarded with thoracolumbar range of motion." She had diffuse tenderness to palpation with cervical, thoracic and lumbar regions. Dr. Kawasaki did not note the Claimant walking with a limp or using a cane. He outlined she had negative neurologic scans of the brain, cervical, thoracic, and lumbar region, idiopathic hypereflexia, and her urinary incontinence had unclear etiology with no correlating neurologic lesion. He also stated, "delayed recovery and probable psychologic issues perpetuating pain issues." He placed the Claimant at MMI from a physical standpoint (Respondents' Exhibit TT, p. 306).

25. On August 17, 2010, the Claimant was initially referred to Dr. Bert Furmansky for a psychiatric evaluation and treatment for severe depression. She saw Dr. Furmansky the same day that Dr. Kawasaki placed her at MMI from a physical standpoint. She presented to Dr. Furmansky using a cane, which no doctor prescribed, and not observed by Dr. Kawasaki the same day. The Claimant reported to Dr. Furmansky that, on the day of her fall, she was very happily employed as an infant daycare worker for Employer. Then, she tripped on concrete steps "landing on her face falling forward about 10 steps resulting in loss of consciousness and multiple physical injuries. She remembers waking up after the fall in pain and was 'blank' in the ambulance, but capable of moving her arms and legs. She sustained severe and massive soft tissue injury to her face and left thorax. A series of x-rays was within normal limits and subsequent MRIs have been negative although she demonstrates consistent neurological findings of a thoracic spinal cord lesion" (Respondents' Exhibit UU, p. 308). Dr. Furmansky noted the Claimant "is worried about whether she will be able to recover and return to full time work. Her options are rather limited as a Spanish speaking female without much English language use" (Respondents' Exhibit UU, p. 309). The Claimant reported to Dr. Furmansky that "she worked in the office at her father's factory in high school and completed 12th grade graduating in 1996 or 1997 when she was approximately 18 years old. Following high school graduation she continued to work for her father who paid her salary." The Claimant also reported that she took English classes and became certified in early childhood daycare before going to work as a child care worker for Employer (Respondents' Exhibit UU, p. 310). Dr. Furmansky diagnosed her with severe depression and anxiety. He noted that she experienced a loss of consciousness and a concussion but noted that he had very few medical records available to him at the time of this initial evaluation. Dr. Furmansky also noted that he found it difficult to evaluate her cognitive abilities due to her being Spanish speaking and he noted that his required consideration. Dr. Furmansky recommended an

increase in medication and a psychiatric follow-up to include psychotherapy and marital psychotherapy for a work-related relational problem with a Spanish speaking psychologist, Ricardo Esparza (Respondents' Exhibit UU, pp. 311-312).

26. On September 14, 2010, Dr. Kawasaki noted that the Claimant reported her pain was getting worse in her mid back. He also noted her reports of diffuse complaints of numbness and tingling in her bilateral extremities. The Claimant reported frustration with her continued pain and she "feels the pain is stronger." On examination she had "very minimal motion with lumbar forward flexion, extension and lateral bend." Dr. Kawasaki added "delayed recovery" to his impression. Dr. Kawasaki noted that he believed the Claimant was at MMI for her physical condition and noted "we will leave the psychologic maximum medical improvement to Dr. Furmansky (Respondents' Exhibit XX, pp. 317-318).

27. On September 16, 2010, Dr. James Ogsbury performed a medical record review concluding that there was no evidence of a spinal cord injury and nothing to indicate MRI pathology consistent with detrusor hyperactivity or relate to her urologic condition. Dr. Ogsbury opined that the Claimant's bladder situation was not causally related to a spinal injury and he found her at MMI for all physical conditions (Respondents' Exhibit YY, pp. 319-320).

28. On September 22, 1010, The Claimant presented to Dr. Bachman with a cane and, other than this, he noted no change from previous exams. He indicated that the Claimant would follow up with him in two weeks for MMI and medical impairment rating (Respondents' Exhibit ZZ, pp. 331-332). On October 22, 2010, the Claimant told Dr. Bachman "the medication is not working anymore" and her headaches were getting worse. The Claimant told Dr. Bachman that, "Dr. Furmansky thinks that Dr. Kawasaki should evaluate her headaches prior to MMI." Dr. Bachman noted that he would wait to place her at MMI until after she had an appointment with Dr. Kawasaki (Exhibit AAA, pg 323).

29. Dr. Kawasaki met with the Claimant on November 2, 2010 (Exhibit BBB, pp. 325-326). The Claimant reported continued diffuse pain complaints, neck pain with headaches more towards the right into the occipital region and continued low back pain, numbness and paresthesis into the lower extremities. On this examination, Dr. Kawasaki reported the Claimant had giveway pattern weakness throughout the bilateral lower extremities not following a dermatomal pattern. Because of her increasing pain complaints of breakthrough pain, Dr. Kawasaki increased the Claimant's prescription of opiates to add Vicodin to her morphine sulfate and he switched her headache medication from Maxalt to Midrin. Dr. Kawasaki expected the Claimant would be placed at MMI on her next visit with Dr. Bachman (Exhibit BBB, pp. 325-326).

30. On November 12, 2010 Dr. Bachman placed the Claimant at MMI. Dr. Bachman provided the Claimant a 43% whole person rating and included a cervical rating (including the headaches), a thoracic rating, and a lumbar rating. At this visit, Dr. Bachman noted that on her pain diagram, the Claimant shaded in her entire body, "from

her head to toes only leaving her arms out" as being in pain and she listed her current pain level as an "8" with a range of 7-9. Dr. Bachman noted that the Claimant's course of care included the following:

1. Multiple MRIs of the brain and entire spine
2. PM & R evaluation from Dr. Kawasaki
3. Second opinion from Dr. Shen, orthopedics
4. Neuro/urologic evaluation
5. EMGs of the LEs
6. Neurological evaluation from Dr. Renkin
7. Psychiatric evaluation and treatment from Dr. Furmansky
8. Psychological evaluation and treatment from Dr. Esparza
9. Extensive physical therapy

Dr. Bachman also noted that as of November 12, 2010, the Claimant was taking the following medications:

1. Maxalt MLT 10
2. Gabapentin 300
3. Enablex 15
4. Cymbalta 30
5. MS Contin 30
6. Nortriptyline
7. Celebrex
8. Ambien

Dr. Bachman indicated the Claimant's work status is desk work only 4 hours per day. He recommended as ongoing maintenance care:

1. pain management with Dr. Kawasaki 3 months with appropriate labs (8 visits);
2. psychiatric management with Dr. Furmansky, deferred to Dr. Furmansky;
3. psychological management with Dr. Esparza, deferred to Dr. Furmansky;
4. Biofeedback with Jessica Graves, MA, deferred to Dr. Furmansky;
5. Physical therapy at CACC 2/week for six weeks (12), 1/week for six weeks (6) for total of 18 visits, then re-evaluate;
6. PCP W/C management by myself q 3 months for 2 years (8 visits).

(Claimant's Exhibit 29; Respondent's Exhibit DDD).

31. The Claimant saw Dr. Furmansky for treatment prior to psychiatric MMI from August 31, 2010 through March 21, 2011, at which time Dr. Furmansky placed the Claimant at MMI (Respondents' Exhibits WW, CCC, EEE, JJJ and Claimant's Exhibit 35, pp. (a)-(f)). On March 21, 2011, Dr. Furmansky provided a psychiatric impairment rating for the Claimant. As part of his impairment rating calculation, Dr. Furmansky notes that the Claimant is moderately impaired in her sexual functioning and sleep, markedly impaired in her recreational activities with family, moderately impaired in her

interpersonal relationships and mildly impaired in her ability to manage conflicts and face adversity. He found the Claimant minimally impaired in memory, attention and concentration. Dr. Furmansky found her markedly impaired in her adaptation to job performance requirements. He assigned the Claimant a 23% overall psychiatric permanent impairment rating (Claimant's Exhibit 35, p. (c); Respondents' Exhibit JJJ, p. 346). Ultimately, Dr. Furmansky did not place the Claimant at psychiatric MMI for seven months after initially seeing her. He initially listed traumatic brain injury as a diagnosis, though this had never been listed as a diagnosis by any prior doctor (Exhibit UU, p. 311). Dr. Furmansky noted he did not have medical records at his first visit and stated his opinions might change should he receive additional medical records (Exhibit UU, p. 312). He treated the Claimant as if she had a thoracic spinal cord lesion or neurological injury, yet these diagnoses had been excluded by Dr. Kawasaki on the same day that Dr. Furmansky began treating the Claimant. Dr. Furmansky was in error to include these diagnoses and his assumptions regarding her diagnoses were not corrected for two years and two months.

32. After placing the Claimant at MMI, Dr. Furmansky opined that the Claimant required maintenance care of 8 more psychotherapy sessions over 18 months and ongoing psychiatric care of evaluations every 2 weeks for the first year and then anticipating psychiatric treatment every 2-4 weeks for an undetermined period of time based on her clinical status and ability to taper down or off of some of her mediation (Claimant's Exhibit 35, p. (c); Respondents' Exhibit JJ, p. 346). Dr. Furmansky continued to diagnose and treat the Claimant per his March 21, 2011 report until February of 2013.

33. The Respondents sought a Division IME and Dr. Carolyn Gellrick was selected as the DIME. Dr. Gellrick examined the Claimant on April 19, 2011. Dr. Gellrick also performed a review of medical records and diagnostic testing and studies. Dr. Gellrick assessed the Claimant with: (1) facial abrasions – normal CT and MRI of the brain, no evidence of lesions today; (2) cervical spine strain with cervicogenic headache; (3) thoracic strain with normal MRI x2; (4) lumbar strain with disk bulge at L5-S1 normal lower extremity EMGs; and (5) depression and anxiety. Dr. Gellrick noted that she agreed with the date of MMI assigned. She notes that there was a very thorough and comprehensive work up due to the persistence of pain, but no evidence of spinal cord lesion or neurological problems and no evidence of memory, thinking or concentration issues. Dr. Gellrick also specifically stated that the bladder symptoms are not causally related to the Claimant's work injury. The Claimant received impairment ratings for her cervical spine (16%) and thoracic spine (6%). The Claimant's lumbar range of motion was invalidated initially and the Claimant returned to have range of motion repeated. She later assigned a 15% rating for her lumbar spine on April 21, 2011. In combining the values, Dr. Gellrick assigned the Claimant a 33% whole person impairment for her physical rating with no apportionment. As for the psychiatric impairment, she noted that Dr. Furmansky had assigned a 23% whole person impairment rating. Dr. Gellrick stated, "Admittedly, this examiner finds Dr. Furmansky's impairment rating rather high considering how the patient presents today in the office.

However, this examiner is not a board certified psychiatrist. Therefore, it is requested that the patient undergo a psychiatric IME to determine impairment with this examiner's impairment calculation being different significantly from that of Dr. Furmansky." Dr. Gellrick recommended the Claimant follow with Dr. Kawasaki and Dr. Furmansky for medication maintenance for 18 months (Claimant's Exhibit 5; Respondents' Exhibit LLL).

34. The Claimant met with Dr. Gary Gutterman on September 6, 2011 as a DIME provider to evaluate psychiatric conditions (Claimant's Exhibit 5; Respondents' Exhibit OOO). Dr. Gutterman noted the Claimant had improved and stabilized from a psychiatric perspective while on Prozac and agreed the Claimant was at MMI. He assigned a four percent (4%) partial mental impairment based on four areas of functioning assessed in the mental impairment rating. Per his worksheet, he rated the Claimant's impairment at a 1 for "Activities of Daily Living"; a 1.5 for "Social Functioning"; a zero for "Thinking, Concentration and Judgment"; and a 1.5 for "Adaptation to Stress" resulting in his overall rating of 4% impairment. Dr. Gutterman commented on maintenance care and recommended the Claimant meet with Dr. Furmansky one time per month for four more months, follow up for medication management every 2 months for an additional 2 months, every three months for 12 months to 15 months, and then a reassessment for use of psychotropics would be necessary. He did not recommend ongoing psychotherapy in his discussion of maintenance care (Claimant's Exhibit 5; Respondents' Exhibit OOO).

35. The Claimant continued to follow up with Dr. Kawasaki reporting continued multiple global pain and pain in her neck and low back with continued urinary incontinence, depression, headaches and dizziness. He noted that "she reports in the last few months, her right arm has been falling to sleep on her. She indicates at times she has no sensation in the arm and has been losing strength. She indicates that this symptom was more intermittent previously but is now very constant with regard to the right arm numbness and weakness." Dr. Kawasaki notes an antalgic gait pattern and use of a cane. Dr. Kawasaki reco9mmended an EMG/nerve conduction study of the right upper extremity based on the Claimant's new complaint (Claimant's Exhibit 30; Respondents' Exhibit QQQ).

36. On April 3, 2012, Dr. Kawasaki noted the Claimant continued to report "global pain" that changes from time to time. The Claimant reported "that she has a sense that her nerves are pulling in her body, causing pain. She gave her pain level at 9/10 but Dr. Kawasaki noted "she does not have the appearance of somebody in 9/10 pain." He reported diffuse tenderness and numbness and guarding with motion and a "give-way pattern weakness through the right upper extremity diffusely." Dr. Kawasaki noted the EMG study he recommended had not been authorized yet. In response to the Claimant's questions about her diffuse pain and worsening of her symptoms, Dr. Kawasaki noted "I do not have a good explanation for this." He also strongly warned the Claimant about changing her medications on her own. He noted she would discontinue morphine sulphate and start the Claimant on OxyContin (Respondent's Exhibit RRR).

37. On May 8, 2012, the Claimant saw Dr. Kawasaki again with report of another new pain complaint in the right knee that she reported has occurred in the last three weeks. Dr. Kawasaki noted multiple side effects on the Oxycodone and switched her back to morphine. Dr. Kawasaki noted new complaint of right knee pain was not related to the Claimant's work injury (Respondents' Exhibit SSS).

38. The Claimant saw Dr. Mark Paz for an IME on July 31, 2012 (Respondents' Exhibit A). Dr. Paz took a detailed history from the Claimant, performed a physical examination, and he conducted an extensive medical record review as detailed in Appendix A of his report (Respondents' Exhibit A, pp. 11-18). In the history that she provided to Dr. Paz, the Claimant does not mention a loss of consciousness during or immediately after the fall. Rather, she states that "she does not recall what occurred after the paramedics arrived….her next recollection is when she woke up in the hospital" (Respondents' Exhibit A, p. 2). He noted that the Claimant told him that her walking is limited to 15-20 minutes and she does not drive a motor vehicle "because of the right lower extremity trembling which occurs in the right foot (Respondents' Exhibit A, p. 4). On his physical examination, Dr. Paz did not observe spasm of the Claimant's cervical, thoracic or lumbar spine. It was his opinion there were no objective studies of the cervical, thoracic or lumbar spine which clinically correlated with the subjective complaints and diffuse findings on physical examination (Respondents' Exhibit A, p. 7). He observed pain behaviors and nonphysiologic responses during his physical examination. He noted she continued to report symptoms of depression despite pharmacotherapy and clinical therapy. Her depression had been attributed to a subjective report of multiple areas of severe symptoms, yet these severe physical symptoms were not supported by objective findings (Respondents' Exhibit A, p. 7). Dr. Paz opined there were no objective findings which clinically supported a conclusion that claimant could not return to work on a full or part time basis. He opined her "subjective complaints of pain . . . are the only basis for her functional limitations" (Respondents' Exhibit A, p. 8). Dr. Paz also opined continued psychological treatment was not medically necessary in this case, concluding current psychosocial care has fostered on ongoing dependence on therapy (Respondents' Exhibit A, pp. 8-9).

39. On August 21, 2012, the Claimant reported to Dr. Kawasaki that her pain medications were losing effectiveness and she was switched to fentanyl patches and break through hydrocodone (Respondents' Exhibit UUU). At a September 18, 2012 visit with Dr. Kawasaki, the Claimant reported the fentanyl patches were helpful. She continued to report pain diffusely including her neck, down her arm, her thoracic spine, low back and pain, numbness and tingling into her legs bilaterally and in her right arm and some head pain. Dr. Kawasaki noted no change in the Claimant's functional status with regards to the prior work restrictions established by Dr. Bachman (Respondents' Exhibit VVV).

40. The Claimant saw Dr. Judith Weingarten on October 8, 2012 for an IME and Dr. Weingarten prepared a written report dated October 19, 2012 (Respondents' Exhibit B). The Claimant appeared at the IME with an interpreter and Dr. Feldman

(Respondents' Exhibit B, p. 19). Dr. Weingarten reported that the Claimant described her mechanism of injury as follows:

> [S]he got hurt as she was coming back from lunch one day and had to go down the stairs to the basement. She tripped on the first couple of steps and flew down the stairs. She stated that she felt like her head and face cracked. She remembers being told not to move and remembers she couldn't breathe and was choking. She stated that at the moment she got hurt, everything hurt. She stated that she hit her head and her face was scraped. Her whole body was in pain and she could not even lie down (Respondents' Exhibit B, p. 20).

41. Dr. Weingarten took a lengthy history from the Claimant and questioned her in detail about her activities prior to and after her injury and how they differed. Dr. Weingarten also noted that the Claimant stated, "that her pain is in the area of her mid back and she also has pain in her neck. Her other symptoms include her legs feeling heavy, her right hand starts to feel heavy like she can't grasp things and headaches that are very frequent with a lot of dizziness" (Respondents' Exhibit B, p. 20). The Claimant advised Dr. Weingarten that there is nothing else in her life that is causing her stress other than this and that she currently sees Dr. Furmansky every two to three weeks to help control her stress, depression and for medication management (Respondents' Exhibit B, p.22). As part of her IME, Dr. Weingarten reviewed the records from Rose Medical Center ER, Dr. Bachman, Dr. Kawasaki, Dr. Shen, Dr. Mueller, Dr. Renkin, Dr. Furmansky, Dr. Esparza, Dr. Ogsbury, Jessica Graves (physical therapist), Dr. Gellrick, Dr. Gutterman and Dr. Paz. Dr. Weingarten provided a summary and review of the medical records which spanned from January 20, 2010 to October 2, 2012 (Respondents' Exhibit B, pp. 24-33). As a result of her examination, history and record review, Dr. Weingarten diagnosed a pain disorder associated with both psychological factors and a general medical condition and opioid dependence (Respondents' Exhibit B, p. 33). Dr. Weingarten opines that the Claimant meets the criteria for Pain Disorder associated with both psychological factors and a general medical condition and "this diagnosis explains what is going on with [the Claimant], specifically her delayed recovery. With Pain Disorder, there is no obvious relationship between the objective findings and the degree of pain and suffering that a patient complains of" (Respondents' Exhibit B, p. 34). Dr. Weingarten expressed concerns that the Claimant has developed symptoms after the initial injury that do not make physiologic sense, and according to her medical records, has non-organic findings on the physical exam (Respondents' Exhibit B, p. 34). Dr. Weingarten cautioned against treating subjective complaints as opposed to objective evidence of injury and noted that most Pain Disorder patients do not respond to psychotherapy so that should be brought to a close (Respondents' Exhibit B, p. 36). She also recommended against continued narcotic medications for the Claimant. She opined that the lack of functional gain while the Claimant has been on narcotics, combined with the risks and side effects of opioids, make this a poor treatment option for the Claimant and she recommended tapering off all opioid medication (Respondents' Exhibit B, p. 37). Dr. Weingarten also opined that the

continued referrals for the Claimant, both medical and psychiatric, create a psychological risk for the Claimant and may have fostered an ongoing dependence on therapy (Respondents' Exhibit B, p. 38).

42. On November 29, 2012, there is a note of Dr. Furmansky that he spoke with Dr. Kawasaki regarding a SAMMS conference. The note refers to Dr. Paz' orthopedic consultation and Dr. Weingarten's opinion of "inappropriate meds." The note also references "migratory" symptoms with "few objective signs" and "unidentified generators" (Respondents' Exhibit XXX).

43. Dr. Kawasaki also authored a note dated November 29, 2012 wherein he discussed the SAMMS conference of November 28, 2012. Dr. Kawasaki noted, "it was clear that Dr. Furmansky did not have all the medical records and knowledge as far as what was going on with the patient from a physical standpoint. He was under the impression that there was an anatomic lesion to explain her symptomatology." Dr. Kawasaki reviewed the Claimant's work up, "which has been essentially negative with no clear objective findings to substantiate her subjective findings. I also discussed that she has had some migratory expanding symptomatology." Dr. Kawasaki also noted that he discussed pain medication management with Dr. Furmansky and stated that "Dr. Furmansky was fully agreeable to helping in the process of trying to get the patient to understand that she does not have objective findings to warrant continual use of opioid medications" and noted a goal to wean her off these medications in the next two months (Respondent's Exhibit YYY).

44. On December 3, 2012, Dr. Kawasaki authored a note regarding his conversation with Dr. Esparza about the SAMMS conference and the Claimant's diagnosis of pain disorder. Dr. Kawasaki noted that Dr. Esparza "was very agreeable to see the patient, treat the patient for this disorder, and help in the process" (Respondents' Exhibit ZZZ).

45. On December 12, 2012, the Claimant requested a follow-up visit with Dr. Esparza because "she has been feeling desperate because there is a sense that others do not believe her given that pain symptoms have persisted for a long period of time without major improvement. She is struggling with the default interpretation to her problem as only psychological in nature. Part of the difficulty is that [the Claimant] has over-identified being a patient because she was initially told that she had major physical problems." Dr. Esparza noted that the Claimant "concurs that she emphasizes her physical condition because she cannot understand how something physical could change to that of being psychological." Dr. Esparza noted that the Claimant needs to "renew her commitment to pain management strategies, coping skills, reality testing, problem solving, and support by which she could focus on ways to adapt rather than maintaining her victimization mentality" (Claimant's Exhibit 36; Respondents' Exhibit BBB).

46. On January 22, 2013, the Claimant saw Dr. Kawasaki for maintenance care and she came in "asking about why her medications were decreased." Dr.

Kawasaki "rehashed with her" the recent events culminating in discussions with her doctors and an agreement by all of her authorized treating providers that she would be best served by trying to decrease her medications and get her off all opioid medications. Dr. Kawasaki noted the Claimant "is not at all happy with this decision" and had multiple pain complaints and wanted to know why her pain still exists. He explained that in spite of an extensive workup there was "no clear objective explanation for her ongoing symptomatology" (Claimant's Exhibit 30; Respondents' Exhibit CCCC).

47. On January 30, 2013, the Claimant was referred to Dr. Ricardo Esparza for additional counseling for coping skills as she is being weaned off pain medications. Dr. Esparza notes that "patient understands this referral has occurred because there is more than one medical opinion that psychological factors are playing a much greater role in her pain perception," although Dr. Esparza further noted that the Claimant disagrees with this perspective because she feels that she experiences pain at the physical level. Dr. Esparza noted the Claimant was distressed by what she felt was the minimization of her condition and a focus on psychological issues and she feels this is because others do not understand her pain condition. Thus, Dr. Esparza comments that the Claimant remains in a "victimization mentality" with a high degree of anxiety about her physical condition. He notes "she remains hyper-sensitive to anything that does not meet her belief system while at the same time, cannot let go of a need to prove that she has pain" (Claimant's Exhibit 36, p. 214; Respondents' Exhibit EEEE, p. 411). Dr. Esparza noted the Claimant was distrustful of her medical providers and their intentions towards her, including rehabilitation providers, who she perceives as not caring about her and setting her up to fail. Dr. Esparza noted that an effort was made to help the Claimant discuss the need to move away from a reliance on pain medication and physical complaints in order to move forward. However, he noted the Claimant was resistant to this strategy and was anxious about case closure because she feels she will be forced into a situation where there is no available treatment that will cure her (Claimant's Exhibit 36, p. 215; Respondents' Exhibit EEEE, p. 412).

48. On January 30, 2013, Dr. Furmansky noted that the Claimant is "permanently and totally disabled." He stated: "she suffers from chronic pain, chronic depression, chronic anxiety; chronic insomnia and has multiple problems adjusting to her severe social, occupational, and recreational losses." He opined "She requires ongoing maintenance treatment to prevent further mental and physical decline or increased impairments; patient is receiving several psychotropic and other medications requiring monitoring for serious toxic effects" (Claimant's Exhibit 35, p. 182; Respondents' Exhibit DDDD). In February, 2013, his opinion regarding total disability of the Claimant remained the same. He also reported she still continued to receive several psychotropic medications which required monitoring for serious toxic effects same (Claimant's Exhibit 35, p. 183).

49. On February 19, 2013, the Claimant saw Dr. Kawasaki and complained that her low back was worsening, her thoracic region was worsening and she had pins-and-needles sensations down her bilateral lower extremities with neck pain and achiness in her head. Her reported pain level was 7-8/10. The Claimant reported that

she is barely able to get out of bed on some days and is not able to be as active as she was previously. Dr. Kawasaki did note that prior to being taken of opioid medications the Claimant's pain ranged between 6-8/10 so there was not significant change. The Claimant stated to Dr. Kawasaki that she felt she needed to be back on her pain medications for increased functionality. However, he pointed out that the goal was to get her off all opioid medications due to long term side effects and he pointed out to her that her pain scores had not really changed. Dr. Kawasaki noted pain behaviors and guarding with motion. Dr. Kawasaki also noted that Dr. Furmansky was recommending Suboxone but Dr. Kawasaki opined that it is in the Claimant's best interests to stay away from all opioid/narcotic medications due to a non-objective pain disorder. Dr. Kawasaki noted the Claimant has had quite a bit of physical therapy in the past. He recommended a recreational center including a pool pass for her to continue rehab on her own, but indicated this was denied by the insurer. Dr. Kawasaki opined that "physical activity including strengthening, conditioning, and cardiovascular exercises could be important for [the Claimant] to continue her chronic rehab process" (Respondents' Exhibit FFFF).

50. On February 25, 2013, after reviewing medical records including the IMEs of Drs. Weingarten, Gellrick, Gutterman, Renkin and medical records of Dr. Kawasaki from November 29, 2012, December 3, 2012 and January 22, 2013, Dr. Furmansky notes that neurological evaluations and studies conclusively demonstrated that the Claimant does not have a spinal cord injury or any other medically objective signs of neurological defects. Dr. Furmansky opined that, based on his review of the provided medical records, the most accurate physical diagnosis is myofascial strain of the cervical, thoracic, and lumbar areas with cervicogenic headaches. Dr. Furmansky also opined that the Claimant's "symptoms of depression and anxiety have been improving and are much more mild than when she first entered treatment" (Respondents' Exhibit GGGG, p. 406). Dr. Furmansky also observed that the Claimant's pain complaints "are greater than one would expect from an individual suffering from myofascial pain syndrome" and he also stated that, "I had until very recently been under the mistaken impression that [the Claimant] had indeed suffered from a spinal cord injury in the thoracic area, and the information I have obtained will be incorporated into a revised treatment plan." Dr. Furmansky continued to disagree with the conclusions of Dr. Weingarten and felt that there was objective evidence to support the Claimant's pain complaints. However, he ultimately opined that the Claimant's "work-related anxiety and depression have contributed to her pain complaints and there is some degree of psychological enhancement of her complaints," especially, as Dr. Furmansky notes, the Claimant continues to believe she suffers from a serious neurological problem that has not been adequately diagnosed and treated. Based on his revised opinions, Dr. Furmansky detailed an updated treatment plan to: (1) review medical records with the Claimant over several sessions to reinforce that she does not suffer from any serious neurological spinal disorder; (2) help the Claimant set realistic goals for functioning physically at a higher level, including resuming driving and walking without a cane; (3) continue to treat signs and symptoms of work-related depression with medication and psychotherapy; (4) continue to treat signs and symptoms of work-related anxiety with

medication and psychotherapy; (5) refer the Claimant back to Jessica Graves for 4 biofeedback sessions; (6) assist the Claimant in understanding that she may have to live with chronic pain for the rest of her life, but it doesn't mean is permanently totally disabled; (7) encourage the claimant to continue English classes; (8) provide emotion support for the Claimant as she increases her level of physical functioning; and (9) encourage the Claimant to participate in regular physical exercise including hydrotherapy (Respondents' Exhibit GGGG, pp. 417-418).

51. In spite of his February 25, 2013 report wherein Dr. Furmansky acknowledged that he was mistaken about the Claimant's physical diagnoses and he noted in his treatment plan that while the Claimant may have to live with chronic pain, it doesn't mean she has to be permanently totally disabled, Dr. Furmansky, nevertheless, begins his March 2013 medical note with the statement, "Patient is permanently and totally disabled and has reached psychiatric and physical MMI." Not surprisingly, Dr. Furmansky later notes that "she is confused about the dsiaganosis [sic] based on the recantation of previous diagnoses. She is scared because she still has the pain and cannot go on with her life" (Claimant's Exhibit 35, p. 184; Respondents' Exhibit IIII, p. 420).

52. On March 7, 2013, Dr. Kathy McCranie reviewed the Claimant's case. She noted that Dr. Kawasaki successfully tapered the Claimant off opioid medications and was completing treatment for the Claimant's pain disorder. Dr. MCranie opined that it was reasonable for the Claimant to return to work and it did not appear that the Claimant had any physical restrictions. She recommended a return to Dr. Kawasaki for assessment for return to work on a full-time, full-duty status (Respondents' Exhibit HHHH).

53. May 7, 2013, Dr. E. Jeffrey Donner, an orthopedic surgeon, evaluated the Claimant and reviewed prior MRI scans from 2010 and ordered new scans to be completed since prior cervical scans were blurred based on movement. Dr. Donner noted that the Claimant "now requires the use of a cane for ambulation" and he noted her multiple complaints, "including chronic headaches, neck pain, a pins and needles sensation into the right upper and lower extremities, and numbness in the left lower extremity" along with urinary incontinence (Claimant's Exhibit 37, pp. 216-218).

54. On May 8, 2013, the Claimant reported to Dr. Furmansky that she has increased severe chronic pain that was made worse by increased activity, increased stress and made better by changing positions and by medication. Dr. Furmansky also noted that the Claimant sought a second opinion with a surgeon identified as "Dr. Don" somewhere near Greeley and she had an argument with her prior attorney and stated that "she got disgusted by her attorney's behavior yelling at her in the last sesttlement [sic] hearing. She and her husband agree that this is not just as [sic] mental problem because there are days when she cannot get out of bed." Dr. Furmansky noted that the Claimant does not accept her current condition as a point of MMI because she still believes that there is something that has not been diagnosed. From a physical standpoint, Dr. Furmansky noted that the Claimant complained of incontinence,

headaches and dizziness and pain that is too great to allow her to do any physical exercise. Dr. Furmansky further noted that the Claimant's mother was sending Diclofen (Voltaren) from Mexico and the Claimant was using it. She reported that the higher dose of Gabapentin was helping but it starts to wear off around noon and she takes an extra 200mg at that time (Claimant's Exhibit 35, pp. 187-188; Respondents' Exhibit MMMM, p. 425).

55. On June 19, 2013, Dr. Donner re-evaluated the Claimant, reviewed MRI reports from June 7, 2013 and noted bulging discs at C4-5, C5-6 and C6-7, along with an annular tear and protrusion at L5-S1. Dr. Donner noted that the Claimant had been through extensive conservative treatment, but she has not had radiofrequency rhizotomy or EMG nerve conduction studies to his knowledge. He referred the Claimant to Dr. Pouliot for nerve conduction studies and potential facet rhizotomies on her right side of her cervical and lumbar areas (Claimant's Exhibit 37, pp. 219-221).

56. On July 10, 2013 the Claimant saw Dr. Donner and he noted that "she continues to have neck pain with radiation down both arms with symptoms primarily in the right arm in the radial distribution. She is now starting to notice symptoms on the left side in the same distribution. However, her worst symptom is at the lumbosacral junction with radiation into both legs, primarily the right leg where she has numbness and weakness. The pain at the lumbosacral junction also radiates into the thoracic region when she in active." Dr. Donner opined that "[the Claimant does not show evidence of chronic pain behavior or symptom amplification." He further stated: "I referred her to Dr. Pouliot for lumbar discography since I suspect the L5-S1 annular tear is the source of her chronic disabling pain. I explained if the discogram is positive at L5-S1, then she would be a good candidate for a one-level interbody fusion." He noted that her cervical condition would continue to be managed conservatively (Claimant's Exhibit 37, pp. 223-225).

57. On November 20, 2013, Dr. Weingarten wrote a Supplemental IME report after reviewing additional records. Dr. Weingarten reviewed additional records ranging from September 18, 2012 through September 17, 2013 (Respondents' Exhibit D). In the time since the Claimant's IME with Dr. Weingarten a little over a year prior, Dr. Weingarten noted that Dr. Kawasaki had tapered the Claimant off all her opioid medications and the medical records indicated that the Claimant's pain decreased in severity when she went off opiates (Respondents' Exhibit B, p. 81). In discussing events occurring since Dr. Weingarten's last report, she expressed that she was impressed by Dr. Kawasaki's success in weaning the Claimant off of all opiates with Dr. Furmansky's help, especially as the Claimant was opposed to the idea. Dr. Weingarten noted that Dr. Kawasaki's medical records showed that initially once off the opioids, the Claimant's pain levels were reported as lower, but then later, she reported more diffuse pain, which is consistent with the diagnosis of Pain Disorder (Respondents' Exhibit B, p. 81). Dr. Weingarten opined that Dr. Furmansky's continuing treatment is not reasonable or necessary. She went on to say that even though Dr. Furmansky has received information from Dr. Kawasaki that the Claimant has no spinal cord injury and no clear objective findings to explain her subjective symptoms, it appears to Dr. Weingarten that

Dr. Furmansky treats the Claimant as if she has a physical diagnosis causing her pain, namely, myofascial strain of the cervical, thoracic and lumbar areas with cervicogenic headaches. In Dr. Weingarten's opinion, myofascial pain does not warrant psychiatric treatment twice a month but would be best treated by a family doctor or physiatrist familiar with Pain Disorder. Dr. Weingarten also expresses concern that, although Dr. Furmansky revised his treatment plan for the Claimant, he seems to have deviated from the plan and continues to discuss pain complaints and note that he would monitor her pain and adjust pain medications accordingly and support the Claimant in pursuing new treatments such as biofeedback, physical therapy, pool therapy and getting a second opinion for surgery. As such, Dr. Weingarten finds that Dr. Furmansky is not treating the Pain Disorder, but rather, is treating the Claimant with the belief that the Claimant has pain that is yet to be diagnosed and treated (Respondents' Exhibit B, p. 82). Dr. Weingarten also opined that she disagreed with Dr. Furmansky and she does not believe that the Claimant has depression or anxiety related to her work injury. Dr. Weingarten opines that the Claimant gets anxious or scared when she has certain symptoms or she is upset about what she can't do, but this is explained by the diagnosis of Pain Disorder (Respondents' Exhibit B, p.83). Dr. Weingarten also expressed concerns about Dr. Furmansky, a psychiatrist, prescribing medications for physical conditions when he is not evaluating those physical conditions (Respondents' Exhibit B, p. 84). With respect to Dr. Donner's recommendations for continue treatment and consideration of surgical options, Dr. Weingarten strongly opines that the Claimant is not a surgical candidate (Respondents' Exhibit B, p. 84). Dr. Weingarten opines that the Claimant remains at MMI and that there should not be any further medical treatment (Respondents' Exhibit B, p. 84). She further opines that there are no psychological work restrictions. As for physical work restrictions, Dr. Weingarten cautions that it is important to base those on an actual diagnosis with objective findings and not on subjective complaints of pain or Claimant's statements about what she can or cannot do (Respondents' Exhibit B, p. 85). Dr. Weingarten ultimately adds that she believes it is important that the Claimant's providers do not advise the Claimant her problems are psychiatric rather than physical in a dismissive way. Rather, she opined that the Claimant's providers merely need to understand what Pain Disorder is and keep in mind that no treatments will result in decreased complaints and they should anticipate that various symptoms will continue or occur over time with or without treatment. The best treatment in Dr. Weingarten's opinion is to empathize and "do no harm" by avoiding unnecessary surgery, ER visits and medications, and to support work and functionality rather than disability. Dr. Weingarten opines that if her providers "collude" by attributing the Claimant's difficulties to her injury and pain, she will not be able to maximize her potential to live a productive an independent life (Respondents' Exhibit B, p. 85).

58. The Claimant saw Dr. Furmansky on January 3, 2014 reporting increased severe chronic pain and Dr. Furmansky noted continuing chronic depression and anxiety. He noted new physical symptoms reported by the Claimant for the first time to him of: legs cramping at night which keep her up and her arms hurt and her fingers get stiff. He also noted that she reported a strong headache and then her eye gets blurred on the right and her eye lid feels spasms and then her face gets numb including her

tongue. Dr. Furmansky opined these were “classic migraine symptoms.” He also noted that the Claimant reported her pain is much worse in the last 2 months than it has ever been before. At this visit, Dr. Furmansky again characterizes the Claimant as “permanently and totally disabled” (Respondents’ Exhibit RRRR, pp. 435-439). In confidential psychotherapy notes dated January 3, 2014 and January 22, 2014, Dr. Furmansky indicates that the Claimant’s relationship with her husband was healing and that her husband is more patient of her physical condition. He notes that the Claimant is frustrated by her case being closed or moving to settlement, especially with requirements of attending appointments and evaluations. He notes that the Claimant’s vocational testing has to be repeated. Dr. Furmansky noted that the Claimant’s husband supports her having surgery in Mexico if she wants it, but the Claimant reported that it does not look like that will happen as the surgeon her attorney sent her to was out of the chain of referrals and his opinion on surgery is not going to be considered. The Claimant reported that she still is not driving due to sensations and weakness of her right foot (Respondents’ Exhibit RRRR, p. 440).

59. On October 23, 2013, Dr. Jutta Worwag performed an IME with respect to the Claimant’s low back pain, cervicothoracic junction/neck pain, headaches, bladder incontinence, right greater than left leg symptoms and right arm parethesias (Respondents’ Exhibit C, p. 40). Dr. Worwag provides an extensive recap of her interview with the Claimant, including notes of Dr. Worwag’s observations of the Claimant’s behaviors and movements during the course of the interview which Dr. Worwag finds inconsistent with the Claimant’s reported pain complaints. In describing her fall, the Claimant stated “she felt she was flying through the air and landed on her right face and right head on cement flooring” and she felt she lost consciousness for a while (Hrg. Tr., November 17, 2014, p. 41). Dr. Worwag provided an extensive review and summary of the medical records provided to her (Hrg. Tr., November 17, 2014, pp. 44-65). Dr. Worwag also conducts a physical examination. Dr. Worwag finds the Claimant’s reflexes to be “symmetric for biceps, triceps, brachioradialis, knee and ankle jerks.” Dr. Worwag also notes, “there’s no Hoffmann sign, no Babinsky’s, variable and not reproducible 1-2 beats clonus either on left or right” (Hrg. Tr., November 17, 2014, p. 66). Ultimately, Dr. Worwag opined that “there is no physiologic anatomic or nervous system basis for this examination. In other words, there is no evidence of a spinal or peripheral nerve lesion that would explain this examination which is marked by nonphysiologic findings and pain behavior. There is no objective evidence of a lumbosacral radiculopathy” (Hrg. Tr., November 17, 2014, p. 67). Dr. Worwag assigns the DSM-IV diagnosis of Pain Disorder, renamed as Somatic Symptom Disorder in the new DSM-V. She opines that this diagnosis is not causally related to the Claimant’s work injury, “but is rooted in her personality structure and coping abilities” (Hrg. Tr., November 17, 2014, pp. 67-68). Dr. Worwag expresses significant concerns regarding Dr. Furmansky’s psychiatric treatment, including his positions that the Claimant is on the appropriate medications and that she continues to require psychological care without addressing the Pain Disorder diagnosis. She questions “the validity and efficacy” of his approach (Hrg. Tr., November 17, 2014, p.70). With respect to Dr. Donner’s evaluation and recommendations, Dr. Worwag notes that “no other medical provider has ever

diagnosed the patient with radiculopathy or discogenic pain" nor is there clinical evidence of the same (Hrg. Tr., November 17, 2014, p. 71). Dr. Worwag opines that the Claimant remains at MMI and finds that, in tapering the Claimant off narcotics, her pain level and functional status were not negatively impacted (Hrg. Tr., November 17, 2014, p. 71). Aside from additional care by Dr. Kawasaki to taper the Claimant off current prescribed medications, Dr. Worwag opines that "no additional medical treatment is recommended in relation to the patient's work injury of 1/20/2010" (Hrg. Tr., November 17, 2014, p.73). Dr. Worwag opines that work restrictions must be based on objective underlying pathology and clinical diagnoses that influence the restrictions need to be based on objective data. She finds that "there is no objective evidence that this patient cannot return to work without restrictions" from a strictly medical perspective (Hrg. Tr., November 17, 2014, p. 73).

60. On December 24, 2013, Dr. Kawasaki responded to a request to review medical evaluations by Dr. Worwag and a supplemental report dated November 21, 2013 by Dr. Weingarten. Based on his review, Dr. Kawasaki opined,

> I do agree with Dr. Worwag's interpretation that work restrictions have not been anatomically based but based on the patient's subjective somatic complaints. She has had extensive workup, which has been very well documented in my previous notes and conversation with you during the SAMMS conference. She has had multiple migrating symptomatologies that were well described in Dr. Worwag's and Dr. Weingarten's notes as well. The patient had a very through workup with regard to her multiple complaints including multiple MRIs, basically, imaging her entire neuraxis from her brain, cervical spine, thoracic spine, and lumbar spine as well as bilateral lower extremity EMGs, which have not shown any pathology to explain her objective symptomotology. I agree with both Dr. Worwag and Dr. Weingarten that the patient has a pain disorder to a somatic symptom disorder. She has had continuation of severe complaints of subjective pain without objectification of symptomotology without any significant pathology. She has had no real response to very extensive treatment. I fully agree there is not medical explanation for her subjective pain. Therefore, there is no contraindication for full-time, full-duty work from a physical standpoint. However, the patient is very entrenched in her disability subjectively, which is more of a psychological/psychiatric issue, which is part of the pain disorder. There are no objective findings, which any restrictions would be applicable (Respondents' Exhibit PPPP).

Dr. Kawasaki specifically noted that "there are no objective reasons as discussed above for the patient to be placed on any work restrictions. The patient can certainly be released to a light-duty job, which she would be able to handle from her subjective pain standpoint (Respondents' Exhibit PPPP).

61. The Claimant saw Dr. Kawasaki on January 7, 2014 reporting that she was subjectively worse. Yet Dr. Kawasaki noted that he observed the Claimant turning

her neck from side to side with fluid motions, looking at him and the interpreter. However, when he went to examine the Claimant, she was very guarded with range of motion of her neck at only 30 degrees of rotation in either direction. Dr. Kawasaki also noted that the Claimant brought MRI films of her cervical and lumbar spine on a disk and wanted him to review these. These MRIs were not ordered by Dr. Kawasaki, but rather by Dr. Donner, who is a surgeon that the Claimant advised her attorney had sent her to see. On review of the MRIs with the Claimant, Dr. Kawasaki noted the prior MRIs were not available for comparison, but although there were some mild degenerative changes, there was "no specific pathology to explain the myriad of symptomatology that she continues to complaint of" (Respondents' Exhibit SSSS).

62. The Claimant saw Dr. Jack Rook on March 29, 2014 for an evaluation related to complaints of headaches, dizziness, neck pain, shoulder pain, mid and lower back pain, right hip pain and leg weakness (Claimant's Exhibit 27, p. 97). The Claimant described her mechanism of injury and immediate aftermath to Dr. Rook as follows:

> She tripped at the top of a flight of stairs. She reports that she was holding a paper file in her right hand and she had her left hand on the staircase railing. These stairs were outdoors and were made of cement. There were 10 stairs. She stated that her right foot got caught on something and she fell forwards. Her right knee initially struck the first concrete step causing her to let go of the file and the handrail. She had momentum and she tumbled down the stairs. She describes rotating head over heels in the air two times before she struck the concrete landing. She struck the landing against the right side of her head and face. She does not recall how her body moved after the initial impact of her head, She was quite dazed initially and she believes she sustained a loss of consciousness. The next thing she remembered was awakening with people around her and telling her not to move her neck. The patient felt as if she were choking on her blood and she reports that someone turned her head to the side and called an ambulance. At this time she was experiencing pain throughout her body. She then had another loss of consciousness as the next thing she remembered was awakening in an ambulance. She states that was blood everywhere. She had total body pain (Claimant's Exhibit 27, p. 97).

After summarizing the Claimant's history, Dr. Rook undertook an extensive review of medical records, including the records of Dr. Bachman, Dr. Kawasaki, Dr. Furmansky, Dr. Donner, Dr. Gutterman and noted that the DIME report of Dr. Gellrick was not contained in the records he received although it was listed as a provided document (Claimant's Exhibit 27, pp. 98-105). In reviewing these medical records with the Claimant, Dr. Rook then discusses them with the Claimant and discusses the various treatments with her and her level of function over the course of her treatment, noting that over the previous two years the Claimant reports "little if any improvement in her condition" and that she "states that she was better off when she was prescribed analgesics as she was more comfortable and she slept better when she was on these

medications" (Claimant's Exhibit 27, pp. 105-108). On physical examination, Dr. Rook notes that the Claimant changed position from sit to stand to sit on a few occasions, she ambulated with a limp utilizing a cane in her right hand and she tended to favor her right lower extremity. Dr. Rook noted that the Claimant's right distal extremity motor strength was diminished, the Claimant's perception of pinprick sensation was diminished in her right leg, cervical range of motion was markedly decreased in all planes, especially with cervical extension and that she had palpable muscle spasm in her right-sided paracervical and upper trapezius musculature and that this region was extremely tender. He also noted spasm and tenderness in the right sided paralumbar musculature and tenderness of both sacroiliac joints, affecting the right side more than the left (Claimant's Exhibit 27, p. 108). Dr. Rook diagnosed: (1) chronic neck pain, (2) chronic thoracic myofascial pain syndrome, (3) low back pain, (4) stress urinary incontinence, (5) sleep disturbance, (6) tension headaches, and (7) intermittent dizziness (Claimant's Exhibit 27, p. 110). Dr. Rook opined that "it is certainly possible that the patient sustained a spinal cord contusion at the time of her injury which would account for some of her symptoms….More than likely, the patient sustained trauma to pelvic floor musculature resulting in the stress incontinence that she currently describes" (Claimant's Exhibit 27, p. 111). Dr. Rook notes that based on the Claimant's report that she was doing better when she was on a sustained release opioid analgesic, "consideration should be given to resumption of the Fentanyl/Hydrocodone combinations in an effort to make this individual more comfortable and to improve the quality of her sleep (Claimant's Exhibit 27, p. 111). Dr. Rook opined that at that point, the Claimant did not appear to be capable of competitive employment due to sleep interruptions causing her to be tired during the day, bladder dysfunction requiring her to be close to a bathroom at all times and physical functioning "in a less than sedentary physical demand level" with right leg weakness. Further he found that due to headaches and dizziness, the Claimant is afraid to drive (Claimant's Exhibit 27, pp. 111-112). Dr. Rook also opined that he found the psychiatric impairment rating of Dr. Furmansky more persuasive than that of Dr. Gutterman (Claimant's Exhibit 27, p. 112).

63. On April 8, 2014, the Claimant saw Dr. Kawasaki for follow-up and she was reporting "global pain" including neck pain, headaches, back pain, pain radiating into her bilateral lower extremities, and pain and numbness in her right arm. She reports no improvement overall and indicates almost intolerable increasing pain. Dr. Kawasaki noted that the Claimant ambulated using a cane "very antalgically and dramatically" and had difficulty standing from a seated position with complaints of severe pain in her right hip region, pointing to the greater trochanter areas. The Claimant was exhibiting quite a bit of facial grimacing and verbalization of pain. Dr. Kawasaki diagnosed: idiopathic hyperreflexia, multiple pain symptoms without specific correlating symptoms, right greater trochanter bursitis, chronic headaches, psychologic and emotional issues with delayed recover and pain disorder. He noted that the Claimant had been weaned off narcotic medications and was requesting something stronger than Dr. Furmansky was currently prescribing (Claimant's Exhibit 30, pp. 172-173; Respondents' Exhibit UUUU, pp. 450-451).

64. Dr. Furmansky testified by deposition on October 24, 2014 as an expert witness in the areas of psychiatry and forensic psychiatry and as a member of the committee to develop the CDLE Division of Workers' Compensation report and worksheet for Permanent Work-Related Mental Impairment Rating (form WC-M3-Psych) as set forth in Claimant's Exhibit 41 (which the ALJ notes is admitted per the deposition testimony of Dr. Furmansky). Dr. Furmansky testified that he currently sees the Claimant about every three weeks and prescribes the Claimant Fluoxetine, Bupropion, Pantaprazole, Zaleplon and Gabapentin. Dr. Furmansky opined that these medications should be continued at this time (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 11). Dr. Furmansky confirmed that he placed the Claimant at MMI on March 21, 2011 and that he still considers her to be at MMI (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 11). However, he also testified that the Claimant requires ongoing post-MMI treatment to prevent further regression (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 12). Dr. Furmansky testified that he finds objective data to support the Claimant's reported physical complaints (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 12-19). Dr. Furmansky testified that the Claimant's ongoing diagnosis to be: chronic depression with intermittent exacerbations and improvements, chronic anxiety, and insomnia and per the DSM-5, somatic symptom disorder with predominant pain, persistent, severe (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 19). Dr. Furmansky testified that he considers the Claimant permanently and totally disabled because he does not believe that an employer would accept her absences or her symptoms of depression that include attention and concentration impairments, some memory loss and fatigue (Tr. of Depos. of Drs. Furmansky and Weingarten, p.22). In relation to the Claimant's inability to work from a psychiatric standpoint, Dr. Furmansky went on to testify that the Claimant's psychiatric functioning is inconsistent in terms of activities of daily living, she is fatigued due to impaired sleep and her social functioning is impaired when she is in severe pain so that the Claimant would have difficulty relating appropriately to others. The Claimant's cognitive impairments include attention, concentration and short-term memory impairments and the Claimant would have a difficult time adapting to moderately stressful situations (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 27-28).

65. On cross-examination, Dr. Furmansky concedes that contrary to his August 17, 2010 report, there were no medical records that documented a loss of consciousness nor any that diagnosed a post-concussive syndrome. Rather, Dr. Furmansky's testimony at the deposition was that this opinion must have come from the Claimant's history and reporting of her trauma (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 33-37). After being directed to his treatment notes (Respondents' Exhibits WW and PPP), Dr. Furmansky also agreed that the Claimant had advised him that as of August 31, 2010, that she was driving a little and on May 11, 2011 that she was driving her car and got stuck at the gas station (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 37-39). Dr. Furmansky testified that after being advised by Dr. Kawasaki of the discussions during a SAMMS conference (held on November 29, 2012) that the Claimant's treating physicians ruled out a thoracic spinal cord lesion, he and Dr. Kawasaki agreed that the Claimant would be weaned off opioid medications under Dr.

Kawasaki's monitoring. In order to help with this process, Dr. Furmansky prescribed Gabapentin starting on January 30, 2013 to help with withdrawal symptoms (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 47-49 and 64-67). Dr. Furmansky also testified that on February 25, 2013, after he had the opportunity to review all of the Claimant's medical records for the first time, he issued a new report with a new treatment plan station (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 70). Relying on the reports of Drs. Gellrick, Kawasaki and Renkin, Dr. Furmansky opined that "the most accurate physical diagnosis is myofascial strain of her cervical, thoracic, and lumbar area with cervicogenic headaches" (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 71). Dr. Furmansky agreed that there was no physical reason why the Claimant should have an antalgic gait or why she couldn't resume driving a motor vehicle (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 83). When questioned about why he noted the Claimant was totally disabled on his March 3, 2013 note, Dr. Furmansky testified because she still was at that time even though his treatment plan was to encourage the Claimant to "start to reconceptualize her physiological physical state" (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 84-85). On redirect testimony during his deposition, Dr. Furmansky testified that it is not his impression that the Claimant is a drug seeker and that he believes that the Claimant has a bona fide physical injury. He testified that her remaining physical injury involves "the paraspinal muscles in the cervical, thoracic, and lumbar regions, as well as some chronic facet pathology" (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 93).

66. Dr. Weingarten testified by deposition on October 24, 2014 as an expert witness in the area of psychiatry and as to matters related to Workers' Compensation Level II accreditation (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 108-110). Dr. Weingarten testified that at the time of her two written reports, she diagnosed the Claimant under the DSM-IV, which was in effect at that time, with Pain Disorder associated with both psychological factors and a general medical condition and opioid dependence. Under the DSM-V, which is currently in effect, Dr. Weingarten testified the diagnosis title has changed to "Somatic Symptom Disorder" but although the terminology changed, it is the same system complex (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 111-112). Dr. Weingarten testified that in reaching the diagnosis of Pain Disorder, she reviewed the medical records and conducted an interview and came to the conclusion that her subjective pain complaints were not consistent with objective findings and there were changes in her pain complaints, including more diffuse pain, sometimes in her entire body, and the Claimant had a dramatic way of presenting her pain (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 113). Dr. Weingarten testified that another way in which the Claimant met the criteria for Pain Disorder was that as one complaint would go away, another one would come up, such as the urinary complaints and the headaches and, later on, complaints of numbness (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 114). In addition, Dr. Weingarten testified that, "a very important part of pain disorder is that no matter what treatment is offered to a patient and what – no matter what treatment they undergo, the compliant of pain is not significantly relieved and pretty much doesn't go away (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 114). Dr. Weingarten testified that when a person has a Pain

Disorder, they often get numerous referrals and numerous treatments that yield negative results and no alleviation of symptoms, or if the symptoms are relieved, new ones appear. In the Claimant's medical records, Dr. Weingarten observed this occurring (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 120). Dr. Weingarten testified that when a Pain Disorder is identified, it is appropriate for all doctors involved with treatment to be aware of the diagnosis and likely outcome that no matter what treatment is provided, the pain is not likely to stop (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 123). She testified that if there are multiple doctors and one doctor is not applying the correct approach to a Pain Disorder patient, then the patient continues to think they are going to be cured and treatment gets prolonged and the patient inadvertently has iatrogenic problems resulting from treatments that don't cause them to feel better or make functional gains but do cause side-effects (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 124-125). In going through the criteria for a diagnosis of Depression, Dr. Weingarten testified that she did not come up with a required five symptoms that the Claimant had (out of the constellation of symptoms for diagnosing Depression) and therefore, found that the Claimant did not meet the DSM-IV or DSM-V criteria for depression (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 135-137). Based on this, Dr. Weingarten testified that it is not reasonable or necessary for the Claimant to continue to take antidepressants (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 138). Dr. Weingarten also testified that the Claimant did not meet the criteria for Generalized Anxiety Disorder, but also stated that, even if she did, it would not be related to the work injury. She opines that it is not reasonable or necessary to prescribe medications to treat anxiety (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 138-139). Dr. Weingarten testified that, in her opinion, a psychiatrist should not prescribe medications for pain, headache, or anything physical. She further testified that it can blur the role of the psychiatrist with a Pain Disorder patient and gives that patient the false impression that the psychiatrist thinks there is pain that is going to go away (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 144). Dr. Weingarten also testified that ongoing psychotherapy is not reasonable and necessary because, as a Pain Disorder patient, she won't respond to psychotherapy and because she is not improving in terms of functionality (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 156). Dr. Weingarten testified that she disagrees with Dr. Furmansky that the Claimant is permanently and totally disabled and discusses that it is not in the Claimant's best interest to reinforce that rather than have the expectation that she should be more functional, including returning to work (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 157-158).

67. On cross-examination, Dr. Weingarten reconsidered her diagnosis of Pain Disorder with a generalized medical component and stated that "right now I cannot see a generalized medical component to this case" (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 160-161). Dr. Weingarten acknowledged that it is not recommended to immediately withdraw all medications from the Claimant, but rather certain medications, such as Gabapentin and Senoda/Zaleplon (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 164-170). Dr. Weingarten also testified that the Claimant's psychiatric care should be discontinued in a termination process that also includes discontinuing or

tapering medications in a healthy way for a short period of time (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 178-179 and pp. 183-184).

68. After the testimony of Dr. Weingarten at the depositions on October 24, 2014, Dr. Furmansky was asked to testify in rebuttal (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 193). Dr. Furmansky testified that he agreed that there are some medications that cannot be terminated immediately but must be gradually and incrementally reduced while evaluating the consequences of each incremental move (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 194). Dr. Furmansky testified that he thinks there is a "tremendous misunderstanding" about the Claimant's clinical case as of the time when Dr. Weingarten evaluated her, namely because the Claimant had already received a lot of care for depression and generalized anxiety by then through medication and psychotherapy. So, if at the time of the evaluation, the Claimant did not meet all of the criteria for depression or generalized anxiety disorder, it was because her treatment for several years prior to that time had been effective (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 196). Dr. Furmansky testified that the point of his care was to get the Claimant to the point where she did not present as depressed and anxious as when she first started to treat with him (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 197). However, as Dr. Furmansky testified, although the Claimant is improving, it is not appropriate to just wean her off her medications and discharge her after 4 weeks because it depends on her diagnosis and the Claimant also had a chronic stressor of myofascial pain (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 197-198). Dr. Furmansky also testified that he believes that there is a misunderstanding about how much contact he had with Dr. Kawasaki. He testified that there was almost no contact until it was discovered that the Claimant did not have a spinal cord lesion. That was the first communication that Dr. Furmansky had with Dr. Kawasaki (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 200). Dr. Furmansky also testified that with respect to withdrawing the Claimant from narcotics, he opined that this was successful primarily because of the cooperation between Dr. Kawasaki and him and the Claimant herself, who he believes was supportive as she did not seek to be on unnecessary medication (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 199-200). Dr. Furmansky also testified that he disagreed with Dr. Weingarten about the differences between Pain Disorder in the DSM-IV and Somatic Symptom Disorder in the DSM-V, and states that there is a "reconceptualization" of these diagnoses with the new emphasis on a more comprehensive and complex understanding of how individuals experience pain with "culture-related diagnostic issues that refer to environment, education, course modifiers, vulnerability of certain individuals, preexisting other medical disorders….instead of thinking all individuals are uniformly built and have the same electrical structure" (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 203-204). Dr. Furmansky also further addressed the issue of medications and stressed again the importance of carefully titrating down certain medications, such as Gabapentin, to avoid serious medical symptoms (Tr. of Depos. of Drs. Furmansky and Weingarten, pp. 205-206). Dr. Furmansky also cautioned against an abrupt withdrawal of psychotherapy in a complex case such as the Claimant's because if this support is withdrawn, the Claimant is much more vulnerable to a significant relapse in any of her

symptoms (Tr. of Depos. of Drs. Furmansky and Weingarten, p. 207). On cross-examination of the rebuttal testimony, Dr. Furmansky agreed that it is possible that they Claimant's new symptoms reported on January 3, 2014 of numbness on her face, even affecting her tongue, could be a side effect of Gabapentin (Tr. of Depos. of Drs. Furmansky and Weingarten, pp.211-212).

69. Dr. Jack Rook testified as an expert in the areas of physical medicine and rehabilitation, pain management and electrodiagnostic medication, anatomy and physiology of the urinary system and dysfunction, and as to Workers' Compensation Level II accreditation matters on the second day of hearing testimony on November 17, 2014 (Hrg. Tr., November 17, 2014, pp. 8-10). Dr. Rook testified regarding his evaluation and medical record review of the Claimant on March 29, 2014. Dr. Rook testified that he generally found the description of the Claimant's mechanism of injury to be compatible with medical records he reviewed, although he noted "it's a little unclear as to whether she had a loss of consciousness, although the early medical records suggest that she did not" (Hrg. Tr., November 17, 2014, p. 11). Based on his evaluation of the Claimant, Dr. Rook testified that he believes the Claimant's overall work restrictions should limit lifting to 10 lbs., no carrying due to her limp and use of cane, limit standing and walking to 15-30 minutes, avoid, bending, twisting, climbing and ladders, kneeling and crawling. Dr. Rook opined that the Claimant would have difficulty reaching above shoulder level on the right side and difficulty with any prolonged activity. He also noted the Claimant's social disability with urinary incontinence requiring access to a bathroom (Hrg. Tr., November 17, 2014, pp. 13-14). With respect to the Claimant's urinary incontinence condition, Dr. Rook testified that per a urodynamic study the Claimant underwent, it was identified that the Claimant has a neurogenic bladder, or detrusor sphincter dyssynergia (DSD), which basically means that her bladder and sphincter do not work together as they are supposed to function. Based on this, Dr. Rook opined that at some point in time, the Claimant suffered some level of spinal cord injury that resulted in her urinary incontinence condition. Dr. Rook testified that this is also supported by the findings identified by Dr. Kawasaki in his initial evaluation of a sensory level at the T4 level, hyperreflexia in her lower extremities, multiple beats of clonus at the ankle and a positive Babinski sign. Dr. Rook testified that he attributes this to the significant forces associated with the Claimant's injury. While Dr. Rook testified that he agrees that the imaging studies do not reveal a disk herniation or spinal cord lesion, a spinal cord can, nevertheless, be injured by concussive forces and bodies twisting in a certain way (Hrg. Tr., November 17, 2014, pp. 14-16). In addition to this finding, Dr. Rook also testified that the Claimant exhibited other objective findings such as chronic muscle spasm throughout her neck and back (Hrg. Tr., November 17, 2014, p. 17). Dr. Rook testified about the risks associated with terminating the medications the Claimant is currently taking, especially if the medications are withdrawn rapidly, from an increase in pain, to a seizure disorder in the case of the Gabapentin (Hrg. Tr., November 17, 2014, pp. 19-20). In accord with his written report, Dr. Rook also testified that he believes the opiate medications the Claimant previously took are reasonable and necessary and they would help the Claimant with the sleep problems she is having (Hrg. Tr., November 17, 2014, p. 21). Dr. Rook further recommended that the Claimant

finish her urology work up and that she may be a candidate for a sacral nerve stimulation procedure (Hrg. Tr., November 17, 2014, p. 22). Dr. Rook also testified that due to the Claimant's physical disabilities and her social disability with the bladder dysfunction and her inability to feel safe when driving, in conjunction with her poor sleep, the Claimant has factors that negatively impact her employability (Hrg. Tr., November 17, 2014, pp. 26-27).

70. On cross-examination, Dr. Rook agreed that the Claimant's reflexes were examined in the initial emergency room visit after her injury and they found no reflex changes (Hrg. Tr., November 17, 2014, pp. 30-31). He also agreed that the effects of a spinal cord contusion would be immediate, including urinary changed, but Dr. Rook is not aware of the Claimant mentioning urinary changes to the emergency room practitioners nor to Dr. Bachman, who initially treated the Claimant (Hrg. Tr., November 17, 2014, pp. 31-32). Dr. Rook testified that he understands that there was no documentation in the medical records for almost two months post-injury of a urinary issue (Hrg. Tr., November 17, 2014, p. 32). After reviewing the emergency room records at Respondents' Exhibit AA, from the Claimant's February 23, 2010 visit to the emergency room, Dr. Rook agreed that there was no bowel or bladder incontinence, no motor weakness, no numbness, no abdominal pain and no dysuria or urine output changes or urinary urgency and that this was "a pretty comprehensive review of systems" (Hrg. Tr., November 17, 2014, p. 33-36). Dr. Rook also agrees that there is no early documentation of urinary changes for the Claimant until Dr. Kawasaki's note. He further conceded that if the onset of urinary changes happened after February 26, 2010, that would probably not be connected to a fall on January 20, 2010 (Hrg. Tr., November 17, 2014, p. 36). Dr. Rook testified that he does not believe the Claimant has a Pain Disorder or a Somatic Symptom Disorder (Hrg. Tr., November 17, 2014, p. 38), although he agrees that the Claimant has some degree of psychological enhancement in her pain complaints (Hrg. Tr., November 17, 2014, p. 40). On redirect examination, Dr. Rook testified that, to the extent the Claimant does have a Pain Disorder, it would be caused by the Claimant's 2010 injury (Hrg. Tr., November 17, 2014, p. 54).

71. Dr. Jutta Worwag testified as an expert in the areas of physical medicine and rehabilitation, anti-aging and regenerative medication, acupuncture, and as to Level II accreditation matters at the second day of hearing on November 17, 2014 (Hrg. Tr., November 17, 2014, pp. 171-172). Dr. Worwag testified that she performed an IME of the Claimant including a rather extensive review of medical records, an interview and a physical examination. Based on this IME, Dr. Worwag concluded the Claimant's diagnosis was Pain Disorder and that the Claimant had a work-related fall down stairs on January 20, 2010 without loss of consciousness or fractures. Dr. Worwag further testified that the Claimant was a delayed recovery case, with local pain complaints without an anatomic basis for the subjective complaints. She also testified that the Claimant had a late onset of migraine headaches and a delayed onset of urinary incontinence with may have a potentially relational component (Hrg. Tr., November 17, 2014, pp. 172-173). For Dr. Worwag, the pain disorder diagnosis is not based on any one single thing, but the whole pattern of components. She testified the diagnosis is

supported by a lack of objective anatomic basis for subjective symptoms, symptoms that have multiplied and magnified over time, diffuse/global pain, and lack of change in pain despite years of intervention (Hrg. Tr., November 17, 2014, pp. 173-175). Dr. Worwag specifically noted that the onset of the urinary incontinence was an issue in that the medical records show that the Claimant was discharged from an ER visit related to leg pain with instructions that, if she has problems with her bowel or bladder, to return to the ER. Then, the next day, the Claimant presented to physicians with her legs numb and complaints of bladder incontinence (Hrg. Tr., November 17, 2014, p. 177). Dr. Worwag testified that there is also a change from how the Claimant initially presented her injury without involving a loss of consciousness and then, later, with a loss of consciousness (Hrg. Tr., November 17, 2014, p. 180). Regarding Dr. Rook's testimony that a spinal cord contusion could be causing the Claimant's symptoms even if it were not revealed by an MRI, Dr. Worwag testified that it is not medically probable that the onset of symptoms from a spinal cord contusion would be weeks later (Hrg. Tr., November 17, 2014, pp.188-191). Dr. Worwag testified that after Dr. Kawasaki had the opportunity to review Dr. Weingarten's report and after the SAMMS conference, Dr. Kawasaki changed the course of the Claimant's care significantly, including tapering the Claimant off medications (Hrg. Tr., November 17, 2014, p. 199). However, Dr. Worwag testified, Dr. Furmansky continued to treat the Claimant as if she had a thoracic spinal cord lesion, when she didn't (Hrg. Tr., November 17, 2014, p. 200). Dr. Worwag also testified that she has concerns with a psychiatrist prescribing medications for physical conditions (Hrg. Tr., November 17, 2014, p. 208). With respect to biofeedback and it's use with physical medicine and rehabilitation, Dr. Worwag testified that biofeedback is not used to diagnose or verify the presence of an injury, it is a therapeutic tool to help with pain management (Hrg. Tr., November 17, 2014, pp. 217-218). Dr. Worwag also testified that the Claimant should be tapered off Gabapentin since the original reason it was prescribed was to get the Claimant off opioids and this has occurred and there are no functional gains demonstrated clinically from her current use of Gabapentin (Hrg. Tr., November 17, 2014, p. 221). Dr. Worwag also recommended that the Claimant be tapered off Neurontin (Hrg. Tr., November 17, 2014, p. 222), Wellbutrin and Prozac (Hrg. Tr., November 17, 2014, p. 223), Pantoprazole sodium (Hrg. Tr., November 17, 2014, p. 224) and Sonata (Hrg. Tr., November 17, 2014, pp. 224-225). Ultimately, Dr. Worwag opines that none of these medications have increased or helped the Claimant with her functioning (Hrg. Tr., November 17, 2014, p. 225). As for work restrictions, Dr. Worwag testified that it is not appropriate to rely on the restrictions from Dr. Bachman because they are outdated and she disagrees with Dr. Rook regarding his opinion and testimony regarding the Claimant's employability (Hrg. Tr., November 17, 2014, p. 228).

72. At the first day of hearing, the Claimant testified that prior to her injury, she was an active person and she did laundry, cleaned the house, prepared food, ran errands, drove, shopped for groceries, attended sporting events with her children, took family trips to Mexico, went dancing with her husband, went out to dinner, took her children to amusement parks (Hrg. Tr., May 13, 2014, pp. 36-37). Since her injury, the Claimant does not do most of these activities. Her husband and children do the laundry and clean the house. Sometimes she can prepare food but some days she cannot. Her

family, friends and neighbors now run her errands or drive her places. The Claimant no longer attends sporting events with her children as often because sometimes she is in pain and also because she no longer drives and cannot take the children to sports practice. The Claimant no longer goes out dancing (Hrg. Tr., May 13, 2014, pp. 37-39). The Claimant testified that strong pain currently limits her activities of daily living and in between engaging in activities, she must stop and rest for 20-30 minutes (Hrg. Tr., May 13, 2014, p. 40).

73. On cross examination during the testimony on the first day of hearing, the Claimant testified that she stopped driving when she started taking narcotics and signed a document that she wouldn't drive while taking morphine and narcotics. However, the Claimant agreed that she was no longer taking morphine (Hrg. Tr., May 13, 2014, p. 70) and was weaned off narcotics in September of 2012 (Hrg. Tr., May 13, 2014, p. 74). The Claimant currently holds a valid driver's license and there are currently no restrictions from any medical provider that would prevent her from driving (Hrg. Tr., May 13, 2014, p. 71). The Claimant testified that the reasons she does not currently drive are that she gets dizzy, can't concentrate, has headaches, has slow reaction time and does not have good sensation in her right toe and cannot move it up and down (Hrg. Tr., May 13, 2014, pp. 72-73).

74. The Claimant testified that she currently experiences urinary incontinence and must wear absorbent pads all of the time and limit the amount of liquid intake. The Claimant testified that she has sought medical treatment for this condition and would like to proceed with surgery that has been recommended (Hrg. Tr., May 13, 2014, pp. 47-48). On cross-examination, the Claimant agreed that in the first few weeks after her injury, due to medications she was taking she was sleeping most of the time and not eating much, so she did not notice a problem with urinary incontinence. She would have mentioned it to her medical providers when it started happening (Hrg. Tr., May 13, 2014, p. 76).

75. The Claimant returned to work only briefly for three weeks after her injury. She was provided with office duties, making copies and cutting out activities. The Claimant testified that her pain level was higher when she did this work. She did not go back to her normal duties of caring for the 6 week to 15 month-old babies. The Claimant testified that she was told by the principal at her Employer that because she could not return to her work caring for the babies, she would be given "family release" (Hrg. Tr., May 13, 2014, pp. 42-44).

76. The Claimant testified that her tolerance for standing and sitting is about one and ½ hours. As for walking, the Claimant testified that she will start to feel more pain and will have to keep slowing her pace. If she has a day where she exceeds her tolerances for standing or walking, the following morning she is in a lot of pain and spends most of that day resting (Hrg. Tr., May 13, 2014, p. 44).

77. Prior to working for Employer, the Claimant had several other job positions. She worked in the nursery at a place that offered adult English classes, she

worked as a package scanner at FedEx, and she has worked for cleaning companies that cleaned at commercial locations (Hrg. Tr., May 13, 2014, pp. 44-45).

78. The Claimant was evaluated by Donna Ferris on March 10, 2014. Ms. Ferris provided a lengthy and thorough history and summary of the Claimant's medical care (Respondents' Exhibit E, pp. 87-98). Ms. Ferris also interviewed the Claimant to discuss her current status through an interpreter as the Claimant reported "she does not speak English and understands only a little English" (Respondents' Exhibit E, p. 98). The Claimant reported the following to Ms. Ferris about her current symptoms:

> …she is the 'same' since the time of her injury. [The Claimant] explained her primary source of pain is her low back which is constant…constant neck pain and struggles to turn her head to the right….her right hand feels very weak and initially stated she had weakness and tingling at the time of the injury although later reported the tingling developed after the injury. [The Claimant] spent some time discussing mid back pain initially reporting her right shoulder and right side of her neck become painful when the mid-back is 'really bad.' [The Claimant] then explained when the pain is 'very strong' in her neck, her mid back becomes painful and noted there are times when she has no mid back pain. [The Claimant] indicated her sense the neck and mid-back pain 'go together.' [The Claimant] then stated her entire right side is painful. When asked about any pain in her right arm, [the Claimant] stated she has pain from the shoulder radiating to the palm of her hand. [The Claimant] explained the pain is not constant although has arm pain with increased neck pain. [The Claimant] reported difficulty using her right hand noting even very light items such as an envelope falls out of her hand....[The Claimant] then stated actually her left hand feel the same as her right hand and estimated the left hand symptoms developed one and one-half years ago. [The Claimant reported bilateral leg pain 'the majority of the time' and when asked to describe her pain, she indicated, 'it is hard to explain'….When asked why she uses a cane, [the Claimant] reported her knees give out and she has poor strength in her legs, the right being worse than the left….[The Claimant] reported daily headaches 'with a lot of dizziness. [The Claimant] indicated the headaches generally last for one and one-half to two hours although they can last longer on occasion. [The Claimant] reported urinary incontinence that also 'affects' her 'a lot' …. While discussing other topics, [the Claimant] later recalled another problem she experiences as a result of her injury. [The Claimant] reported she has difficulty with her memory explaining she has trouble recalling dates, memorizing 'new words,' is unable to multi-task, and gets distracted when moving from one task to another, forgetting the initial task (Respondents' Exhibit E, pp. 98-100).

79. During her evaluation, Ms. Ferris noted that the Claimant sat comfortably and stood several times without hesitation or the appearance of discomfort and never appeared to place any weight on her cane to assist with standing. Ms. Ferris noted that

the Claimant did not appear to be in discomfort while sitting or standing and completed twisting body movements fluidly and without any appearance of pain. The Claimant reported that she was having a 'little headache' at the time of the evaluation and reported her pain level at 6/10 although Ms. Ferris indicated that the Claimant never behaved in any manner to suggest her pain level was as high as she reported (Respondents' Exhibit E, p. 100).

80. Ms. Ferris noted that the Claimant reported she no longer takes pain medications as it was "taken away" from her. The Claimant reported that her pain level was 4-4.5/10 when on the narcotics and that the medications were very helpful (Respondents' Exhibit E, p. 101). Ms. Ferris also noted that the Claimant "went into significant detail about her evaluation with [Dr. Donner] and his recommendation for surgery." The Claimant reported that it is her understanding that she has two herniated discs in her neck that are very damaged which are causing the mid back pain and the tingling and weakness in her hands. The Claimant also reported that it is "her understanding that she has herniated discs in her low back and with surgery she would recover the strength in her legs, resolve the incontinence, and decrease the low back pain." The Claimant described Dr. Donner as lifting her up because he offered "something to do" (Respondents' Exhibit E, p. 101). The Claimant reported to Ms. Ferris that she does not drive because when she was returned to light duty work tasks and driving to work at that time, she noticed her reflexes failing her and she had headaches and dizziness. She also stated that she would not drive while taking narcotic medications. Now that she is no longer on narcotics, the Claimant continues to refrain from driving because she quickly loses focus and her ongoing symptoms prevent her from driving (Respondents' Exhibit E, p. 102).

81. Ms. Ferris relied on the opinions of Drs. Kawasaki, Paz, and Worwag in determining that the Claimant is capable of full time, unrestricted work activities. Based on this, Ms. Ferris opines that the Claimant "remains capable of earning wages despite her work related experience and subsequent medical care (Respondents' Exhibit E, p. 108).

82. The Claimant was evaluated by Michael Fitzgibbons on April 11, 2014. Mr. Fitzgibbons noted that the Claimant reported the following to him:

> constant pain in her lower back radiating into her buttocks. Her legs can feel heavy and numb. She described having ongoing neck pain which can radiate into upper back, shoulder blades and arms. Cold and weather changes can increase her pain. She has headaches on almost a daily basis. She needs to take medication and lie down until they subside. Along with headaches, she has dizziness. She related having urinary incontinence following the work injury. She avoids drinking any liquids except when she is home or close to a bathroom. This is a daily problem for her. [The Claimant] responded when asked about depression that she is affected by depression. She described difficulty with prolonged sitting, standing or walking. She uses a cane to ambulate. She further reported

difficulty with lifting, carrying, bending, kneeling and squatting as restricted by Dr. Bachman (Claimant's Exhibit 38, pp. 228-229).

83. He administered the Wide Range Achievement Test (WRAT-4) to obtain additional information about her academic abilities. She scored at the 3.8 level in word reading, grade 4.9 in sentence comprehension, 3.9 in spelling and 4.8 in arithmetic. He stated she showed competitive performance during the testing (Claimant's Exhibit 38, p. 230). Although Mr. Fitzgibbons noted that the Claimant earned vocational certification in early childhood development and had English as a second language classes over a number of years, he assesses the Claimant with only elementary school academic abilities. Although he does note, "she was able to work, take classes and be active with her three children before sustaining the work injuries" (Claimant's Exhibit 38, p. 231).

84. In his report dated April 11, 2014, Mr. Fitzgibbons relies heavily on the opinion of Dr. Bachman that the Claimant could "work only four hours a day at a desk/office setting" in spite of the fact that this opinion is quite dated, having been issued by Dr. Bachman on November 12, 2010 when he placed the Claimant at MMI. Mr. Fitzgibbons seems to discount the 4% psychological impairment rating provided by Dr. Gutterman and adopted by Dr. Gellrick through her DIME, and instead focused on the much more significant psychological impairment provided by Dr. Furmansky which "would preclude [the Claimant] from being able to successfully engage in competitive employment" (Claimant's Exhibit 38, pp. 232-233). He also discounts the opinions of Respondents' independent medical examiners, Dr. Weinstein, Dr. Worwag and Dr. Paz, that Claimant has no lack of function and therefore no work restrictions should be imposed. Mr. Fitzgibbons did note that if Respondents' independent medical examiners were the only opinions to be considered, and no restrictions should be imposed then Claimant could return to work (Claimant's Exhibit 38, p. 232). However, he opined that when considering the opinions of the multiple treating and DIME examiners and the limited vocational possibilities from her vocational profile (lack of education, academic abilities and discomfort in speaking English), he believed that the Claimant would "be so limited in her vocational possibilities as to be unable, within a reasonable degree of vocational probability, to independently identify and secure appropriate employment (Claimant's Exhibit 38, p. 232). Mr. Fitzgibbons concludes that "in consideration of all the relevant vocational factors and relying on the description of her functioning by the treating providers, [the Claimant] is unable to earn a wage" (Claimant's Exhibit 38, p. 233).

85. Mr. Michael Fitzgibbons testified as an expert in the areas of vocational rehabilitation and counseling at the hearing on November 17, 2014 (Hrg. Tr. November 17, 2014, p. 64). Mr. Fitzgibbons ultimate opinion regarding the Claimant's ability to return to and sustain gainful employment was "that she is not able to resume earning a wage." He recommended vocational rehabilitation assistance, without which, he could not see that it was feasible or reasonable for the Claimant to return to work (Hrg. Tr. November 17, 2014, p. 66). Mr. Fitzgibbons testified that if you assume that the Claimant has no work restrictions, then the entry-level positions identified by Ms. Ferris on page 20 of her report would be appropriate. However, Mr. Fitzgibbons opined that when you look at the work restrictions from Dr. Bachman, the Claimant can only do

office work for four hours a day with no lifting, carrying, pushing, pulling, crawling, kneeling, squatting, or climbing, and the Claimant also has psychological limitations. So, given these restrictions, Mr. Fitzgibbons finds that the occupations identified by Ms. Ferris are not within the Claimant's physical limitations (Hrg. Tr. November 17, 2014, p. 67).

86. Mr. Fitzgibbons further testified that in most office positions there is a higher level of reading, writing and arithmetic required for those positions as well as some computer knowledge and some keyboarding, all skills which Ms. Gomez does not possess (Hrg. Tr. November 17, 2014, p. 68. He testified that in his experience employers would like to return their employees to work because it saves cost in hiring a new person (Hrg. Tr. November 17, 2014, p. 78). The Claimant was reported to have done a very good job with the Employer so there would be a strong incentive for the Employer to provide employment for her on an ongoing basis if that can be done within their limitations (Hrg. Tr. November 17, 2014, p. 79). However, the Claimant attempted a light duty position with the Employer which Mr. Fitzgibbons opined was not successful in sustaining other office-work employment (Hrg. Tr. November 17, 2014, p. 79). He opined that all positions recommended by Ms. Ferris (hostess, food service, fast and casual food restaurants, and janitorial) were outside the restrictions recommended by the treating physicians (Hrg. Tr. November 17, 2014, pp. 79-81)

87. The work restrictions relied on by Mr. Fitzgibbons were not persuasive. Mr. Fitzgibbons stated he relied on physical restrictions assigned by Dr. Bachman as Dr. Bachman stopped treating the Claimant in December 2010. Mr. Fitzgibbons could not even state the last date Dr. Bachman had met with Claimant (Hrg. Tr. November 17, 2014, pp. 129-130). Dr. Bachman issued those restrictions without any of the subsequent information which has come to light about the Claimant's diagnosis of a Pain Disorder. In addition, although Mr. Fitzgibbons stated he was relying on restrictions issued by Dr. Kawasaki, Dr. Kawasaki had more recently clearly stated the Claimant's condition does not justify any work restrictions. Instead, Mr. Fitzgibbons parsed Dr. Kawasaki's December 24, 2013 letter regarding work restrictions and chose to interpret it as releasing the Claimant to light duty only (see Exhibit QQQQ). This strained interpretation is not consistent with the unambiguous statements Dr. Kawasaki made later regarding the Claimant's lack of objective injury and full duty release to work. Mr. Fitzgibbons ultimately conceded if the court relies on Dr. Kawasaki's current opinion, the Claimant is able to work (Hrg. Tr. November 17, 2014, pp. 144-145).

88. Mr. Fitzgibbons relied on Dr Furmansky's permanent impairment rating to outline psychiatric work restrictions (Hrg. Tr. November 17, 2014, p.123). Mr. Fitzgibbons agreed Dr. Furmansky did not outline psychiatric work restrictions when he set forth his permanent impairment rating (Hrg. Tr. November 17, 2014, p. 125). Instead, Mr. Fitzgibbons testified his experience allowed him to "determine" what restrictions were appropriate when reviewing the impairment rating. Mr. Fitzgibbons agreed Dr. Furmansky's rating was not adopted by the DIME physician (Hrg. Tr. November 17, 2014, p.126).

89. Mr. Fitzgibbons relied on WRAT4 testing as "a basic assessment of a person's academic abilities" Hrg. Tr. November 17, 2014, p.67). Mr. Fitzgibbons claimed this test evaluated the Claimant's ability for word recognition, reading comprehension, spelling and math. Mr. Fitzgibbons' test results indicated the Claimant scored a grade 3.8 level in word reading, grade 4.9 in sentence comprehension, grade 3.9 in spelling and grade 4.8 in math. However, the WRAT testing was not created for forensic situations, was purely effort dependent and did not have a validity measure (Hrg. Tr. November 17, 2014, pp. 108-109). The test is typically administered to an English speaking population to determine their education level (Hrg. Tr. November 17, 2014, pp. 111-112). Though the Claimant's graduation from high school has been an issue of controversy, the Claimant acknowledged to Mr. Fitzgibbons she completed the 11th grade. Mr. Fitzgibbons made no comment on why her math would be at a 4.8 grade level. Mr. Fitzgibbons was unaware the Claimant was taking English as a second language course work at Focus Points in 2012 and 2013 (Hrg. Tr. November 17, 2014, p. 114). He had not reviewed her testing scores while at Focus Points.

90. To reach his opinion, Mr. Fitzgibbons relied on incomplete and flawed data. He used old restrictions which were not offered in the context of the Claimant's current diagnoses. He extrapolated psychiatric restriction and he used test results which were inconsistent with the Claimant's real world accomplishments at Focus Points, accomplishments of which Mr. Fitzgibbons was unaware. Most importantly, he ignored the opinion of the Claimant's treating doctor that the Claimant had no work restrictions. As Mr. Fitzgibbons acknowledged, using Dr. Kawasaki's statement of no work restrictions, the Claimant was employable.

91. Ms. Donna Ferris testified as an expert in the area of vocational rehabilitation by deposition on December 15, 2014 (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 3). It was Ms. Ferris' opinion that the Claimant remained capable of earning wages despite her work-related injury (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 4). Ms. Ferris testified that his case was complex due to the large volume of medical records and the restrictions provided by the Claimant's treating physicians over time (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 5-6). She testified that she was aware of the restrictions provided by Dr. Bachman, Dr. Kawasaki, Dr. Furmansky, Dr. Weingarten and Dr. Worwag (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 6). In looking at all of the medical information, and understanding that Dr. Kawasaki provided care from March of 2010 and continues to provide care and has had the advantage of seeing what has evolved over time, Ms. Ferris consequently relied on Dr. Kawasaki's recommendations as far as the Claimant's functional capabilities (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 6-7). Commenting on Mr. Fitzgibbon's reliance on Dr. Bachman's restrictions, Ms. Ferris noted that Dr. Bachman placed the Claimant at MMI in November of 2010 and did not treat the Claimant after that point (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 8). As for Dr. Furmansky's opinion, Ms. Ferris commented that his opinion is "confusing" since he believes the Claimant is permanently and totally disabled from a psychiatric standpoint, however, he has not discussed whether she has restrictions and has not provided information to support this belief (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 9). Ms. Ferris also testified that

she did not consider Dr. Furmansky's psychiatric restrictions because Dr. Weingarten's independent medical evaluation, which identified a pain disorder, became important to the case outcome (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 19-20 and pp. 75-76). Dr. Kawasaki relied on Dr. Weingarten who indicated the Claimant was not psychiatrically restricted from working (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 77).

92. Ms. Ferris disagreed with Mr. Fitzgibbons' use of a psychiatric impairment rating as a basis for determining work restrictions. Ms. Ferris opined that an impairment rating does not define function (Tr. of Depo. of Ms. Ferris, December 15, 2014, p.11. Furthermore, as Ms. Ferris testified, the Division Examiner did not adopt Dr. Furmansky's impairment and did not assign any psychiatric work restrictions (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 15).

93. Ms. Ferris did not find urinary symptoms were an impediment to return to work. She testified that people function with urinary incontinence while at work and can wear special underwear (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 16). When Ms. Ferris met with the Claimant, she observed her for 2-1/2 hours and the Claimant did not leave the room. At the hearing in November, Ms. Ferris observed that the Claimant did not leave the courtroom until 11:30AM (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 17). Ms. Ferris explained these two pieces of experience tell her there would be normal breaks within the workday where the Claimant could go to the bathroom.

94. Ms. Ferris also evaluated the Claimant's vocational background. As part of that process, she looked at the Claimant's English abilities. In reviewing the medical records, Ms. Ferris noted on two occasions, the Claimant attended medical appointments and was able to get through the appointment without use of an interpreter (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 21). When Ms. Ferris met with the Claimant, she brought an interpreter. She encouraged the Claimant to use as much English as she felt comfortable with so Ms. Ferris make a fair assessment of the Claimant's ability to speak and understand English (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 22). Ms. Ferris explained during her interview she observed two things. First, the Claimant did not speak one word of English during their meeting. Second, the Claimant clearly understood many questions posed to her before the interpreter translated the question (Tr. of Depo. of Ms. Ferris, December 15, 2014, p.22). Ms. Ferris specifically asked the Claimant, "Do you speak or understand any English?" The Claimant stated, "None whatsoever. I do not speak English and I have very little understanding of English" (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 23). Ms. Ferris stated this was very troubling to her because there was a great amount of information to the contrary (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 23). Ms. Ferris learned from the Employer that the Claimant spoke, understood, read and wrote English (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 21-23). The employer indicated the Claimant's English skills improved significantly over her period of employment. The Claimant was capable of functioning within her position as a group leader. The Claimant was able to complete forms written in complete sentences in English. She also spoke with English-speaking parents regarding their child (Tr. of

Depo. of Ms. Ferris, December 15, 2014, p. 25). Ms. Ferris indicated information from the Employer was important when formulating her vocational opinion because the employer has day-to-day experience over a period of years which is a very reliable assessment of a person's ability to function in their job. It was clear based on the Claimant's job tasks that she had adequate English language skills (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 27).

95. When looking at the Claimant's vocational background, Ms. Ferris asked the Claimant about her job with the Employer and the Claimant minimized her job tasks with the Employer. The Claimant disagreed she was working as a group leader stating she was a "helper" (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 35). This is despite the undisputable credential that the Claimant held with the State of Colorado (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 36-37). Ms. Ferris asked the Claimant about her educational level. The Claimant advised Ms. Ferris she completed high school (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 39). However, the Claimant stated to Mr. Fitzgibbons she did not finish high school. Ms. Ferris indicated it is important to understand Claimant's motivations and note the timing of her change of her story; she only told Mr. Fitzgibbons and Dr. Rook that she was not a high school graduate (Tr. of Depo. of Ms. Ferris, December 15, 2014, pp. 42-43).

96. Ms. Ferris disagreed with the conclusions drawn by Mr. Fitzgibbons based on the WRAT4. The Claimant's work requirements at the Employer indicated she functioned at a higher level than she tested with Mr. Fitzgibbons (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 29). Furthermore, Ms. Ferris learned the Claimant was involved in English as a second language education through Focus Points and her scores at Focus Points contradicted her WRAT4 scores (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 29). Ms. Ferris testified that contacted Cristina Del Nolio, the Program Coordinator at Focus Points, to obtain a general understanding of testing scores (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 32). The Program Coordinator explained their program provides training in speaking, understanding, reading and writing English. A score of 230 was the highest test score a person could earn in their English as a second language program. The Program Coordinator explained a person who scored 220 or 230 would have "advanced" speaking and comprehension and their reading and writing comprehension would be "good" (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 33). Asking for further elaboration on a definition of "advanced" and "good," Ms. Ferris asked her to be specific from a functional standpoint. The Program Coordinator explained with these scores, an individual would be capable of taking the language portion of the GED in English (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 34). Ms. Ferris testified the Claimant's scores at Focus Points were "entirely inconsistent" with the English skills the Claimant described to her and other providers and depicted in the WRAT4 testing (Tr. of Depo. of Ms. Ferris, December 15, 2014, p.34).

97. Ms. Ferris opined the Claimant remained employable doing the types of jobs she had done in the past (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 44). These jobs included her childcare position at the employer, production work similar to

what she had done at Federal Express, production work similar to her work as a food service worker and also janitorial work (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 44). These jobs all created transferable skills. These are all jobs where she had prior experience and these jobs are all currently found in the labor market on a full and part time basis (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 45). Ms. Ferris felt the vast majority of the jobs she had identified would be below 20 pounds and would even fall within the light duty work category (Tr. of Depo. of Ms. Ferris, December 15, 2014, p. 46).

Ultimate Findings of Fact

98. There was conflicting evidence presented about the Claimant's ability to understand and speak English. The Claimant herself states that she understands some English and can speak very little English. Mr. Fitzgibbons has testified that her testing score supports this finding her English abilities at an elementary school level. However, his testing had no measures to ensure valid effort on the part of the Claimant. While the Claimant downplays her ability to understand and speak English, the ALJ notes that she has lived in the United States for more than 18 years. She has previously held various jobs, including her position with Employer where she was required to participate and function in English. The Claimant was identified as a good employee prior to her work injury and was successful in this position. In addition, the Claimant has taken intermediate to advanced classes in English as a second language and she attained a childcare certification and made solid progress in a post-secondary vocational program, all of which were taught in English. It is found that the Claimant has sufficient ability to understand, speak and otherwise communicate in English such that the Claimant's education level and English language skills would not be a substantial impediment to obtaining and maintaining employment in her commutable labor market.

99. There was conflicting evidence as to whether the Claimant suffered a loss of consciousness during or after her fall down concrete stairs on January 20, 2010. Initial emergency room records do not document a loss of consciousness and the Claimant had substantial recall of events occurring during and after her fall to describe the same to the ER personnel and to Dr. Bachman when he saw her the following day. It was not until her first office visit with Dr. Kawasaki on March 9, 2010 that the Claimant reported a loss of consciousness right after her fall, after which she started to report to Dr. Bachman for the first time, around March 25, 2010, that she was experiencing forgetfulness. Dr. Bachman then ordered a brain MRI which was normal. After this point, the Claimant reported loss of consciousness both immediately after her fall and then again in the ambulance on the way to the hospital. The DIME physician Dr. Gellrick later found no evidence of memory, thinking or concentration issues, nor did Dr. Gutterman in his assessment of the Claimant's psychiatric conditions. Based on the medical records, inconsistent reporting, and giving weight to earlier reports of the Claimant's injury, it is more likely than not that the Claimant did not suffer a loss of consciousness or only suffered a very brief loss of consciousness. The weight of the evidence as set forth in subsequent medical work-up and evaluations have revealed no significant

sequelae resulting from a loss of consciousness, to the extent that there was any loss of consciousness.

100. With respect to the Claimant's bladder dysfunction/urinary incontinence issues, there is no report of urinary system dysfunction in the January 20, 2010 ER records. The following day, on January 21, 2010, Dr. Bachman specifically noted that there was "no frequency, hematuria or change in urination. On January 28, 2010, Dr. Bachman noted "no history of bladder or bowel dysfunction." At an ER visit on February 23, 2010 for low back pain, the Claimant again denies urine output changes, dysuria or changes in urinary frequency or urgency. It is not until February 24, 2010 that the Claimant reports to her physical therapist that she had bladder incontinence and then she reports this again to Dr. Bachman on February 25, 2010. As a result of this, the Claimant is referred to Dr. Mueller for a urology evaluation and to Dr. Renkin for a neurological evaluation. The DIME physician found that the Claimant's bladder symptoms are not causally related to her work injury. It is found that there was no persuasive evidence to establish that the Claimant's urinary incontinence symptoms are causally related to the Claimant's January 20, 2010 work injury.

101. The Claimant received an extensive work-up by her authorized treating physicians as they tried to determine her pain generators and the source of her expanding symptomatology over the course of her treatment. The Claimant had multiple MRIs of all levels of her spine, including lumbar, thoracic and cervical, as well as a brain MRI. She was evaluated by neurologists and orthopedic specialists and underwent an EMG of her lower extremities. Ultimately, all of the Claimant's authorized treating physicians, the DIME physician, Dr. Gellrick and IME evaluators Drs. Paz and Worwag concluded that the Claimant did not have a spinal cord lesion, and that there was no physiologic anatomic or nervous system basis for the symptoms the Claimant continued to exhibit. All of the doctors treating or evaluating the Claimant's physical medicine complaints, except for Drs. Rook and Donner, found that there was no pathology to explain the Claimants subjective symptomatology. Dr. Rook alone continues to opine that it is possible that the Claimant suffered a spinal cord contusion at the time of her injury. Dr. Donner has opined that pathology showing bulging cervical disc and an annular tear and protrusion at L5-S1 may be the source of the Claimant's chronic pain. However, the overwhelming weight of the evidence is that there is no persuasive evidence of pathology to explain the Claimant's expanding symptomatology. It is found as fact that the Claimant did not suffer a spinal cord or nervous system injury during her January 20, 2010 work injury.

102. The Claimant was placed at MMI for her physical condition on November 12, 2010 and she was placed at MMI for her psychiatric condition on March 21, 2011. Ultimately, a DIME was performed by Dr. Gellrick, with psychiatric input from Dr. Gutterman. The Claimant was provided a 33% whole person impairment rating for her cervical, thoracic and lumbar conditions and range of motion deficits and a 4% whole person impairment rating for her psychiatric condition. This DIME determination was not challenged.

103. Subsequent to MMI for her physical condition, the Claimant has continued to treat with Dr. Kawasaki and she continued to be prescribed narcotic medications for pain until after a SAMMS conference that took place on November 28, 2012. Around this time, treating and evaluating physicians reached the consensus that the Claimant had no objective findings to explain or substantiate her subjective complaints and expanding and migratory symptomatology. Dr. Kawasaki concurred with Dr. Weingarten and Dr. Worwag that the Claimant's correct diagnosis was Pain Disorder (per the DSM-IV then in effect, and now Somatic Symptom Disorder per the DSM-V). In light of this, Dr. Kawasaki tapered the Claimant safely and effectively off all opioid medications. Subsequent to this, the Claimant's reporting of her pain level remained effectively level although the Claimant testified and complained to her treating physicians that her pain was increasing. The Claimant currently takes medications prescribed by Dr. Furmansky, including anti-depressants, anti-anxiety medication, Gabapentin, Neurontin, and Sonata/Zaleplon and Pantoprazole Sodium. Based on the persuasive testimony and opinions of Drs. Worwag and Weingarten, and the lack of functional gain as evidenced by the medical records, it is found that these medications are not reasonable or necessary to cure and relieve the Claimant of the effects of her January 20, 2010 injury or prevent further deterioration of her condition.

104. With regard to work restrictions, there was also a considerable amount of conflicting testimony and evidence. At the time he placed the Claimant at MMI on November 12, 2010, Dr. Bachman provided work restrictions for the Claimant of sedentary office work for only 4 hours per day. Dr. Bachman has not treated the Claimant since December of 2010. Dr. Kawasaki initially concurred with Dr. Bachman's work restrictions. However, continuing to treat the Claimant as her case evolved with new information, Dr. Kawasaki changed his opinion regarding work restrictions. On December 24, 2013, Dr. Kawasaki noted that after his review of the medical evaluations of Drs. Worwag and Weingarten, he clearly changed his opinion. He stated that there are no objective reasons for the Claimant to be placed on any work restrictions. He opined that the Claimant can certainly be released to a light-duty job, which she would be able to handle from her subjective pain standpoint. Dr. Rook testified that, based on his evaluation of the Claimant on March 29, 2014, he believes the Claimant's work restrictions should limit lifting to 10 lbs., no carrying due to her limp and use of case, limit standing and walking to 15-30 minutes, avoid bending, twisting, climbing, ladders, kneeling and crawling. He also opined that the Claimant would have difficulty with above the shoulder work on the right side. Finally, he opined that the Claimant's social disability with urinary incontinence requires access to a bathroom. In weighing the evidence, special consideration is given to the persuasive opinion of Dr. Kawasaki who treated the Claimant since 2010 to the present and has the best understanding of how the Claimant's case and her course of treatment has evolved. Relying upon the opinion of Dr. Kawasaki, as supported by Drs. Worwag, Paz, and McCranie, it is found as fact that there are no objective reasons for the Claimant to be placed on work restrictions and that her subjective complaints of pain would allow her to be released to a light duty job.

105. From a psychiatric standpoint, Dr. Furmansky has repeatedly stated his opinion that the Claimant is permanently and totally disabled. He testified that he diagnoses the Claimant with chronic depression, chronic anxiety, insomnia and somatic symptom disorder with predominant pain. He testified that he considers the Claimant permanently and totally disabled because he does not believe that an employer would accept her absences or her symptoms of depression that include attention and concentration impairments and some memory loss and fatigue. However, Dr. Furmansky has never provided specific work restrictions for the Claimant's psychiatric condition. Dr. Weingarten disagrees that the Claimant is permanently and totally disabled by any psychiatric condition. In her supplemental IME report, Dr. Weingarten opined that there are no psychological work restrictions. In deposition testimony, Dr. Weingarten opined that it is in the Claimant's best interests that there be the expectation that she should be more functional, including return to work. Based on the weight of the evidence, and Dr. Weingarten's persuasive opinion, it is found that the Claimant does not have psychological work restrictions.

106. With respect to the vocational rehabilitation expert opinions, the opinion of Ms. Ferris is found to be more persuasive than that of Mr. Fitzgibbons.

107. Based on the foregoing, and considering and weighing all of the lay and expert testimony and the hearing submissions, it is found that the Claimant has not satisfied her burden of proving that she is unable to earn wages in the same or other employment.

CONCLUSIONS OF LAW

Generally

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

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

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

Permanent Total Disability

Permanent total disability, as defined in § 8-40-201(16.5), C.R.S., means an "employee is unable to earn any wage in the same or other employment." When the statute was amended in 1991, it established a strict definition of permanent total disability. The intention of the amendments was to create a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently and totally disabled. *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115 (Colo. App. 1997). A claimant must also establish that the industrial injury was a significant causative factor by showing a direct causal relationship between the industrial injury and the permanent total disability. *Joslins Dry Goods Co. v. Indus. Claim App. Off.*, 21 P.3d 866 (Colo. App. 2001)*; Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App.1986).

It is the claimant's burden of proof to establish that she is permanently totally disabled by a preponderance of the evidence. The question of whether claimant has the ability to earn any wages is one of fact for resolution by the administrative law judge. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995). For purposes of permanent total disability, "any wages" means more than zero. *McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In *McKinney* the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. It is not necessary that the claimant be able to return to previous employment. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for the purpose of the statute. *See also Christie v. Coors Transportation*, 933 P.2d 1330 (Colo. 1997). Although, if the evidence establishes that a claimant is not physically able to sustain post-injury employment, or that such employment is unlikely to become available to a claimant in the future in light of particular circumstances, an ALJ is not required to find a claimant is capable of earning wages. *Joslins,* supra; *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701, (Colo. App. 1999).

The determination of whether a claimant is permanently and totally disabled is made on a case by case basis and varies according to the particular abilities and circumstances of the claimant. In determining whether a claimant is permanently totally disabled, the ALJ may consider various "human factors" such as mental capabilities, physical ability, education, vocational training, overall physical condition, former employment, and availability of work a claimant can perform within a commutable labor market. The overall objective is to determine whether employment exists that is reasonably available to a claimant under her particular circumstances. *Weld County*

School Dist. RE-12 v. Bymer, 955 P.2d 550 (Colo. 1998). No one factor, including the existence of permanent medical impairment, is determinative of permanent total disability. *Van Roy vs. Industrial Claims Appeals Office* (ICAO, July 2, 2001). Medical impairment is distinguished from disability and an individual who is impaired is not necessarily disabled. A respondent's willingness to admit that a claimant sustained permanent medical impairment under the AMA Guides does not amount to an admission that the impairment resulted in any disabling restrictions or that any alleged physical limitations are the result of the admitted medical impairment. *Almodovar v. Resource Management Systems, Inc.,* W.C. No. 4-198-272, (ICAO, July 18, 2001). In *Almodovar,* the claimant was placed at MMI with a 26% impairment rating which was admitted by the carrier. It was found that even though there was an admitted rating for 26% whole person physical impairment, the Claimant failed to carry her burden to establish permanent and total disability.

In this case, the Claimant had migrating and expanding symptomatology which could not be explained by her medical testing and multiple doctors reached the consensus that there were no objective findings to correlate to the Claimant's subjective pain complaints. Eventually, her presentation was considered by Dr. Weingarten who identified the Claimant with a pain disorder. The Claimant's ATP, Dr. Kawasaki, agreed and sought to coordinate with the Claimant's treating psychiatrist, who did not adopt this opinion and possibly delayed and complicated the Claimant's recovery. Dr. Kawasaki specifically agreed with Dr. Worwag that there was no significant pathology to explain Claimant's symptomatology. The medical opinions of Drs. Kawasaki, Weingarten and Worwag were found to be the most persuasive regarding the Claimant's diagnosis. Their opinions are consistent with the various specialists who found no persuasive objective evidence to support the Claimant's ongoing and changing complaints and some who found non-organic results of their testing. These doctors opine that the Claimant could return to full-duty, full time work and the Claimant is not permanently and totally disabled. Even the Claimant's vocational rehabilitation expert, Mr. Fitzgibbons, agreed if the ALJ were to rely on Dr. Kawasaki's statement that Claimant could return to full duty full time work, then the Claimant is employable.

The Respondents' vocational rehabilitation expert, Donna Ferris, relied on the opinions of Drs. Kawasaki, Worwag and Weingarten. She relied on the medical information which makes the most sense of the claimant's shifting medical presentation. Relying on the opinions of these doctors, Ms. Ferris opined that the Claimant can return to work in her commutable labor market. Donna Ferris opined the Claimant can do all of the prior work she performed in the past, and even with light duty work restrictions. Her opinion was that the Claimant remains employable and is not permanently and totally disabled. Donna Ferris' opinion was credible and more persuasive than that of Mr. Fitzgibbons who relied on outdated restrictions from Dr. Bachman and an opinion of Dr. Furmansky that the Claimant was permanently and totally disabled, without providing specific work restrictions.

Ultimately, the Claimant did not meet her burden of proof to show she is permanently and totally disabled. She relied on Dr. Furmansky who did not fully adopt the diagnosis of pain disorder and failed to apply the treatment approach necessary for the diagnosis for pain disorder based on inaccurate information regarding the Claimant's medical status for two years. Moreover, Dr. Furmansky insisted the Claimant had a physical injury; a myofascial condition which was not supported by any treating physical medical doctor or his referrals. Dr. Furmansky disregarded the warnings from Dr. Weingarten and Dr. Worwag of iatragenic injury and disregarded requests for assistance from Dr. Kawasaki to follow the protocol adopted by consensus of treating and evaluating physicians. Thus, Dr. Furmansky's opinion is not persuasive. Likewise, the opinion of Dr. Rook was not persuasive. His opinion is inconsistent with the specialists who have evaluated the case and found there was no organic explanation for the Claimant's injury. He found myofascial injury and spasm when no significant spasms were observed by the treating providers over the course of her care. Dr. Rook's opinion regarding work restrictions was not persuasive. He agreed with Dr. Bachman who has not been involved in the case since December 2010 and Dr. Bachman was unaware of the diagnosis of pain disorder. Dr. Rook opined the Claimant had a spinal cord injury; he is the only doctor who holds this opinion. The Claimant admitted to the urologist that her urinary complaints did not start until weeks after her date of injury. Dr. Rook agreed a delayed onset of urinary complaints was not consistent with a spinal cord injury. Therefore, Dr. Rook has contradicted his own opinion. Finally, Dr. Rook did not observe on exam the numbness from T4 down, the very symptoms which were ostensibly the indicia of the spinal injury. For these reasons, Dr. Rook's opinion is not persuasive.

Finally, the Claimant relied on Mr. Fitzgibbons' opinion, which was based on unsound information. He relied on old restrictions based on medical opinions which were not squared with the current understanding of the Claimant's medical diagnosis. Mr. Fitzgibbons developed restrictions from psychiatric impairment based on a method not supported by the definition of impairment or by the medical experts in this case. He also relied on data diminished by the Claimant's lack of effort. Contrary to the opinion of Mr. Fitzgibbons, the ALJ found that the evidence established the Claimant has sufficient ability to understand, speak and otherwise communicate in English such that the Claimant's education level and English language skills would not be a substantial impediment to obtaining and maintaining employment in her commutable labor market.

In sum, the Claimant's work injuries do not preclude her from returning to work. The Claimant has not met her burden of proof to establish she is permanently and totally disabled. Rather, it is determined that the Claimant has sufficient function, ability, training and education to obtain and maintain continuous employment and such employment is available to the Claimant in her commutable labor market. The claim for permanent total disability benefits is denied and dismissed.

Medical Maintenance Treatment after MMI

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

In this case, the Claimant has not met her burden of proof to establish that continuing care, including, but not limited to, ongoing prescriptions and psychotherapy is reasonable and necessary. Dr. Furmansky admitted in his first meeting with the Claimant that he did not have medical records and receipt of those may change his opinion. He did not follow up on getting those records. Two years later he learned her treating doctor felt she had no organic injury, migrating symptoms and a pain disorder. When he learned the assumptions he had about the case were wrong and his client had not told him the basic truth about her medical status, he still insisted to Dr. Kawasaki that his medication regimen was appropriate. Dr. Weingarten and Dr. Worwag both explained this was unusual, as Dr. Furmansky should have obtained the medical records, revisited his Axis III diagnoses, met again with the Claimant and considered alternative psychiatric diagnosis. More importantly, in the face of Dr. Kawasaki's application of the diagnosis of pain disorder and recommendation that claimant's medication usage be reduced, Dr. Furmansky increased the Claimant's medications and began prescribing for physical conditions. When he finally reviewed the medical records, Dr. Furmansky still concluded the Claimant had a myofascial condition, relying on old medical records, despite the fact this was not a current physical diagnosis offered by Dr. Kawasaki. Dr. Furmansky eventually agreed the Claimant should not have the level of complaints she offered with only a myofascial condition. He agreed she should not need to utilize a cane and should resume driving. However, he has not effectively

pursued his own treatment plan. Instead, he has increased her medications and increased her dependence on his care. This is not curing and relieving the effects of the injury. Dr. Furmansky has substantially ignored the information from the physical medicine doctor who has opined she does not have a significant physical injury. He has prescribed medications for a physical condition, and did this strictly based on the Claimant's self report of symptoms. He has not chronicled any increase in function to support those prescriptions as is recommended by the Medical Treatment Guidelines.

Dr. Weingarten and Dr. Worwag testified persuasively that medications for depression and anxiety were not reasonable and necessary. Dr. Worwag and Dr. Weingarten testified prescriptions for medications including, but not limited to, Gabapentin, bupropion, diclofenac potassium, Zaleplon, Fluoxetine HCL, pantoprazole sodium, Zanaflex, and tinzanidine were not reasonable and necessary because they have not helped the Claimant and did not increase her function. The Claimant shall be weaned off of these medications as medically appropriate in accordance with the recommendations of her authorized treating physicians. The treating physician who currently prescribes the prescription(s) shall be responsible for overseeing the Claimant's safe and appropriate withdrawal of the prescription medications. This entire process should be monitored and overseen by Dr. Kawasaki to ensure that the withdrawal process is completed safely, but without unreasonable delay.

Claimant has not shown by a preponderance of the evidence that her request for ongoing maintenance medical benefits consisting of psychotherapy and the medications prescribed by Dr. Furmansky are reasonable, necessary and related to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition.

In addition, the Claimant has failed to establish that her urinary incontinence symptoms and condition are causally related to her January 20, 2010 work injury. With respect to the Claimant's bladder dysfunction/urinary incontinence issues, there is no report of urinary system dysfunction in the January 20, 2010 ER records. The following day, on January 21, 2010, Dr. Bachman specifically noted that there was "no frequency, hematuria or change in urination. On January 28, 2010, Dr. Bachman noted "no history of bladder or bowel dysfunction." At an ER visit on February 23, 2010 for low back pain, the Claimant again denied urine output changes, dysuria or changes in urinary frequency or urgency. It is not until February 24, 2010 that the Claimant reported to her physical therapist that she had bladder incontinence and then she reported this again to Dr. Bachman on February 25, 2010. Ultimately, the DIME physician found that the Claimant's bladder symptoms were not causally related to her work injury. It was found that there was no persuasive evidence to establish that the Claimant's urinary incontinence symptoms are causally related to the Claimant's January 20, 2010 work injury and therefore post-MMI medical care for the Claimant's urinary condition is denied and dismissed.

Finally, all of the doctors treating or evaluating the Claimant's physical medicine complaints, except for Drs. Rook and Donner, found that there was no pathology to explain the Claimants subjective symptomatology. Dr. Rook alone continues to opine that it is possible that the Claimant suffered a spinal cord contusion at the time of her injury. Dr. Donner has opined that pathology showing bulging cervical disc and an annular tear and protrusion at L5-S1 may be the source of the Claimant's chronic pain. However, the overwhelming weight of the evidence is that there is no persuasive evidence of pathology to explain the Claimant's expanding symptomatology. It is found as fact that the Claimant did not suffer a spinal cord or nervous system injury during her January 20, 2010 work injury. The Claimant has failed to establish that the surgery or any other procedures recommended by Dr. Donner is reasonable and necessary to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition.

ORDER

It is therefore ordered that:

1. The Claimant has failed to establish that she is unable to earn any wages and has failed proven that she is entitled to receive permanent total disability benefits. The Claimant's claim for permanent total disability benefits is denied and dismissed with prejudice.

2. The Claimant has failed to meet her burden of proof regarding maintenance medical treatment. Ongoing prescriptions and psychiatric care is not related and is not reasonable and unnecessary, except, to the extent outlined in this order, as required for the safe and appropriate withdrawal of the medications being prescribed. The treating physician who currently prescribes the prescription(s) shall be responsible for overseeing the Claimant's safe and appropriate withdrawal of the prescription medications. This entire process should be monitored and overseen by Dr. Kawasaki to ensure that the withdrawal process is completed safely, but without unreasonable delay.

3. The Claimant has failed to establish that the surgery or any other procedures recommended by Dr. Donner are reasonable and necessary to relieve the effects of the Claimant's industrial injury or to prevent further deterioration of her condition. The claim for ongoing medical benefits for surgery or related procedures recommended by Dr. Donner 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 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: August 26, 2015

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

ISSUES

The issues to be determined by this decision are:

1. Whether the claimant has proven by a preponderance of the evidence that she is permanently and totally disabled under the Workers' Compensation Act;

2. If the claimant is not permanently and totally disabled, whether the claimant has overcome the DIME rating;

3. Whether the respondents are liable for penalties in connection with temporary disability benefits;

4. Whether the claimant is entitled to reimbursement and/or ongoing payment of personal training services; and

5. Disfigurement benefits.

FINDINGS OF FACT

1. The claimant suffered an admitted industrial injury on August 13, 2010. She tripped and fell while walking into work, and landed directly on her right shoulder. As a result of the accident, she sustained a "very massive" tear of the right rotator cuff.

2. The claimant was referred to Dr. Meinig, an orthopedic surgeon, who ultimately performed three surgeries on the claimant's right shoulder. The first surgery was performed on May 13, 2010, and involved an AC joint resection, distal clavicle resection, and repair/reattachment of the rotator cuff tendons, which had been completely avulsed. The second surgery was done on July 21, 2010 to repair a recurrent tear of the supraspinatus tendon. She underwent a third surgery on February 7, 2013, which was a manipulation under anesthesia (MUA) to address a "frozen shoulder." Dr. Meinig also found that her deltoid had detached.

3. The claimant has continued to suffer from significant pain and limitation in her right shoulder and arm despite extensive treatment. She has also had significant pain, muscle spasm, and trigger points affecting her neck.

4. The claimant returned to work in a part-time, modified duty position for the respondent-employer in January 2011. She initially started at six hours per day, with the hope of working up to eight hours shifts. However, the work severely aggravated her condition, despite substantial accommodations provided by the respondent-employer. As a result, her schedule was reduced to four hours per day.

5. The aggravation resulting from her work activities is repeatedly documented throughout her medical records, particularly her contemporaneous physical therapy records. She was forced to resign her position in November 2012, and has not worked since that time.

6. The respondents admitted liability for TTD benefits after the claimant stopped working. However, the respondents did not pay TTD benefits. Rather, they continued to pay TPD benefits at the same rate they had been paying while the claimant was working part-time.

7. Dr. Tyler became the claimant's primary ATP on January 30, 2012. Dr. Tyler found a number of significant clinical findings on physical examination. For example, she had an anteriorly displaced right shoulder girdle complex, due to significant muscle spasm with active trigger points in multiple locations. Examination of her cervical spine revealed segmental dysfunctions at C4 and C5 due to increased myofascial tone in the superior medial periscapular muscles as well as some myofascial trigger points in the scalenes and splenius capitis muscles on the right.

8. Dr. Tyler placed the claimant at MMI on October 9, 2013, with a 34% whole person impairment. His rating included a rating for the neck. Dr. Tyler opined that

> [t]his patient also has pathology in the cervical spine related to chronic spasticity in the right posterior and lateral cervical spine brought on by the injuries suffered to the right shoulder. There is objective finding of spasms with myofascial trigger points and even localized areas of segmental dysfunctions in the cervical spine based on clinical examination today. There is even some soft tissue swelling in the supraclavicular notch related to ongoing chronic spasticity in the cervical spine, which gives further objective evidence of injury to this region.

9. The respondents filed a Final Admission of Liability (FAL) on June 10, 2014. The FAL admitted liability for medical benefits after MMI.

10. The claimant has been exercising with the assistance of a personal trainer for the past several years. The claimant has paid for these services out of her own pocket.

11. Dr. Tyler opined that the ongoing use of the personal trainer services is not reasonable and necessary treatment for the admitted injury. Dr. Raschbacher agreed that ongoing personal trainer services were not reasonable or necessary. The ALJ finds these opinions to be credible.

12. Mr. Fitzgibbons opined that the claimant is unable to obtain or sustain employment in any occupation. Mr. Fitzgibbons based his opinion on several factors, including Dr. Tyler's opinions, the results of a valid functional capacity evaluation (FCE), the claimant's inability to sustain her part-time accommodated modified-duty assignment with the respondent-employer, the limitation to part-time work, and the claimant's advanced age. Mr. Fitzgibbons also opined that the effects of chronic pain would substantially impair the claimant's ability to obtain and maintain employment on a consistent basis. Mr. Fitzgibbons also opined that none of the occupations identified by the respondents' vocational expert, Ms. Nowotny, were suitable for the claimant.

13. Ms. Nowotny opined that the claimant can work as a telemarketer/ customer service representative, retail sales clerk, parking lot attendant, or receptionist.

14. The ALJ finds that the opinions of Mr. Fitzgibbons are credible and more persuasive than vocational opinions to the contrary.

15. The ALJ finds that the opinions of Dr. Tyler are credible and more persuasive than medical opinions to the contrary.

16. The ALJ finds that the claimant has established by a preponderance of the evidence that she is unable to earn any wages in the same or other employment.

17. The ALJ finds that the claimant has failed to establish by a preponderance of the evidence that she is entitled to reimbursement for personal trainer services or payment of future personal trainer services.

18. The ALJ finds that the claimant has failed to establish by a preponderance of the evidence that the respondents are responsible for the payment of penalties.

19. The claimant has a surgical scar on the right shoulder that is approximately six inches in length and one-half inch in width at its widest. The scar has a depressed appearance and is discolored when compared to the surrounding tissue. At

one end of the scar is a visible suture that has remained for over six months. The ALJ finds that the claimant should be awarded $1,200.00 for this disfigurement.

CONCLUSIONS OF LAW

1. A 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).

2. 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).*

3. 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.

4. A claimant is permanently and totally disabled if she "is unable to earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. 2005. In determining whether the claimant is unable to earn any wages, the ALJ may consider a number of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). These factors include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within her limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant is capable of getting hired and sustaining employment. *See e.g.*,

Case v. The Earthgrains Co., W.C. No. 4-541-544 (ICAO, September 6, 2006); *Cotton v. Econ. Lube N Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997). Consequently, if the evidence shows the claimant is not physically able to "sustain" employment, the ALJ can find that she is not capable of earning wages. *Joslins Dry Goods Co. v. ICAO*, 21 P.3d 866m 868 (Colo. App. 2001).

5. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits which are reasonably necessary to cure and relieve the work-related injury. C.R.S. §8-42-101; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). Where liability for a particular medical benefit is contested, the claimant must prove that the treatment reasonably necessary and is causally related to the industrial injury. See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997); *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). Whether services are medically necessary for treatment of a claimant's injuries or incidental to obtaining such treatment is a question of fact to be determined by the ALJ. *Bellone v. Indus. Claim Appeals Office of the State,* 940 P.2d 1116 (Colo. Ct. App. 1997).

6. Section 8-43-304(1) subjects an insurer to penalties for violation of the Act, violation of the rules, or violation of an order. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001). The maximum penalty is $1,000 per day for conduct occurring after August 11, 2010. *Robinson v. Goodbye Blue Monday*, W.C. No. 4-613-287 (ICAO, April 21, 2011). The failure to comply with a procedural rule is a failure to obey an "order" within the meaning of § 8-43-304(1). *Paint Connection Plus v. ICAO*, 240 P.3d 429, 435 (Colo. App. 2010). "An insurer or employer fails to obey an order if it failed to take the action that a reasonable insurer or employer would take to comply with the order." *Id*.

7. The imposition of penalties under § 8-43-304(1) is a two-step process. The ALJ must first determine if the Respondents violated a rule or statute. If so, the ALJ also must determine whether the violator's actions were objectively reasonable. *Thomson v. Pioneers Hospital of Rio Blanco County*, W.C. No. 4-536-930 (ICAO, April 14, 2004). Whether the insurer's action was objectively reasonable depends on whether it was predicated on a rational argument based on law or fact. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312, 1313 (Colo. App. 1997).

8. Section 8-42-108 provides for additional compensation if an employee is permanently disfigured about the head, face, or parts of the body normally exposed to public view.

9. As found above, the preponderance of persuasive evidence demonstrates

that the claimant is unable to earn any wages in the same or other employment. Accordingly, she is permanently and totally disabled under the Workers' Compensation Act of Colorado.

10. The claimant is not capable of sustaining competitive employment, even on a part-time basis. A finding of PTD in this case is supported by objective medical evidence regarding the claimant's severe pathology; the persuasive testimony of Dr. Tyler; the persuasive vocational opinions of Mr. Fitzgibbons; and the credible testimony of the claimant, her spouse, and the claimant's personal trainer.

11. Dr. Tyler has been the claimant's primary authorized treating physician (ATP) since January 2012. This longitudinal treatment relationship allowed Dr. Tyler to develop a good understanding of the claimant's functional capacity and tolerance for activities.

12. Dr. Tyler provided permanent work restrictions when he placed the claimant at MMI. In addition to physical limitations, Dr. Tyler opined at hearing that the claimant's chronic pain has significantly impacted her emotional state. With respect to the claimant's capacity to sustain employment in general, Dr. Tyler opined that she would not be able to tolerate work activities on a regular basis, even in a part-time, sedentary job.

13. The ALJ finds Dr. Tyler's testimony and opinions to be credible and persuasive. The ALJ finds Dr. Tyler's opinions more persuasive than the contrary opinions expressed by the respondents' expert, Dr. Raschbacher.

14. As found above, Mr. Fitzgibbons opined that the claimant is unable to obtain or sustain employment in any occupation. The ALJ concludes that the opinions of Mr. Fitzgibbons are credible and more persuasive than vocational opinions to the contrary.

15. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is unable to earn any wages in the same or other employment.

16. In light of the foregoing finding that the claimant is permanently and totally disabled, the issues of permanent partial disability and challenging the DIME are moot.

17. The ALJ concludes that the claimant's unreimbursed expenses for personal trainer services were not reasonable and necessary treatment for the industrial injury. The ALJ concludes that ongoing personal trainer services are not reasonable and necessary treatment for the industrial injury.

18. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence a basis for imposition of penalties.

19. The claimant has sustained a permanent disfigurement as a result of her compensable injury. The ALJ concludes that the claimant should be awarded $1,200.00 for this disfigurement.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay permanent total disability benefits based on the admitted AWW, subject to the applicable offset for Social Security retirement benefits, commencing October 9, 2013, and continuing until terminated according to law;

2. The claimant's request for permanent partial disability benefits is dismissed as moot;

3. The claimant's requests for reimbursement of personal trainer services, and payment of ongoing personal trainer services are denied and dismissed;

4. The claimant's request for penalties is denied and dismissed;

5. The respondent-insurer shall pay $1,200.00 to the claimant for disfigurement;

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

7. Any and all issues not determined herein, and not closed by operation of law, are reserved for future decision.

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

DATE: August 20, 2015

/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 4-834-919-04

ISSUE

- Whether the ligament reconstruction tendon interposition ("LRTI") surgical procedure recommended by Dr. Thomas Fry to eliminate stress on the scaphotrapezotrapezoidal ("STT") joint of Claimant's right hand is related, reasonable, and necessary to cure and relieve the effects of her industrial injury.

FINDINGS OF FACT

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

1. Claimant is a 29 year old, right hand dominant woman who sustained an occupational disease to both her left and right hand as a result of her work as a medical equipment assembler for Employer. The job required repetitive use of both her hands including constant gripping, grasping and use of tools to clip and clamp. Claimant has undergone extensive medical treatment, including multiple surgeries since that time. But, she has not yet achieved her desired result in her right hand and now requests an LRTI procedure be performed on her right wrist.

Course of Treatment

2. On September 16, 2009, Dr. Fry performed surgery on Claimant's right hand/thumb; a carpometacarpal ("CMC") joint arthroscopy. Claimant testified that this procedure was to remove a chip in her right thumb joint. The operative report noted that a loose body was suggested on X-ray but none was seen at the time of the procedure.

3. On March 29, 2010, Dr. Fry performed a second surgery on Claimant's right hand/thumb. Iit included an exploration of the STT joint and CMC joint, capsulorrhaphy with reattachment of volar beak ligament, reconstruction of the volar ligaments and capsule. Claimant testified that the purpose of that surgery was to put a pin in her right thumb to stabilize her thumb joint. The operative note indicates that the indication for surgery was chronic pain and instability that had been unresponsive to non-operative treatment. The report indicated that the STT joint was intact; but the CMC joint was unstable with a medial evulsion of the volar beak ligament and extremely lax volar capsule.

4. Claimant testified that her right hand was in a cast for a significant period of time, and during this time she began to develop difficulties with her left thumb, particularly after she returned to work because her right hand was casted.

5. On December 8, 2010 the same problems developed in Claimant's left thumb, Dr. Fry performed surgery on Claimant's left hand/thumb; a left volar beak

ligament reconstruction and volar CMC joint capsular augmentation. The purpose of the surgery was to stabilize the CMC joint with a pin. The surgical notes indicate that Claimant had left thumb CMC joint instability and capsular laxity with volar beak ligament laxity. Dr. Fry noted a thinned and lax volar capsule with a lax volar beak ligament. Dr. Fry noted that on examination the CMC joint had significant attenuation of the volar capsule and significant laxity of the joint.

6. On July 19, 2011, Claimant's ATP placed her at MMI, provided an impairment rating, and placed her on work restrictions.

7. On December 27, 2011, Dr. Timothy Sandell performed a Division IME. He rated Claimant's impairment as a 3% upper extremity rating for her left hand. Although Dr. Sandell agreed with MMI, he advised that should Claimant have a significant change in symptoms, she may need a follow up evaluation with a hand surgeon and this can occur on an as-needed basis. The ALJ who presided over an earlier hearing found that both of Claimant's hands were included in her claim and Dr. Sandell had erred by failing to include her right hand in his evaluation and failing to provide an impairment rating.

8. Claimant continued to have pain in her bilateral thumb joints, with locking, popping, and pain. She continued to have difficulty using her hands for everyday activities.

9. On October 8, 2012, Dr. Thomas Mordick conducted a Respondents' IME. After examining Claimant, Dr. Mordick stated that objective findings were not present to correlate to Claimant's subjective pain. Dr. Mordick indicated Claimant's current symptomology was not evident on x-rays, which showed stable CMC joints of the thumb with possibly very slight laxity on the right side still within the physiologic range. Claimant did not demonstrate evidence of swelling, crepitus, or arthritic changes. Dr. Mordick noted Claimant's historic presentation to doctors had been inconsistent with regards to range of motion. Specifically, Dr. Mordick referenced Claimant's Functional Capacity Evaluation ("FCE") conducted on July 13, 2011, in which Claimant showed normal function of her right thumb with above-average grip strength. By October 8, 2012, Claimant showed very limited strength even though she has had no "forceful employment." Dr. Mordick recommended no future surgeries or treatment, with the possibility of maintenance care for pain control issues.

10. On June 17, 2013, Administrative Law Judge Bruce Friend found that Claimant's condition had worsened by April 17, 2013, and reopened her case. Respondent's reinstated TTD on June 11, 2012. TTD remains ongoing.

11. On July 23, 2013, Dr. Fry performed a left thumb CMC joint fusion surgery on Claimant's left hand/thumb. Prior to surgery, Dr. Fry noted that despite a significant decrease in activities, Claimant was no longer working but in school, her left hand was very painful. He noted synovitis, crepitance, and instability at the CMC joint. The surgery notes indicate that the indication for surgery was chronic pain CMC joint with failure of soft tissue reconstruction. Claimant had severe pain which interfered with the

motion of her left thumb in forceful and simple activities of daily living.

12. Claimant testified that the left thumb fusion performed by Dr. Fry on her left thumb "helped a lot," and that although it remains achy, the pain is tolerable and she can live with it.

13. On February 25, 2014, Dr. Fry performed a CMC joint fusion surgery on Claimant's right hand/thumb. He performed the fusion because Claimant complained of ongoing pain, especially when the joint would "pop" out of place. Dr. Fry noted during the surgery that there were "significant chrondromalacic changes in the CMC joint with a pencil eraser size state chrondromalacic change and the majority of the rest of the base of metcarpal was stage III chondromalacia."

14. Following the right CMC joint fusion, Claimant had ongoing difficulties. On May 28, 2014, three months post right CMC joint fusion, X-rays showed incomplete healing and incomplete bridging of the fusion. Dr. Fry left Claimant in a thumb spica cast and was concerned that Claimant was still experiencing discomfort and pain. Claimant remained casted as of June 9, 2014.

15. Respondent requested that Claimant undergo an IME with Dr. Jonathan Sollender, a plastic surgeon, on June 12, 2014. Dr. Sollender indicated that he was unable to physically examine Claimant's right hand, wrist and thumb because her right hand and wrist were still in a cast and no quality hand examination was able to be performed at that time. He opined that it was nearly impossible for a 28 year old to have osteoarthritis. He questioned whether a genetic-based collagen disease could be causing Claimant's problems, and noted that a Connective Tissue Disease would explain the significant laxity in her thumbs. He recommended a formal evaluation by a rheumatologist for connective tissue disorders, and noted that even if auto-immune conditions are ruled out, a possible skin biopsy for evaluation of connective tissue disorder might be worthwhile.

16. Dr. Sollender opined Claimant's current condition long ago ceased to be related to her work. Her work only transiently aggravated her underlying condition, but the aggravation was not permanent. Whatever current care was afforded to her through workers compensation specific to her right thumb CMC joint fusion needed to be completed, barring any complications specific to her CMC joint. Further treatment should be outside workers compensation. Dr. Sollender also indicated that he believed that Claimant would begin to have problems with the STT joint, which is adjacent to the CMC joint, and that a stabilization surgery might become necessary in the future because when a person has laxity in a joint and the joint is stable the laxity will start to bother contiguous joints. According to Dr. Sollender the stabilization should not be by fusion because if you fuse all the joints, Claimant will be unable to operate her thumb in conjunction with her hand. Dr. Sollender noted that activities such as buttoning her blouse to turning the keys in car were then aggravating her condition.

17. On August 4, 2014 Dr. Fry removed the retained hardware from Claimant's right hand fusion cite.

18. Dr. Fry referred Claimant to Dr. Hompland for pain control. On August 27, 2014, Dr. Hompland noted that Claimant was doing worse after a right wrist fusion and that any activity can cause her thumb to pop at this point and it is very painful.

19. Claimant saw Dr. Fry on September 2, 2014. His notes indicate that "following cast removal Claimant notes that she is having numbness and tingling and cramping in the hand." She notes that she is having a "popping or catching" at the base of the thumb that is different than the previous problem because the pain in the previous area is gone. The numbness tingling and cramping do not appear to be related to the clicking in the base of the thumb." Dr. Fry indicated that x-rays showed the fusion to be solid but he suspected ulnar neuropathy. He was uncertain of the cause. Dr. Fry ordered an EMG to determine whether or not there is an ulnar neuropathy. There is notation during this examination of tenderness at the adjacent STT joint.

20. On September 9, 2014 Dr. Woodward performed the EMG and documented mild median neuropathy at the right wrist.

21. On October 14, 2014, Claimant told Dr. Hompland that she was not currently involved in physical therapy because there was concern that that the fusion may not have been successful because she continued to experience instability and pain.

22. On October 28, 2014, Dr. Fry followed up on Claimant's right thumb popping, pain, and instability. "Patient appears to have significant pain at the scaphoid trapezial [ST] joint. X-rays are normal today for this joint. This suggests a capsular contracture due to prolonged immobilization, perhaps local scarring, and inflammation." He opined that Claimant's CMC joint was healing nicely, but the adjacent ST joint was problematic. Dr. Fry notes significant pain at the distal ST joint. He injected the ST joint on October 28, 2014. On November 25, 2014, Dr. Fry reported that Claimant's right thumb pain was worse following the injection. He recommended that Claimant seek a second opinion.

23. On November 6, 2014 Claimant was evaluated by rheumatologist Dr. Muddapa Kalajah who indicated there was no evidence for underlying arthritis or systemic connective disuse disorder. He indicated that Claimant's pain and symptoms were only in the bilateral CMC joints and because she has no swelling redness, tenderness, or morning stiffness in any other joints that did not point towards systemic connective tissue disorder. He also indicated that she did not have any other signs and symptoms suggestive of lupus, systematic solerosis or Sjogren's syndrome. He recommended obtaining imaging studies of her hands and feet to rule out erosions or other findings that are commonly seen in inflammatory arthritis and to obtain laboratory studies to include serologic studies to evaluate for rheumatoid arthritis, lupus or other connective tissue disorders.

24. On November 12, 2014, Claimant reported to Dr. Hompland that the last time she saw Dr. Fry; he thought that the popping was coming from the adjacent ST joint.

25. On December 1, 2014, Dr. Fry's notes indicate that he discussed Claimant's various further treatment options. He noted that although she was young, it was his recommendation that she consider an LRTI type of procedure. Dr Fry indicated that this would eliminate both the stress of the fusion on the STT joint as well as any degenerative problems at the ST joint. It would also eliminate any bone spurs she may have. He opined that using her own tendons for the surgery gave her a good chance of a long term result. He did not recommend an implant arthroplasty for the CMC joint. Claimant indicated she would like to proceed with the surgery. She decided to see Dr. Michael Gordon at University Hospital for a second opinion.

26. On December 30, 2014, Claimant returned to Dr. Hompland with ongoing bilateral wrist pain, right greater than left. He noted her wrist pain was aggravated by wrist motion and cold weather. Nevertheless, Claimant continued with all activities of daily living although she limited the use of her hands. Dr. Hompland recommended a psychological evaluation/treatment and a second opinion regarding additional hand surgery. The psychological evaluation/treatment have not yet occurred.

27. On January 12, 2015, Claimant saw Dr. Fry and reported a right thumb injury while brushing her hair and that she heard two pops. She re-expressed her desire to pursue surgery. Dr Fry recommended right thumb LRTI, tendon frat/transfer with excision of trapezium. According to Dr. Fry, Claimant pointed to the STT joint which she has treated with ice and immobilization. Claimant wants to proceed with the recommended surgery. Dr. Fry noted that her then-current options were implant arthroplasty, LRTI, STT fusion, or living with it. It was Dr. Fry's opinion that the STT fusion would significantly increase stress on the remainder of the wrist and limit her ability to use her thumb. He did not recommend the implant arthroplasty because of the significant chance of failure at some point in the future. He opined that the LRTI had a good chance of giving acceptable motion and stability in addition to relieving stresses on the other joints. Dr. Fry noted that Claimant is young for the recommended procedure, and that with her healthy tissue and mobility she had a good chance for long term relief. She was advised that even with this surgery she would be unable to return to heavy hand activities such as manufacturing type work. Dr. Fry requested authorization for the surgery on this date.

28. On January 13, 2015, Claimant reported to Dr. Hompland that Dr. Fry had recommended a new surgical procedure to insert a tendon into the joint space to avoid the popping and subsequent pain, and to avoid instability and allow motion.

29. On February 11, 2015, Dr. Kalajah prepared a report following his October 2014 evaluation of Claimant for inflammatory arthritis/systemic connective tissue disorders. Dr. Kalajah concluded that "at this point, I do not see any evidence of underlying systemic connective tissue disease or inflammatory arthritis. Bilateral CMC arthritis appears degenerative in nature. Unsure why a young 29-year old otherwise healthy woman would have such significant degeneration of both CMC joints."

30. On April 3, 2015, Dr. Michael Gordon evaluated Claimant on Dr. Fry's referral for a second opinion regarding Claimant's condition and proposed medical

treatment. Dr. Gordon noted this is an extremely complicated case and that Claimant presented with no significant improvement despite repeated surgical intervention. Dr. Gordon does note marked tenderness over TMC joint and mildly positive grind test. Dr. Gordon believes that there is tenderness suggestive of STT tenderness but this is minor compared with the TMC joint. On exam, Dr. Gordon was unable to identify the ST joint as a source of Claimant's symptoms. Dr. Gordon pointed out that x-ray and MRI studies were inconclusive regarding that joint as the location of pain. "Throughout this there has been a paucity of objective findings to be able to document the pathology at least by a study (x-ray or MRI.)" Dr. Gordon noted that Claimant is young and that the presence of pain symptoms suggested some sort of underlying pathology that may never be diagnosed. Dr. Gordon agreed with Dr. Sollander's recommendation for further evaluation by a rheumatologist, apparently unaware of Dr. Kalajah's work-up. In Dr. Gordon's opinion, the treating physician needed to definitively identify the source of pain through diagnostic injections or radiographic imaging. Even if the source of symptoms is the ST joint, Dr. Gordon was "extremely reluctant" to offer intervention, and noted that any intervention should be undertaken with "great trepidation" as "to consider a fourth surgical procedure for her right thumb, I think, is definitely stretching the limits of our surgical abilities to manage the patient in any rational way."

31. The medical records document that Claimant does well with her hand in a cast. When her hand is not in a cast she has locking, popping, and pain when using her hand to perform everyday hand functions.

32. Claimant testified that her understanding of the requested surgery was that Dr. Fry was going to take tendons from her arm and put them in and around her thumb joint so it can't and won't pop and will allow her to use the thumb with stability. No other persuasive evidence of what the LRTI surgery involved was presented.

33. Respondent filed an Application for Hearing denying Dr. Fry's request for surgery as being unrelated and not reasonable or necessary to cure and relieve the effects of the industrial injury.

34. Claimant's provided Dr. Fry with Dr. Gordon's report and asked for comment. Dr. Fry indicated that the site of the Claimant's current crepitance and symptoms had been identified and a reasonable surgical procedure was available to treat it. Claimant was not at MMI. Dr. Fry recommended removal of bone spurs and a LRTI to recreate thumb motion, stability, and eliminate the ST and TMC impingement and crepitus that are producing the ongoing pain.

35. Dr. Fry was specifically asked whether he agreed with Dr. Gordon that the ST joint was not definitely localized as Claimant's ongoing pain generator. Dr. Fry responded that he reviewed Dr. Gordon's excellent and complete report but that Dr. Gordon must not have been provided with all of the medical records specifically the most recent X-ray that would have provided him with the information that Claimant's TMC joint had been fused and therefore on physical examination there could not be crepitance at a joint that no longer exists. Dr. Fry indicated that he felt the crepitance that Dr. Gordon was feeling and describing was partially at the ST joint, but primarily

from the interface between the fusion site and the trapezoid and index metacarpal. Dr. Fry noted that the recent X-rays noted significant irregularity and spurring at that site.

36. Dr. Fry was asked to respond to Dr. Gordon's statement "that a fourth surgical procedure for her right thumb is definitely stretching the limits of our surgical abilities to manage the patient in any rational way." Respondents' counsel asked Dr. Fry to address how the additional surgery he recommended was reasonable necessary and related to the work injury and designed to cure and relieve the effects of the work injury. Dr. Fry answered that Dr. Gordon's comment was consistent with the multiple surgical procedures and the frustration that all involved feel in a case like this. However it was Dr. Fry's opinion that based upon a reasonable degree of medical certainty that the site of Claimant's recurrent crepitance and symptoms has been identified and a reasonable surgical procedure is available. Dr Fry indicated that each surgical intervention must be evaluated both in its overall context as well as within its isolated set of symptoms and objective findings. In the isolated contest this procedure is completely justifiable and necessary.

37. On May 5, 2015, Dr. Hompland referred Claimant to pain psychology. Claimant has not participated in pain psychology recommended by Dr. Hompland.

38. Claimant testified that her condition on her right thumb remains essentially unchanged since her original injury despite multiple surgeries. She still has pain, throbbing, and sometimes her thumbs pop. Claimant wants to proceed with surgery to restore function, decrease pain, and because she does not want to be in a cast or continue with medications. She understands that the proposed surgery may not help either. Claimant testified that she is participating in pain management with Dr. Hompland, but that is not enough to allow functional use of her right dominant hand. Claimant is concerned that the longer she is casted and has to use her left hand to do all her activities of daily living, that the left hand will "go bad" again.

39. The ALJ credits the opinions of Dr. Gordon over those of Dr. Fry with respect to surgery and that surgery is not related, reasonable, or necessary. Dr. Fry's opinion is not persuasive because of the lack of objective findings to support that Dr. Fry identified a pain generator and that another surgery will cure and relieve the effects of the work injury when multiple prior surgeries failed. The ALJ finds the opinions of Dr. Gordon to be based on a fuller and more accurate understanding of Claimant's medical situation. Therefore, the ALJ finds the opinions of Dr. Gordon to be more credible and persuasive than the opinions of Dr. Fry.

40. Claimant has not established by a preponderance of the evidence that the recommended surgery is related, reasonable, or necessary to cure and relieve the effects of her industrial injury.

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

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

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.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). 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).

Claimant failed to demonstrate that another surgery is reasonable or necessary or related to her admitted work injury. The ALJ credits the opinions of Dr. Gordon and and Dr. Solender over those of Dr. Fry and finds the opinions of Dr. Gordon and Dr. Solender to be more credible and persuasive than the opinions of Dr. Fry. Dr. Fry has performed multiple surgeries on Claimant's right hand/thumb but they failed to accomplish the desired results. Dr. Fry did not indicate that another surgery has any better chance of success. Dr. Fry's opinion is not persuasive, in part, because of the lack of objective findings to support identification of a pain generator. For example, on September 9, 2014, Dr. John Woodward performed an electrodiagnostic evaluation that was essentially normal; on October 28, 2014, Dr. Fry noted popping, pain, and instability at the scaphotrapezial joint but also noted that x-rays were normal for that joint; and Dr. Fry performed an injection that was not diagnostic.

The ALJ finds the opinions of Dr. Gordon to be based on a fuller and more accurate understanding of Claimant's medical situation. Dr. Fry suggested Dr. Gordon perform the second opinion evaluation. Dr. Gordon credibly reported that Claimant presented with no significant improvement despite repeated surgical intervention. Dr. Gordon was unable to identify the scapho-trapezial joint as a source of Claimant's symptoms and he pointed out that x-ray and MRI studies were inconclusive regarding that joint as the location of pain. Dr. Gordon noted that Claimant is young and that the presence of pain symptoms suggested some sort of underlying pathology that may never be diagnosed. Dr. Gordon credibly reported that the treating physician needs to definitively identify the source of pain through diagnostic injections or radiographic imaging. Also, Dr. Gordon opined that even if the source of symptoms is the scapho-trapezial joint, he was "extremely reluctant" to offer intervention, and any intervention should be undertaken with "great trepidation" as "to consider a fourth surgical procedure for her right thumb, I think, is definitely stretching the limits of our surgical abilities to manage the patient in any rational way."

Dr. Gordon's opinion is supported by Dr. Mordick's opinion as far back as October 8, 2012, when Dr. Mordick reported that objective findings were not present to correlate to Claimant's subjective pain. At that time, Dr. Mordick indicated Claimant's then-current symptomology was not evident on x-rays. That is still the case. On October 28, 2014, Dr. Fry noted that x-rays were still normal. Dr. Mordick recommended against future surgeries or treatment, with the possibility of maintenance care for pain control issues. Nevertheless, additional surgeries occurred and, as Dr. Mordick anticipated, despite multiple surgeries, Claimant's condition remains essentially the same as when she initially reported her claim.

Also, on June 12, 2014, Dr. Sollender reported that Claimant's current condition long ago ceased to be related to her work. Her work only transiently aggravated her underlying condition, but never permanently. Whatever current care was afforded to her through workers compensation specific to her right thumb CMC joint arthrodesis needs to bevcompleted, barring any complications specific to her CMC joint. Further treatment should be outside workers compensation. In fact, Claimant has not worked for Respondent for years but continues to aggravate her condition. For example, on August 27, 2014, Dr. Hompland noted right wrist pain worse after her wrist recently popped; and on January 12, 2015, Dr. Fry noted Claimant suffered another significantly painful episode when she was brushing her hair and heard two pops and felt pain.

Other treatments may exist. Dr. Hompland recommended a psychological evaluation and pain psychology; neither of which have occurred. Dr. Gordon recommended the treating physician definitively identify the source of pain through diagnostic injections or radiographic imaging; and that has not occurred.

In summary, the ALJ finds and concludes that Claimant failed to meet her burden of proof and demonstrate that additional surgery proposed by Dr. Fry is reasonable or necessary or related to her injury at work.

ORDER

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

1. The request for LRTI surgery recommended by Dr. Fry is denied.

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

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

DATED: August 3, 2015

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that claimant has sustained a permanent impairment that is not contained on the schedule of impairment set forth at Section 8-42-107(2), C.R.S. allowing for a conversion of her scheduled impairment rating to a whole person impairment rating?

- Whether claimant has proven by a preponderance of the evidence that she has sustained a disfigurement that is normally exposed to public view and allows for an award under Section 8-42-108, C.R.S. as a result of her admitted industrial injury?

- Whether claimant has proven by a preponderance of the evidence that she is permanently totally disabled as a result of the industrial injury?

- The parties stipulated prior to the hearing that claimant's date of maximum medical improvement ("MMI") is May 21, 2014.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on November 7, 2012 when she tripped and fell at work, landing on her knees. When claimant fell, she hit the inside of her left arm on a cart as she fell and injured her left pectoral area and shoulder.

2. Claimant was taken to the Mercy Medical Center Emergency Room ("ER") after her fall. Claimant underwent x-rays at the ER which were negative for any fractures, but did show mild AC joint osteoarthritis. Claimant was provided with medications and a sling and released with instructions to follow up with Mercy Occupational medicine. Claimant was diagnosed on discharge with an axillary contusion, shoulder injury, shoulder dislocation and brachial plexus injury.

3. Claimant was evaluated on November 8, 2012 by Dr. Graham with Mercy Occupational Medicine Center. Dr. Graham noted claimant was complaining of pain in her left shoulder, left elbow, left forearm, left wrist and left hand. Dr. Graham took an x-ray of claimant's wrist and recommended physical therapy. Claimant returned to Mercy Occupational Medicine on November 13, 2012 and was evaluated by Dr. Jernigan. Dr. Jernigan diagnosed claimant with ulnar neuritis along with contusions from the fall. Dr. Jernigan recommended a quick splint and prescribed medications including Neurontin and Relafen.

4. Claimant continued to treat with Dr. Jernigan who ordered a magnetic resonance image ("MRI") of her left shoulder on November 16, 2012. The MRI was

performed on November 30, 2012 and showed a full thickness tear of the distal supraspinatus tendon.

5. Following the MRI, claimant was referred to Dr. Phipps for surgical consultation. Dr. Phipps examined claimant on December 17, 2012. Dr. Phipps noted that claimant likely had lateral epicondylitis associated with her left elbow pain and paraspinal pain involving her neck. Dr. Phipps recommended physical therapy and prescribed valium and Dilaudid. Claimant eventually underwent surgical intervention to repair her left rotator cuff tear under the auspices of Dr. Phipps on January 31, 2013. The surgery consisted of an open repair and sub-acromial decompression. The operative report indicates visual confirmation of the full thickness tear of the rotator cuff. The anchor was noted to have broken which required Dr. Phipps to convert that arthroscopic repair into an open repair of the rotator cuff tendon.

6. Following her surgery, claimant returned to Dr. Jernigan on February 18, 2013 with complaints of a lot of pain post surgery. Dr. Jernigan encouraged claimant to continue to follow up with her post surgical evaluations with Dr. Phipps and continued claimant off of work. By March 28, 2013, Dr. Jernigan noted claimant had begun a course of physical therapy and noted that claimant would likely need a nerve conduction study to see if the nerve going to the deltoid was damaged.

7. Claimant underwent a bilateral nerve conduction study ("NCS") under the auspices of Dr. Wallach on May 7, 2013. The NCS was noted to be abnormal, but Dr. Wallach noted that there was not a severe nerve injury and determined that the atrophy was probably more secondary to disuse. In regards to the primary question of potential axillary nerve injury, Dr. Wallach noted he found no electrodiagnostic evidence of denervation to the deltoid or teres minor.

8. Claimant returned to Dr. Jernigan on May 16, 2013 with complaints of twitching and burning pain in her deltoid. Dr. Jernigan noted a little less atrophy on physical examination. Claimant retuned to Dr. Jernigan on June 6, 2013. Dr. Jernigan noted that Dr. Phipps had recommended claimant undergo a repeat MRI to make sure that was not any posterior recurrent muscle injury. Dr. Jernigan agreed with this course of care.

9. Claimant eventually underwent the MRI of her left shoulder on July 3, 2013. The MRI showed a complete retear of the insertions of the supraspinatus and infraspinatus tendons, retracted to the level of the glenoid with moderate atrophy.

10. Claimant returned to Dr. Phipps on July 9, 2013. Dr. Phipps noted claimant's functionality was quite limited and the MRI showed the retear of the rotator cuff. Dr. Phipps noted that claimant's rotator cuff tear could be irreparable due to the condition of claimant's bone in her shoulder and it's inability to hold an anchor. Dr. Phipps recommended a CAT scan to get a better sense of the bone structure and determine if claimant is a candidate for reattempt at a rotator cuff repair. Claimant was subsequently referred to Dr. Hackett for a second opinion on claimant's further course of treatment.

11. Claimant was examined by Dr. Hackett on August 29, 2013. Dr. Hackett performed a physical examination and diagnosed claimant with left shoulder failed rotator cuff repair with significant decrease in function in her left shoulder. Dr. Hackett referred claimant for another MRI of the left shoulder and noted that he would develop a treatment plan after reviewing the results of the MRI.

12. The August 29, 2013 MRI showed elevation of the humeral head with a large full thickness rotator cuff tear with approximately 4-5 centimeters defect retraction of the supraspinatus and infraspinatus tendons to the level of the glenoid rim, among other changes.

13. Claimant returned to Dr. Jernigan several times during the fall of 2013. Dr. Jernigan noted that claimant had been referred to Dr. Hackett and indicated that MMI would be dependent on what Dr. Hackett recommended as far as additional treatment. Dr. Jernigan continued claimant with work restrictions that included minimal use of the left arm during this time.

14. Claimant returned to Dr. Hackett on December 5, 2013. Dr. Hackett recommended an injection to the left shoulder in order to alleviate some pain and increase her deltoid function. Claimant underwent a second set of injections on January 9, 2014, again under the auspices of Dr. Hackett. Dr. Hackett also recommended that the physical therapist focus on triceps and deltoid strengthening.

15. On February 21, 2014, Dr. Jernigan noted claimant's ongoing neck complaints and referred claimant for six massage therapies. Dr. Jernigan also noted that claimant was continuing to consult with occupational therapy to figure out an orthotic device for claimant. Eventually, it was recommended that claimant receive a Lehrman's brace. Dr. Hackett noted on May 15, 2014 that the Lehrman's brace would offer claimant forearm support thus allowing claimant to rotate her body in order to move her hand and wrist on a keyboard and would successfully allow her to improve her function from an occupational standpoint.

16. Dr. Jernigan eventually placed claimant at MMI on May 21, 2014 and noted that there was nothing further to provide claimant except to allow her to finish physical therapy and get her Lehrman's brace. Claimant returned to Dr. Jernigan on June 11, 2014 for a permanent impairment rating. Dr. Jernigan noted it was difficult to ascertain claimant's range of motion of her shoulder, but used his best judgment to find that it had ankylosed to 0. This equated to a 45% upper extremity impairment for range of motion. Dr. Jernigan provided claimant with an additional 38% upper extremity impairment for a neurologic injury involving the upper brachial plexus trunk with atrophy of the muscles and no motor or sensory use of her C5 trunk of the brachial plexus. Combining the 45% upper extremity and 38% upper extremity rating, Dr. Jernigan came to a total impairment of 66% of the upper extremity. Dr. Jernigan noted that this converted to a 40% whole person impairment rating. Dr. Jernigan noted that claimant's only work restriction would be "no left arm use of significance" and noted that when claimant got the Lehrman brace, she should be able to use her hand and wrist and even elbow to some degree.

17. Claimant eventually underwent a Division-sponsored Independent Medical Evaluation ("DIME") on November 13, 2014 with Dr. Thurston. Dr. Thurston reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Thurston prepared a medical report dated November 16, 2013 and effectively agreed with the 66% upper extremity impairment rating provided by Dr. Jernigan, including the 45% for loss of range of motion and 38% for loss of axillary nerve sensory and motor function.

18. The parties stipulated prior to the hearing to the 66% upper extremity impairment rating, but noted that a dispute existed as to whether the 66% upper extremity rating should be converted to a 40% whole person impairment rating for the issue of permanent partial disability.

19. Following the DIME, respondents filed an application for hearing endorsing the issue of PPD benefits. Therefore, no final admission of liability was entered in this case and the issue of PPD benefits was endorsed as an issue for hearing, but resolved as to the extent of the permanent impairment, by the stipulation of the parties. They only issue involving PPD benefits is merely if the permanent impairment is limited to the schedule of impairment. Claimant endorsed the issue of permanent total disability benefits in her response to the application for hearing.

20. Claimant underwent a vocational evaluation with Mr. Van Iderstine with an interview taking place on September 4, 2014. Mr. Van Iderstine issued a vocational report dated January 28, 2015. Mr. Van Iderstine reviewed claimant's medical records in connection with his report. Mr. Van Iderstine noted that claimant was a 56 year old (claimant was 57 years old at the time of hearing) married female residing in the area of Ignacio, Colorado. Mr. Van Iderstine indicated in his report that he performed a labor market research in the Ignacio and La Plata County geographical area. Mr. Van Iderstine noted that claimant had not driven since January 2013 and opined that he was unable to identify any current job openings that would be appropriate for claimant.

21. Mr. Van Iderstine testified consistent with his vocational report at hearing. Mr. Van Iderstine testified that claimant was left hand dominant and that, based on his review of the medical records, he considered her work restrictions to be that claimant was not able to use her left upper extremity. Mr. Van Iderstine testified that claimant could lift 8-10 pounds maximum.

22. Mr. Van Iderstine admitted on cross examination that he was unaware of Dr. Hackett's report from May 2014 that claimant's use of the Lehrman brace would allow claimant to use her hand and wrist with a keyboard. Mr. Van Iderstine agreed, however, that claimant would be able to use her left hand and wrist to some degree.

23. Claimant underwent a vocational evaluation with Ms. Montoya at the request of respondents. Ms. Montoya interviewed claimant on March 25, 2015. Ms. Montoya issued a vocational report dated April 20, 2015 in which she indicated that it was her opinion that claimant was capable of returning to work in the area of a receptionist, front desk clerk or service cashier.

24. Ms. Montoya testified at hearing consistent with her report. Ms. Montoya noted that claimant had graduated high school and performed on-the-job training while employed with employer. Ms. Montoya testified claimant worked for her family before she went to work for employer. Ms. Montoya testified claimant worked for employer in the banking industry beginning in 1984 and had transferrable skills from that work that included dealing with people, handling money and customer service.

25. Ms. Montoya testified that claimant had not been provided with work restrictions that would limit her standing or sitting or driving. Ms. Montoya testified that the work restrictions she considered when determining claimant's ability to earn wages were the restrictions set forth by Dr. Jernigan in his June 11, 2014 report that limited her use of the left upper extremity.

26. Claimant testified at hearing that she was injured at work and eventually underwent surgery involving a rotator cuff repair that did not take. Claimant testified she was unable to perform keyboarding with her left arm. Claimant testified she did not think she could use her left arm at all. With regard to the Lehrman brace, claimant testified she felt stable while wearing the brace and wore the brace for protection. Claimant testified she has not looked for employment since her injury. Claimant testified she owns a treadmill and can walk for fifteen minutes at most. Claimant testified that she can sit for 15 to 30 minutes before she has to change positions. Claimant testified at hearing that she lies down 10-15 times per day but did not provide credible testimony as to why she needs to lie down or how it relates to her work injury. Claimant's testimony regarding these self-imposed limitations are not credited by the ALJ over the work restrictions set forth by Dr. Jernigan in his June 11, 2014 report.

27. Claimant testified at hearing that she could not carry more than three towels. However, claimant did not explain why she would not be able to carry anything more than three towels when there are no lifting restrictions involving her right hand. While claimant is left hand dominant, claimant's ability to lift up to 8-10 pounds, as testified to by both Mr. Van Iderstine and Ms. Montoya, appears to be the appropriate lifting restriction. This would place claimant's work restrictions in the sedentary work capabilities, as testified to by Ms. Montoya.

28. Claimant testified that she graduated high school in 1978 and attended vocational school in Cortex, Colorado for secretarial courses, but did not receive any certificates. Claimant testified she received on the job training while employed with employer and held positions in the mail room, as a teller, in customer service and as a teller supervisor. The ALJ credits the opinions from Ms. Montoya regarding claimant's transferrable skills obtained with her work in the banking industry and finds the medical restrictions used by Ms. Montoya to be supported by the medical records entered into evidence at hearing.

29. The ALJ credits the testimony of Ms. Montoya regarding claimant's ability to earn wages in the commutable labor market over the contrary opinions expressed by Mr. Van Iderstine and finds that claimant has failed to demonstrate that it is more probable than not that she is permanently totally disabled.

30. The ALJ notes that the medical records document claimant sustained an injury to her shoulder that resulted in surgery involving an open repair and sub-acromial decompression of her left shoulder. Following the surgery, claimant developed atrophy involving her deltoid. Claimant testified at hearing that she has pain in the left side of her neck and between her shoulder blade and her neck.

31. The ALJ credits claimant's testimony at hearing regarding her symptoms involving her left shoulder and notably the atrophy involving her deltoid and finds that claimant has proven that it is more likely than not that she sustained a permanent impairment that is not contained on the schedule of impairment set forth at Section 8-42-107(2), C.R.S. The ALJ therefore finds that claimant has established that she is entitled to a whole person award based on the conversion set forth by Dr. Jernigan and Dr. Thurston.

32. As a result of claimant's November 7, 2012 injury, claimant has disfigurement consisting of a scar on her left shoulder measuring 2 ½ inches in length and ½ inch in width along with a portal scar measuring ½ inch in diameter that was discolored on the back of her left shoulder. Claimant also had a scar on the top and back of her left shoulder measuring 1 inch in length and ½ inch in width and a scar with sutures on the front of her left shoulder measuring ½ inch in length and ½ inch in width. Claimant also had noticeable atrophy of the left shoulder.

33. The ALJ finds claimant has proven that it is more probable than not that she is entitled to an award for disfigurement pursuant to Section 8-42-108, 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. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(1) states in pertinent part:

(a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.

(b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. It is claimant's burden of proof by a preponderance of the evidence to establish both that she suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is Claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

5. As found, claimant has proven by a preponderance of the evidence that she sustained a permanent impairment to a part of the body not contained on the schedule of impairment. As found, claimant's injury has resulted in atrophy to the deltoid region following her surgery to repair the rotator cuff tear and subacromial decompression. As found, claimant is entitled to an award based on a whole person impairment rating.

6. Based on the stipulation of the parties entered into evidence prior to the hearing, the impairment rating based on the conversion is 40% whole person.

7. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. §8-40-201(16.5)(a), C.R.S. (2007). A claimant therefore cannot receive PTD benefits if he or she is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. See, *Lobb v. ICAO,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances. *Weld County School Dist. R.E. 12 v. Bymer*, Id.

8. The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds*, *Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

9. As found, claimant has failed to establish that she is unable to earn wages in the same or other employment. As found, the opinions expressed by Ms. Montoya regarding claimant's ability to return to work are more credible and persuasive than the contrary opinions expressed by Mr. Van Iderstine.

10. Pursuant to Section 8-42-108, C.R.S. in effect at the time of claimant's injury, claimant is entitled to a discretionary award up to $4,504 for her serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general appearance of claimant's scarring, the ALJ concludes claimant is entitled to disfigurement benefits in the amount of $1,501.33, payable in one lump sum.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on a 40% whole person impairment rating.

2. Respondents shall pay claimant disfigurement benefits in the amount of $1,501.33.

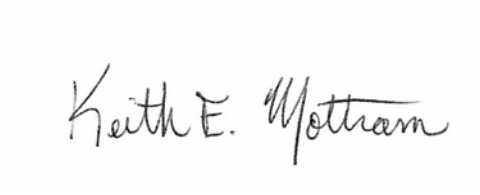
3. Claimant's claim for permanent total disability benefits is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 17, 2015



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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the L5-S1 disc replacement surgery recommended by Dr. Patel is reasonable medical treatment necessary to cure and relieve claimant from the effects of his admitted November 4,2 011 work injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his low back on November 4, 2011 when he was working in an access room, got tangled in some debris and fell landing on his left hip with his leg going into an opening into the vault below. Claimant was initially seen in the emergency room ("ER") following his injury. Claimant underwent x-rays of the pelvis, right tibia, right fibula and lumbar spine. Claimant was given a prescription and released from the ER.

2. Claimant followed up with Dr. Lorah following his injury. Dr. Lorah had previously treated claimant for a cervical spine issue. Dr. Lorah diagnosed claimant with a lumbar strain with a possible sacroiliac ("SI") joint dysfunction and referred claimant for physical therapy.

3. Claimant was referred to Dr. Lippman, Sr. for medical treatment in April 2012. Dr. Lippman referred claimant for a magnetic resonance image ("MRI") of his lumbar spine. The MRI was completed on June 7, 2012 and showed degenerative disc disease without evidence of nerve root compression. Dr. Lippman referred claimant to Dr. Feler following the MRI for surgical consultation. Dr. Feler issued a report dated June 26, 2012 that noted claimant's ongoing complaints of pain and recommended claimant return to physical therapy. Claimant testified at hearing that Dr. Feler did not recommend surgery.

4. Claimant was referred to Dr. Hahn for facet joint injections in July 2012. After noting that the facet joint injections did not provide any reported improvement, Dr. Hahn recommended epidural steroid injections ("ESI"). Dr. Hahn performed an interlaminar epidural steroid injection at the L5-S1 level on August 21, 2012. Dr. Hahn noted on September 7, 2012 that the claimant did not report any improvement with the injection. Claimant reported some relief following a left sided SI injection on September 18, 2012, but reported no relief, other than for the first 2 hours, following an SI injection on November 20, 2012.

5. Claimant testified he was referred to Dr. Patel by Dr. Lippman. Claimant further testified that he was referred to Dr. Adams by Dr. LIppman and Dr. Adams

recommended stretching and core strengthening. Claimant testified he found Dr. Patel's name on a computer search. Claimant testified Dr. Adams recommended against the original SI joint fusion.

6. Claimant was initially seen by Dr. Patel on February 4, 2013. Dr. Patel reviewed claimant's SI injections and noted claimant was complaining of debilitating pain. Claimant testified Dr. Patel recommended surgery on his first visit.

7. Claimant underwent sacroiliac fusion surgery at the University of Colorado Medical Center on April 25, 2013 under the auspices of Dr. Patel. Claimant remained under the care of Dr. Patel following the surgery. Claimant continued to complain of pain and was eventually referred for a follow up MRI scan on February 27, 2014. The MRI noted no significant changes from his prior MRI in June 2012.

8. Claimant underwent a computed tomogram ("CT") scan with a discogram of his lumbar spine on June 12, 2014. The CT and discogram showed a degenerated L5-S1 disc with an annular tear but no complication of the SI fixation devices. Dr. Patel recommended L5-S1 disc replacement surgery.

9. Dr. Patel testified at hearing in this matter that the proposed surgery was necessary to cure claimant's symptoms. Dr. Patel testified that the L5-S1 level was a pain generator.

10. Respondents referred claimant for an independent medical examination ("IME") with Dr. Rauzzino on September 13, 2014. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history and performed a physical examination of the claimant in connection with his IME. Dr. Rauzzino issued a report that opined that claimant's proposed L5-S1 disc replacement surgery was not related to his November 4, 2011 work injury. Dr. Rauzzino noted that claimant's pain was the result of the SI joint and not from the disc disease at the L5-S1 level. Dr. Rauzzino opined that there was no additional treatment for the left SI joint that would be recommended at this point.

11. Dr. Rauzzino testified consistent with his report at his deposition. Dr. Rauzzino opined during his deposition that the SI joint was claimant's sole pain generator and was treated following his injury. Dr. Rauzzino further testified that if claimant's symptoms were coming from the L5-S1 disc disease, claimant would have reported a significant response to the L5-S1 ESI in August 2012.

12. The ALJ finds the IME report and testimony of Dr. Rauzzino to be credible and persuasive.

13. Dr. Patel testified in rebuttal in this case. Dr. Patel noted that claimant's MRI of June 7, 2012 showed degeneration of the discs at the L5-S1 level. Dr. Patel testified that the June 7, 2012 MRI showed evidence that the L5-S1 disc could be a pain generator as of June 7, 2012. Dr. Patel testified that he believes the L5-S1 disc is the source of claimant's pain because the MRI findings show significant degeneration and

claimant's back complaints are consistent with degenerative disc disease type of pain, and claimant's discogram findings verified the source of claimant's pain. Dr. Patel was not able to provide an opinion, however, as to whether claimant's work injury was the cause of his L5-S1 degenerative disc condition that was causing his pain.

14. Dr. Rauzzino subsequently provided additional testimony in this case after reviewing the testimony of Dr. Patel. Dr. Rauzzino continued to maintain his opinions after the deposition of Dr. Patel that the proposed surgery was not related to claimant's November 4, 2011 work injury.

15. The ALJ credits the opinions expressed by Dr. Rauzzino in his report and testimony and finds that claimant has failed to demonstrate that it is more likely than not that the L5-S1 arthroplasty recommended by Dr. Patel is reasonable and necessary medical treatment related to claimant's November 4, 2011 work injury. The ALJ credits the opinions expressed by Dr. Rauzzino and denies claimant's request for an Order requiring respondents to pay for the surgery recommended by Dr. Patel.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2012. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for medical treatment that is reasonably 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).

4. As found, claimant has failed to prove by a preponderance of the evidence that the surgery recommended by Dr. Patel consisting of an L5-S1 arthroplasty is reasonably necessary to cure and relieve claimant from the effects of the industrial injury.

5. As found, the opinions expressed by Dr. Rauzzino in his report and testimony are found to be credible and persuasive regarding the issue involving the relatedness of the proposed surgery to the November 4, 2011 work injury. Therefore, claimant's request for an Order requiring respondents to pay for the surgery recommended by Dr. Patel is denied.

ORDER

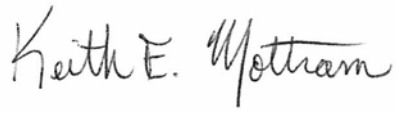
It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the L5-S1 arthroplasty recommended by Dr. Patel 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: August 28, 2015



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

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ISSUES

1. Whether the respondents have forfeited the right to challenge the opinion of the Division Independent Medical Examiner (DIME) for failure to comply with the jurisdictional deadline contained in C.R.S. 8-43-203(2)(b)(II)(A), C.R.S. 8-42-107.2(4)(c) and WCRP Rule 5-5(F).

2. If the respondents have not forfeited the right to challenge the DIME, have the respondents proven by a preponderance of the evidence that the DIME opinion has been overcome, and if so, what is the most appropriate measure of permanent medical impairment.

3. Whether the claimant has proven by a preponderance of the evidence that she sustained injuries which are not on the schedule of impairments contained in C.R.S. 8-42-107(2) permitting conversion to whole person impairment pursuant to C.R.S. 8-42-107(8).

4. Whether the claimant has proven that penalties pursuant to C.R.S. 8-43-304 and C.R.S. 8-43-305 should be imposed upon the respondents for violation of C.R.S. 8-42-107.2(4)(c), C.R.S. 8-43-203(2)(b)(II)(A) and Rule 5-5(F).

5. Whether the claimant has proven by a preponderance of the evidence that she sustained a substantial and permanent disfigurement pursuant to C.R.S. 8-42-108.

FINDINGS OF FACT

1. The claimant was injured on February 10, 2013 within the course of employment with the respondent-employer. She is employed as a flight attendant. The injury was admitted as compensable by the respondent-insurer.

2. The claimant's injury occurred while she was walking down a concourse at Denver International Airport. She fell to the ground landing on her outstretched left upper extremity. The injury has been admitted as arising out of and in the course of employment by the respondent-insurer.

3. She was initially diagnosed with a comminuted minimally displaced greater tuberosity fracture of the humerus; myofascial strain of the deltoid muscle, triceps muscle and rotator cuff muscles; small full-thickness tear of the supraspinatus muscle; and inferior capsular tear with a tear of the inferior glenohumeral joint complex and inferior labral tear; joint effusion; fluid extending into the subacromial subdeltoid bursa through the rotator cuff tear.

4. As her diagnosis developed she was additionally diagnosed by electrodiagnostic testing with "severe left brachial plexopathy and left axillary neuropathy."

5. She also has developed osteoarthritis in the left hand.

6. The claimant was afforded lengthy and comprehensive diagnostic testing and treatment ultimately reaching the status of maximum medical improvement on August 19, 2014 as determined by her authorized treating physician Dr. Albert Hattem.

7. A functional capacity evaluation was performed which permitted the claimant to return to her job as a flight attendant in the medium physical demand level.

8. The claimant credibly testified that she continues to have marked difficulty with the left upper extremity. She is forced to wear a compression glove at all times on her hand and wrist. She has had to modify her activities so as to use her right hand extensively more than the left. She cannot tolerate having her upper extremity touched. She testified that the upper extremity is always swollen. Further she has lost range of motion in the shoulder. She has decreased grip strength in her left hand. She is unable to fully discern textures of objects by touch. She has a permanent and unremitting tremor in her hand. She has osteoarthritis in the bones of her hand causing thinning of the bones. Due to her loss of range of motion she has great difficulty using her upper extremity above the level of the shoulder. She describes loss of sensation and pain in the upper extremity. Although claimant's pain will wax and wane, it is always present when she uses the extremity. She describes muscle wasting in the entire extremity, including the left thumb.

9. Notwithstanding the release to her regular job as a flight attendant, the claimant credibly testified that she has had to make accommodations and adjustments to her job functions in order to fulfill her duties. She is forced to close all overhead bins in the airplane with her right arm as she experiences pain in raising her left arm above the shoulder. Lifting carry-on bags is a source of pain and difficulty and she likewise primarily uses her non-injured arm to perform this duty.

10. The claimant credibly testified that she feels her condition has deteriorated since the cessation of her occupational and physical therapy. Her sleep is impaired due to the inability to lie on her left shoulder. She described that when she inevitably rolls onto that shoulder she is immediately awakened due to pain in the shoulder. This has an impact on the quantity and quality of her sleep. She has lost the ability to type; play the piano and violin; open jars; hold hands with her husband; clap her hands together; and close a fist, among many other limitations. Her inability to fully use her left arm has caused symptoms of overuse to develop in her right arm.

11. The AMA Guides to the Evaluation of Permanent Impairment (3rd Edition Revised) sets for the parameters for evaluating a brachial plexus injury in Section 3.1h. Administrative notice is given that brachial plexus injuries require an initial determination as to the affected trunks of the brachial plexus (Table 13, page 44). Once the initial determination is made it is then followed by a determination as to whether the injury has caused deficits in pain and sensory function as well as deficits in motor and power function. If there are such deficits a determination as to the severity of those deficits is made using a grading scheme. (Tables 10 and 11, page 42).

12. The initial impairment of permanent impairment was provided by Dr. Albert Hattem, Concentra Medical Centers on August 19, 2014. Dr. Hattem provided a 23% upper extremity and the equivalent 14% whole person impairment rating. His upper extremity impairment consisted of 6% due to loss of range of motion of the shoulder and 18% for impairment due to the loss of motor and power arising from the upper trunk of the brachial plexus. He graded the loss of motor and power as being "2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=25%."

13. Upon receipt of Dr. Hattem's impairment rating, the respondent-insurer filed a Final Admission of Liability (FAL) on September 11, 2014. The admitted permanent impairment was 23% of the upper extremity.

14. The claimant timely objected to the FAL and requested an independent medical examination through the auspices of the Division of Workers' Compensation. Dr. William Watson was selected to perform the DIME.

15. The claimant sought an independent medical evaluation with Dr. Timothy Hall which took place on November 10, 2014. Dr. Hall provided a 53% upper extremity and the equivalent 32% whole person impairment rating. His upper extremity impairment consisted of 4% due to loss of range of motion of the shoulder; 25% due to loss of motor and power from the entire (all three trunks of the) brachial plexus of the

brachial plexus; and 35% for pain and loss of sensation from the entire (all three trunks of the) brachial plexus. He graded the loss of motor and power as being "2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=25%." He graded the pain and sensory loss as being "3. decreased sensation with or without pain, which interferes with activity-35%."

16. The Division IME took place on January 20, 2015 with Dr. William Watson. Dr. Watson set forth an extensive description of the history of present illness, chart review, and physical examination. Dr. Watson provided a 49% upper extremity and the equivalent 29% whole person impairment rating. His upper extremity impairment consisted of 9% due to loss of range of motion of the shoulder; 20% due to loss of motor and power from the entire (all three trunks of the) brachial plexus brachial plexus; and 30% for pain and loss of sensation from the entire (all three trunks of the) brachial plexus brachial plexus. He graded the loss of motor and power as being "2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=20%." He graded the pain and sensory loss as being "3. decreased sensation with or without pain, which interferes with activity-30%." It is noteworthy that Dr. Watson stated that the decreased range of motion of the shoulder is directly related to the pathology within the shoulder and not to the neurological injury. Further, it is noteworthy that he stated in the neurological impairment section, "…my (physicial) evaluation showed that she has sensory loss both in the upper, middle, and lower trunk."

17. The respondent-insurer commissioned an independent medical examination with Dr. Allison Fall. This examination took place on April 24, 2015. Dr. Fall provided a 34% upper extremity and the equivalent 20% whole person impairment rating. Her upper extremity impairment consisted of 8% due to loss of range of motion of the shoulder; 18% due to loss of motor and power for only the lower trunk of the brachial plexus; and 12% for pain and loss of sensation for only the lower trunk of the brachial plexus. She graded the loss of motor and power as being "2. complete range of motion against gravity and some resistance, or reduced fine movements and motor control=25%." She graded the pain and sensory loss as being "3. decreased sensation with or without pain, which interferes with activity-60%."

18. The brachial plexus is a bundle of nerve roots which begins in the neck. The roots commingle with other nerve roots as they descend towards the upper extremity ultimately becoming individual nerve roots prior to entering the arm itself. It is found that all of the structures of the brachial plexus structures are beyond the "arm." Consequently, the structures of the brachial plexus are permanently altered and damaged above and medial to the glenohumeral joint and therefore, above the "arm."

19. Doctors Hall and Watson (DIME physician), both opine that all of the trunks of the brachial plexus remain compromised. It is found that these opinions are credible to the ALJ. It is found that the opinion of Dr. Fall does not rise to the level of clear and convincing evidence. Nor does it rise to the level of a preponderance of the evidence. It is merely a reasonable difference of opinion as between the medical providers.

20. The claimant has proven by a preponderance of the evidence that the situs of her functional impairment extends beyond the arm at the shoulder. Work activities and other activities of daily living cause pain in her arm and shoulder, such that the claimant is unable or limited in her ability to engage in actions requiring overhead movement or movement behind her back, among other things. Her impairment requires her to make adaptations in the performance of work duties and other activities of daily living. The claimant's testimony regarding her sleep disturbance caused by pain into the shoulder is also evidence of functional impairment beyond the arm at the shoulder.

21. The claimant has proven by a preponderance of the evidence that she sustained permanent medical impairment of 29% of the whole person as found by the DIME physician.

22. Contrary to the requirements of W.C.R.P. Rule 11-2(B) there is no indication on the Division IME report dated January 20, 2015, nor the attachments to it, that the DIME physician mailed the report to any party.

23. On March 2, 2015 adjuster Libby Taylor covering for adjuster Bea Calvert, who was on a leave of absence, testified she found no Division IME report in the file and wrote a letter to opposing counsel asking if he had a copy of the DIME report and whether the claimant attended the Division IME.

24. On March 17, 2015, it is uncontroverted that counsel called adjuster, Bea Calvert, to confer with her regarding filing an Application for Hearing on penalties. Bea Calvert credibly testified that she informed counsel she had neither the Division IME report, nor the Notice of Complete DIME in her file. Thereafter counsel faxed the DIME report and the Notice of Complete DIME to the adjuster Bea Calvert on March 17, 2015.

25. Ms. Taylor credibly testified that she evaluated the status of the claim on March 2, 2015 and found neither the Division IME report nor the Notice of Complete Division IME, and testified that therefore she wrote and asked counsel if he would provide the DIME report or if the claimant attended the DIME appointment.

26. Ms. Calvert testified credibly and consistently that after being telephoned by counsel she could not locate and did not receive the Division IME report or the Notice of Complete Division IME prior to March 17, 2015. The first time the respondents had the Division IME report and the Notice of Complete DIME was on March 17, 2015.

27. Based upon a totality of the evidence the ALJ finds that the respondents rebutted the presumption that the Division IME and the Notice of Complete Division IME were actually received by the respondents prior to March 17, 2015.

28. The ALJ finds that the respondents did not have actual notice of the DIME report or the Notice of Complete DIME until March 17, 2015.

29. On March 17, 2015 the claimant filed an Application for Hearing on the issues of disfigurement, PPD, and penalties.

30. On March 18, 2015, the respondents filed an Application for Hearing pursuant to Rule 5-5(F).

31. The respondents substantially complied with this Rule once they had notice of the Division IME report and the Notice of Complete DIME.

32. The ALJ finds that the respondents have not forfeited their right to apply for a hearing in conjunction with the DIME.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondents violated any provisions of the Act or Rules of procedure entitling them to an award of penalties.

34. The claimant has sustained muscle wasting on and about the left hand as compared with her uninjured hand. She has a continuous tremor in the left hand. She is forced to wear a compression glove at all times to avoid the painful sensation of touch. All of these findings are serious, substantial, and normally exposed to public view. The claimant has proven by a preponderance of the evidence that she sustained a substantial and permanent disfigurement pursuant to C.R.S. 8-42-108. The ALJ awards the amount of $2,000.00 for the disfigurement.

35. The ALJ finds that the respondent-insurer has previously paid the claimant permanent partial disability benefits pursuant to their FAL and is entitled to an offset for those payments.

CONCLUSIONS OF LAW

1. 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. ICAO,* 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. ICAO,* 5 P.3d 385 (Colo. App. 2000).

2. Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of C.R.S. §8-42-107.8(c) which state that the DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

3. Nonetheless, the ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the DIME physician was incorrect in his assessment of the claimant's permanent impairment scheduled rating.

4. 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. Section 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 Section 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). In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder. *Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

5. "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 assess by medical means. Disability or 'functional impairment", on the other hand, 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. ICAO, 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., supra at 658.*

6. "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).* Moreover, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez, v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005); Latshaw v. Baker Hughes, Inc., W.C. No. 4-842-705 (ICAO, December 17, 2013).* Nonetheless, symptoms 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 the claimant's ability to use a portion of her 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. 96CA1508, February 13, 1997)(not selected for publication)*(claimant sustained functional impairment of the whole person where back pain impaired us of the arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as impairment of the 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 her "capacity to meet personal, social and occupational demands." *Askew v. ICAO, 927 P.2d 1333 (Colo. 1996).* Consequently, an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm at the shoulder. *Walker v. Jim Fucco Motor Co., supra; Strauch v. PSL Swedish Healthcare System, supra; Langton V. Rocky Mountain Health Care Corp., supra.*

7. Whether the claimant has sustained functional impairment beyond the arm at the shoulder is a factual question for the ALJ and depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co., supra.* In the instant case, the medical records support that claimant has consistently complained of (and received treatment for) pain, discomfort and functional loss beyond the shoulder

joint. She has increased symptoms while completing activities of daily living as well as activities of employment and upon MMI demonstrated loss of active range of motion of the left shoulder. She testified credibly regarding her inability to move the arm overhead in all planes.

8. As found, the claimant has proven by a preponderance of the evidence that she has sustained a functional impairment beyond the arm at the shoulder entitling her to permanent partial disability compensation based upon an impairment rating of 29% whole person.

9. In *Henderson v. Kaiser Hill Co.*, W.C. No. 4-604-199 (August 3, 2012) the Industrial Claim Appeals Office ruled that the time period to dispute a DIME finding established by §8-42-107.2(4) did not begin to run until after a DIME report is considered final and after the report is mailed by the Division as documented by its Certificate of Mailing. This was to ensure that the parties were provided a final DIME report by a time certain as indicated by the Division's Notice of Completion. Here, the Certificate of Mailing on the Notice of Complete Division IME dated February 4, 2015 indicates mailing on that date. Respondents have submitted testimony of Libby Taylor and Bea Calvert, which establishes that neither the Division IME report, nor the Notice of Complete Division IME were in their possession until March 17, 2015.

10. Due process requires the parties receive adequate notice of a critical determination and the effect of the failure to act. *Hall v. Home Furniture Company*, 724 P.2d 94 (Colo. App. 1996). An Order is a "critical determination." ID. Although a properly executed Certificate of Mailing may create a presumption that notice was finally received, the presumption may be overcome by competent evidence. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The factual assertions of adjusters, Bea Calvert and Libby Taylor, establish that the respondent-insurer did not receive the Division IME report or the Notice of Complete Division IME until March 17, 2015.

11. Section §8-43-304 C.R.S. provides that an insurer who refused to obey any lawful Order made by the Director shall be punished by a fine of not more than $1,000.00 per day for each such offense. The imposition of penalties under this statute requires a two-step analysis. It must first be determined whether the disputed conduct constituted a violation of a lawful Order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

12. Under the circumstances in this case neither the Division IME report nor the Notice of Complete DIME were received by the respondents until March 17, 2015. As a result, there was no violation of the Act or Rules.

13. The ALJ concludes that the claimant is entitled to an award of $2,000.00 for disfigurement pursuant to C.R.S. 8-42-108.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondents request to overcome the DIME with respect to the scheduled rating is denied and dismissed.

2. The respondent-insurer shall pay the claimant permanent partial disability benefits based upon a whole person rating of 29%.

3. The claimant's request for penalties is denied and dismissed.

4. The respondent-insurer is entitled to offset payments previously made for permanent partial disability benefits.

5. The respondent-insurer shall pay the claimant a $2,000.00 award for disfigurement.

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

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

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

DATE: August 18, 2015

/s/ original signed by:

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

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she is permanently and totally disabled? If not,

- Whether Claimant proved by a preponderance of the evidence that her scheduled upper extremity impairment rating should be converted to whole person?

- Whether Claimant overcame the DIME physician's opinion that her neck and back conditions are not work-related?

- Whether Respondents overcame the DIME physician's impairment rating? And

- Whether Claimant proved by a preponderance of the evidence entitlement to mileage reimbursement?

FINDINGS OF FACT

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

1. Claimant sustained admitted industrial injuries arising out of her employment on April 8, 2013. Claimant alleges these injuries include her bilateral shoulders; bilateral knees; cervical, thoracic, and lumbar spine; and bilateral upper extremities.

2. Claimant has a pre-injury history of lumbar and thoracic back injuries. In 2010, Claimant filed a workers' compensation claim for a low back injury which was treated and resolved. On April 2, 2012, Claimant went to the University Hospital emergency room complaining of severe back pain. Imaging revealed a herniated thoracic spine disc and Claimant was diagnosed with prolapsed intervertabral disc. The treating physician referred Claimant to the hospital's spinal clinic for further treatment.

3. Claimant has a history of pre-injury shoulder injuries. In 1982, Claimant underwent a right shoulder subacromial decompression. By April 8, 2013 Claimant had asymptomatic moderate acromioclavicular joint arthrosis in both shoulders.

4. Claimant's pre-injury history includes knee injuries and knee osteoarthritis. In 1992, Claimant reported a non-work related left knee injury that was "scoped." A May 23, 2013 MRI of Claimant's left knee revealed advanced patellofemoral chondromalacia, an area of full thickness cartilage loss on the lateral tibial plateau with subchondral cystic change and bone edema, and moderate cartilage loss along the

medial femoral condyle. These conditions, noted on May 23, 2013, are degenerative and would have existed pre-injury, although they appear to have been asymptomatic.

5. Claimant suffers from type II diabetes, which predates the injuries involved in this matter. She has a BMI of 31.

6. On April 8, 2013, Claimant sustained an admitted injury to her left upper extremity and left knee when she tripped over boxes and fell face forward onto her stomach.

7. Before her injury, Claimant worked as a quality control inspector for Employer. Her job involved constant walking between three production lines, lifting receivers onto and off of podiums, and frequent lifting of eight pound items. She was able to perform all of her job duties.

8. Claimant denied having problems with her left shoulder and neck prior to her work injury. She acknowledged prior problems with her right shoulder, low back, and left knee. All of these had been treated and were resolved before April 8, 2013.

9. On April 9, 2013, Claimant saw Dr. Moore at Concentra Medical Center. At that time, she reported pain in her bilateral shoulders, thoracic / cervical spine, and bilateral hips. Claimant also reported hitting her left knee on the floor. Knee x-rays performed that day revealed osteoarthrosis of both knees without acute findings. Physical examination revealed tenderness to the low back and left knee.

10. On April 11, 2013, Claimant returned to Dr. Moore. X-rays of Claimant's cervical spine were negative for any acute fracture or malalignment of the cervical spine. But they did show moderate degenerative disc disease from C4-C7. Claimant added her lumbar spine as an area of pain, along with her medial right knee, prompting Dr. Moore to note, "Patient has added several body parts since her last original visit." However, Dr. Moore had noted lumbar spine pain in his April 9, 2013 exam notes, and only the right knee had been added. Claimant was referred to physical therapy and provided work-restrictions.

11. On April 12, 2013, four days after Claimant's work-related injury, Employer terminated her due to "review of business needs, as well as performance, your [Claimant's] position is being eliminated effective today, April 12th, 2013."

12. On April 16, 2013, Claimant's left knee range of motion was full and pain-free. Claimant reported stocking-glove numbness and tingling in both hands. Dr. Moore opined that this was not consistent with cervical radiculopathy and recommended a shoulder MRI. Dr. Moore noted again that Claimant added a symptom at each visit and was insistent that all of her problems were related to her fall. He referred Claimant to Dr. John Burris.

13. On April 19, 2013, Claimant's left shoulder MRI revealed a full-thickness supraspinatus tear, partial articular surface tear of the subscapularis, and acromioclavicular joint arthrorsis.

14. On April 30, 2013, Dr. Terrell Webb at Concentra evaluated Claimant. He reviewed Claimant's pain diagram and opined that she did not appear to have pain to the extent of her rating of 9/10 pain. Dr. Webb noted that Claimant could sit, stand, change positions, walk, and get on and off the exam table without assistance. Her cervical range of motion was normal.

15. On May 2, 2013, Claimant underwent an orthopedic consultation with Dr. Sean Griggs with complaints of pain in her left shoulder and neck with numbness in her bilateral hands. Dr. Griggs recommended left shoulder surgery and a cervical MRI.

16. On May 9, 2013, Claimant underwent a cervical spine MRI, with findings of multilevel overall moderate cervical spine degenerative changes with broad-based disc bulges and superimposed large posterior protrusions at C4-C5, C5-C6 and C6-C7 which indent the anterior aspect of the spinal cord at multiple levels and cause multilevel spinal canal stenosis. Spinal stenosis was greatest and moderate at C6-C7. There was no abnormal spinal cord signal. Multilevel overall mild neural foraminal narrowing was also present.

17. On May 17, 2013, Claimant was seen in follow up by Dr. John Burris at Concentra. Claimant's primary complaints were left shoulder and left knee, and Claimant's pain diagram indicated complaints involving Claimant's bilateral knees, bilateral shoulders, neck, low back, and bilateral upper extremities. Dr. Burris recommended a left knee MRI.

18. On May 23, 2013, Claimant underwent a left knee MRI revealing advanced patellofemoral chondromalacia, full-thickness cartilage loss along the weight-bearing surface of the lateral tibial plateau, with subchondral cystic change and bone edema, and moderate cartilage loss along the weight-bearing surface of the medial femoral condyle.

19. On June 7, 2013, Dr. Burris opined that Claimant was at an endpoint for care for the left knee and that the work injury did not cause an exacerbation or acceleration of her pre-existing arthritis. The ALJ finds Dr. Burris' opinion on this point to be unpersuasive because it is not supported by his referral of Claimant for further treatment, and it is inconsistent with Claimant's pre-injury ability to perform her job duties. Further, Dr. Burris provide no work-restrictions contrary to all other physicians. Additionally, Dr. Burris' opinions and statement in the medical records often are contradicted by the medical evidence, and Claimant's pain diagrams which consistently documented Claimant's complaints were seemingly ignored by Dr. Burris.

20. On June 19, 2013, Dr. Griggs performed a left shoulder arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle excision.

21. On September 13, 2013, Dr. Burris noted that Claimant had full range of motion in her left shoulder and full strength with abduction. Dr. Griggs noted Claimant had near-full range of motion in her left shoulder.

22. On December 6, 2013, Dr. Burris again opined that Claimant's knee complaints were wholly consistent with her pre-existing degenerative arthritis. However, he referred Claimant to Dr. Sacha for evaluation and treatment of her left knee and left shoulder, and consideration of injection therapy: actions inconsistent with a finding of non-work relatedness.

23. Dr. Sacha performed steroid and viscosupplemental injections for Claimant's left knee. He placed Claimant at MMI on February 18, 2014.

- Dr. Sacha issued a 17% left lower extremity permanent impairment rating for Claimant's left knee injury.
- He issued a 10% left upper extremity rating for Claimant's left shoulder injury, which would convert to a 6% whole person permanent impairment rating.
- Dr. Sacha recommended a gym and pool pass for 12 months, medications, and office follow up.

24. The ALJ finds Dr. Sacha's conclusions that Claimant's left knee injury was related to her work injury and warranted an impairment rating credible and persuasive. The ALJ also finds credible and persuasive Dr. Sacha's conclusions that Claimant's left shoulder injury was related to her work injury, warranted an impairment rating, and conversion to a whole person impairment.

25. On February 28, 2014, Claimant followed up with Dr. Burris. Dr. Burris added osteopathic manipulation to Claimant's maintenance regime as she had done well with chiropractic care and had tightness in her shoulder girdle. Dr. Burris noted no other complaints. However, Claimant had diagramed pain in her neck and noted back symptoms. It appears that Dr. Burris did not assign any work-restrictions.

26. Claimant underwent osteopathic and massage therapy from Dr. Mark Winslow. Dr Winslow assessed cervicothoracic strain and left upper extremity pain, lumbosacral pain, poor rotator cuff strength, poor mobility, overuse of extrinsic and little coordination of intrinsic muscle coordination and strength in the shoulder-movement system impairment.

27. On June 9, 2014, Dr. Beatty performed a DIME.

- Dr. Beatty agreed with Dr. Sacha's February 18, 2014 MMI date.
- He assigned a 23% upper extremity rating, including 14% for loss of range of motion and 10% for the clavicle resection, which would convert to a 14% whole person rating.

- For the left knee, Dr. Beatty assigned a 44% loss of range of motion impairment, combined with a 5% impairment for Table 40, totaling 47%.
- Dr. Beatty did not note in his report any attempt to reconcile the difference between his range of motion measurements and those of Dr. Sacha.
- Dr. Beatty did not assign an impairment of the upper or lower back as he found no objective specific disorder of the spine.
- Dr. Beatty recommended restrictions of 15 pounds lifting, limited overhead and away-from-the-body work, standing and walking limited to one hour per day, and no kneeling, squatting, climbing, or crawling.
- He recommended a fitness center with pool for 1 year, 6 sessions each of osteopathic manipulation and massage, and appropriate medical follow up.

28. The ALJ finds Dr. Beatty's conclusion that Claimant's left shoulder injury warrants an impairment rating and conversion to a whole person rating to be persuasive and credible. The ALJ finds Dr. Beatty's conclusion that Claimant's left knee injury warrants an impairment rating to be persuasive and credible. The ALJ is not persuaded by Dr. Beatty's opinion that Claimant's cervical and lumbar spine complaints are not related to her work injury as she was able to perform all of her job functions before the injury, noted pain in those areas in her initial reports, and Dr Winslow assessed cervicothoracic strain and lumbosacral pain in an earlier assessment. In addition, Claimant's underlying degenerative back issues were asymptomatic immediately prior to the work injury and became symptomatic with the injury. The ALJ is not persuaded by Dr. Beatty's impairment ratings as they do not comply with the AMA Guides. This finding is supported by the opinions of both Dr. Cebrian and Dr. Hughes.

29. On July 10, 2014, Respondents filed a FAL admitting to the opinions of Dr. Beatty, including liability for a 23% left upper extremity rating, 47% left lower extremity rating, and maintenance medical benefits.

30. On September 18, 2014, Claimant's primary care provider, Ruth Knight, P.A. at Arvada Clinic authored a letter noting that due to osteoarthritis of the knees and persistent rotator cuff pathology of her shoulder, Claimant could not stand or walk for any prolonged period, reach overhead or carry any weight above 10 pounds. Ms. Knight opined that Claimant had been unable to work due to her injuries, and was medically disabled.

31. On or about October 27, 2014, Claimant underwent a vocational workers' compensation evaluation performed by O.T. Resources, Inc. with a report date of December 1, 2014. This evaluation included a functional capacity evaluation and employability assessment. Doris Shriver, who authored the report, opined that

- Claimant's work injury had precluded her from returning to her previous employment positions of quality assurance inspector, administrative assistant, hand packager or customer service representative.

- Ms. Shriver felt Claimant had no transferable skills that would fit within her residual functional capacity because she could not stand or walk long enough to work at the light category of work, and hand use could not be an essential function because Claimant has dominant right hand weakness and lacked coordination.
- Ms. Shriver also pointed to other factors which eliminated work including chronic pain, sleep deprivation and behaviors related to depression that Claimant suffered from and which affected Claimant's concentration, memory and pace.

32. Dr. Carlos Cebrian performed a Respondents' IME and issued a report dated December 3, 2014.

- Dr. Cebrian opined that Claimant was at MMI and required no further medical treatment for her work-related injuries.
- Dr. Cebrian felt the only work-restrictions appropriate for Claimant were limited occasional lifting above left shoulder level to 10 pounds.
- Dr. Cebrian opined Claimant did not merit any impairment rating to her left knee.
- He opined that Dr. Beatty erred in providing his rating by failing to investigate or document the disparity between his lower extremity rating and Dr. Sacha's, or to compare ratings with the uninjured knee.
- Dr. Cebrian provided an 18% left upper extremity rating for Claimant's left shoulder.
- Dr. Cebrian opined that Claimant's permanent impairment for her left shoulder did not extend beyond her left upper extremity and the impairment should remain on the schedule of injuries.

33. The ALJ is not persuaded by Dr. Cebrian's decision to not rate Claimant's left knee or provide restrictions. The ALJ finds it more likely than not that Claimant's underlying arthritic condition was aggravated or accelerated by her work injury as she went from functioning well and without pain, to restricted walking with an assistive device and constant pain. The ALJ is also not persuaded that Claimant's left shoulder injury should remain scheduled as she reports and has been treated for pain and tightness in her shoulder girdle, and Dr. Winslow also treated Claimant for symptoms extending beyond the glenohumeral joint.

34. On December 8, 2014 Dr. John Hughes performed a Claimant's IME. His report contained the following opinions:

- Dr. Hughes opined that he agreed with Dr. Sacha that Claimant's work-related injuries were stable and Claimant was at MMI.
- Dr. Hughes opined that Claimant sustained work-related injuries to her neck and low back in addition to her left shoulder and left knee. He

agreed with Dr. Beatty that Claimant was entitled to a left lower extremity rating for her knee based on an incremental increase in the severity of her patellofemoral arthritis as a result of the work injury.

- Dr. Hughes assessed Claimant with cervical spine sprain/strain secondary to her work related fall, with persistent generalized myofacial pain. He also assessed a lumbar spine sprain/strain secondary to her work related fall with persistent lumbosacral regional myofacial pain. He concluded that Claimant's cervical and lumbar spine injuries were work related because her injury was relatively high energy, there was good documentation of cervical and lumbar spine symptoms from early on in her course of care, and he felt she met the criteria for a specific disorder impairment as outlined in Table 53 of the AMA Guides. He opined that in addition to specific disorder impairments of the neurologic system that range of motion impairments should be included as well.
- Dr. Hughes opined that Claimant sustained functional impairment proximal to her left glenohumeral joint as a result of her work-related injuries. Dr. Hughes further indicated that Claimant had left-sided shoulder and neck pain that extends into the cervical region, concurrent with cervical spine pain that was documented throughout Claimant's care. He opined that Claimant's left shoulder impairment should be converted to a whole person impairment rating unless her cervical spine injury were rated.
- Dr. Hughes opined that Claimant's emerging right shoulder problems were not causally related to Claimant's industrial injury. Dr. Hughes opined that the most likely etiology of Claimant's right shoulder was diabetic tendinopathy. Dr. Hughes anticipated an MRI would show evidence of tendinopathy and even a complete rotator cuff tear.
- Similarly, Dr. Hughes felt that Claimant's right arm, hand, leg, and foot involved neuropathic pain that could be severe and substantially limit her residual functional capacity, although not necessarily work related.
- Dr. Hughes opined that Claimant had permanent restrictions from both her occupational and non-occupational conditions which resulted in a residual functional capacity of less than sedentary as defined by the U.S. Department of Labor. Specifically, standing and walking was limited to one hour per day with use of cane. No bending, stooping or twisting or activities involving kneeling or crawling. Lifting and carrying was limited to five pounds, and Claimant should not perform activities that involve fine motor coordination of her dominant right arm and hand as well as any activity that involves reaching or lifting above shoulder level.

35. Dr. Hughes attributed Claimant's standing and walking with a cane restriction, and her restriction on kneeling and crawling, to both occupational and non-occupational factors. He specifically opined, "I believe that the left knee contusion with increased arthritis contributed measurably to the severity of that restriction."

36. Dr. Hughes attributed Claimant's no bending, stooping, or twisting restrictions to her work related spine problems.

37. Dr. Hughes attributed Claimant's lifting and carrying restriction of ten pounds, and her frequent lifting or carrying restriction of five pounds, to her right shoulder diabetic tendonopathy, her left shoulder arthrosis post work-related injury, her lumbar spine injury, her cervical spine injury, her bilateral knee osteoarthritis, and her work-related left knee contusion.

38. Dr. Hughes attributed Claimant's dominant hand restriction of avoiding fine motor coordination and lifting above her shoulder with her right hand to non-work related causes.

39. The ALJ finds persuasive Dr. Hughes' opinions about the relatedness of Claimant's cervical and lumbar spine as she consistently reported pain in those areas beginning with her initial reports to her medical providers. And, while she had pre-injury degenerative arthritis in those areas, her injury aggravated her condition which then became symptomatic. The ALJ also finds persuasive Dr. Hughes' opinions that Claimant's left shoulder and knee should be given impairment ratings. The ALJ also credits as persuasive Dr. Hughes' opinion that Claimant's permanent restrictions from both her occupational and non-occupational conditions resulted in a residual functional capacity of less than sedentary as defined by the U.S. Department of Labor. The ALJ also credits as persuasive Dr. Hughes' opinion that Claimant's permanent restrictions related to her work injuries substantially impair her ability to earn any wages.

40. On December 9, 2014, Claimant underwent a right shoulder MRI with findings consistent with chronic appearing full-thickness tears of the supraspinatus and infraspinatus tendons. Moderate supraspinatus tendinosis and mild to moderate intra-articular biceps tendinosis were also noted.

41. Ms. Katie Montoya performed a vocation assessment at Respondents' request and issued a report dated December 19, 2014.

- Ms. Montoya opined that Claimant retained residual functional capacity to earn wages in the Denver labor market within the work-restrictions provided by Dr. Beatty.
- Ms. Montoya identified employment in the sedentary work category with material handling in the sedentary to light category. Ms. Montoya specifically identified job titles including office clerk, lobby assistant, PBX operator, customer service clerk, customer service representative/call center, and appointment setter.
- Ms. Montoya's report separates the work-restrictions from Dr. Beatty and Dr. Hughes by eliminating non-occupation factors identified by Dr. Beatty. Ms. Montoya acknowledged that the work-related and non-work related restrictions provided by Dr. Hughes may certainly restrict Claimant's capacity to work at this time.

42. The ALJ finds Ms. Montoya's opinion that Claimant retained residual functional capacity to earn wages in the Denver labor market not persuasive as it is based on the work restrictions assigned by Dr. Beatty which the ALJ finds less credible and persuasive than those assigned by Dr. Hughes. The ALJ credits Ms. Montoya's opinion that the work-related and non-work related restrictions provided by Dr. Hughes restrict Claimant's capacity to work at this time.

43. Dr. Hughes testified by deposition on behalf of Claimant as an expert in Occupational Medicine with Level II accreditation.

- Dr. Hughes testified that Dr. Beatty erred in providing Claimant 6% rather than 5% for 40 degrees left shoulder extension. As a result, Dr. Hughes testified Claimant should have received a 22% left upper extremity which would convert to a 13% whole person rating.
- Dr. Hughes opined Claimant sustained a work-related injury to her neck and low back as a result of her injury. In support, Dr. Hughes noted early documentation of cervical and lumbar injuries. As a result, Dr. Hughes felt Claimant satisfied Table 53 criteria pursuant to the AMA Guides. Dr. Hughes opined that Claimant should receive 4% whole person for the cervical and 5% whole person for the lumbar pursuant to Table 53. Additionally, Dr. Hughes opined that Claimant should receive 10% for range of motion loss for the cervical and 6% for range of motion loss for the lumbar spine.
- Dr. Hughes testified that he agreed with Dr. Beatty that Claimant qualified for permanent impairment of the left lower extremity due to the medically probable increase in the severity of Claimant's patellofemoral arthritis arising of her work-related injury.
- Dr. Hughes testified that Dr. Beatty should have measured the contralateral right leg to determine a baseline and should have supported his disparity in permanent impairment ratings pursuant to AMA Guides and DWC impairment rating tips.
- Dr. Hughes testified that both occupational and non-occupational factors contributed to the restriction of limiting walking and standing to 1 hour per day with use of cane. Dr. Hughes testified that limitation on bending, stooping or twisting were attributable to the spine and occupational. Dr. Hughes testified that the limitation on kneeling and crawling were both occupational and non-occupational, as were the lifting and carrying requirements. Dr. Hughes testified that all dominant right arm and hand limitations were non-occupational.

44. The ALJ finds that Dr. Hughes provided a comprehensive evaluation of Claimant and rendered opinions both for and against Claimant. Dr. Hughes credibly supported his opinions and recognized the varying strengths and weaknesses of the competing arguments.

45. Respondents obtained an independent medical exam from Dr. Cebrian.

- Dr. Cebrian noted that Claimant's pain complaints were widespread, had expanded throughout the course of the claim, and were out of proportion to objective findings.
- Dr. Cebrian opined that Claimant's left knee complaints are solely related to her underlying arthritic condition, as there was no diagnostically demonstrated change in anatomy that could be attributed to Claimant's fall.
- Dr. Cebrian opined that Claimant's work-related impairment is restricted to the left shoulder, and assigned an 18% upper extremity rating only.

46. Dr. Cebrian identified several problems with Dr. Beatty's DIME. He noted that the DIME identified range of motion deficits which were not previously seen or identified thereafter. Dr. Beatty's measurements were not reproducible or consistent with any prior measurement. Dr. Cebrian noted that pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 3d ed. Revised, "If the current findings are not in substantial accordance with the information of records, the appropriate course is to undertake further clinical evaluation to resolve disparities and determine the individual's present status." The AMA Guides further state, "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." Dr. Cebrian noted that Dr. Beatty failed to explain the difference between his measurements and those of Dr. Sacha. Nor did Dr. Beatty undertake any actions to reconcile the differences. As such, Dr. Cebrian opined that Dr. Beatty's DIME rating was incorrect.

47. Dr. Cebrian testified on Respondents' behalf as an expert in family practice and general medicine, Level II certified. Dr. Cebrian testified Claimant suffers from degenerative arthritis in her cervical spine and bilateral knees, all predating her work injury. Dr. Cebrian testified that Claimant's work-related injuries were limited to her left shoulder. Dr. Cebrian opined that objective testing failed to reveal any acute changes in Claimant's left knee. Dr. Cebrian opined that Claimant's neck and back conditions were not work-related. Dr. Cebrian agreed with Dr. Hughes that Claimant's right upper extremity complaints were related to her diabetes. Dr. Cebrian testified that a rating under Table 40 is improper with no objective evidence that Claimant's arthritic condition was caused by her fall. Dr. Cebrian opined that Claimant's neck and back conditions are not work related, based on the waxing and waning nature of her complaints. He testified that an acute injury would elicit consistent pain complaints. He also opined that Claimant's grasping and reaching restrictions were not work related.

48. The ALJ finds Dr. Cebrian's opinions about relatedness are less credible and persuasive than those of Dr. Hughes. The ALJ notes that pre-injury arthritis is not determinative of whether an injury is work related; neither are acute changes in anatomy required. Additionally, the ALJ finds that Claimant consistently reported

cervical and lumbar spine pain, contrary to Dr. Cebrian's characterization of those complaints as waxing and waning. Dr. Cebrian's opinion that all of Claimant's conditions are pre-existing and degenerative in nature fails to consider elements of legal causation reflecting a work-related aggravation of a pre-existing condition. Dr. Cebrian's opinions are contrast to the opinions of Dr. Sacha, Dr. Beatty, and Dr. Hughes with regard to the left knee extremity impairment rating, work-restrictions, and maintenance medical benefits.

49. Claimant underwent a vocational workers' compensation evaluation performed by O.T. Resources, Inc. on or about October 27, 2014 with a report date of December 1, 2014. This evaluation included a functional capacity evaluation and employability assessment. Doris Shriver, who wrote the report, opined that Claimant's work injury precluded her from returning to her previous employment of quality assurance inspector, administrative assistant, hand packager, or customer service representative. Ms. Shriver felt Claimant had no transferable skills that would fit within her residual functional capacity because she could not stand or walk long enough to work at the light category of work, and hand use could not be an essential function because Claimant has dominant right hand weakness and lacked coordination. Ms. Shriver also pointed to other factors which eliminated work including chronic pain, sleep deprivation and behaviors related to Claimant's depression which affected Claimant's concentration, memory, and pace.

50. Dr. Cebrian testified, contrary to Ms. Shriver that none of Claimant's medications would cause a reduction in her cognitive functioning. Dr. Cebrian testified that Claimant's alleged chronic pain would not cause any cognitive impairment or diminished academic testing as found by Ms. Shriver. Dr. Cebrian acknowledged that lack of sleep could limit job performance from a concentration and focus standpoint. Dr. Cebrian testified that Claimant did not sustain any functional limitation proximal to her left shoulder or to any other body part than her arm that would warrant conversion of the shoulder rating to whole person. Dr. Cebrian testified that none of Claimant's work-related restrictions prevent her from working.

51. The ALJ finds these opinions of Dr. Cebrian not to be persuasive as they are inconsistent with earlier findings regarding relatedness of impairments. Additionally, the ALJ finds it more probably true than not that Claimant's narcotic pain medications, chronic pain, and sleep deprivation would cause cognitive impairment and diminished academic testing as opined by Ms. Shriver.

52. Respondents obtained a vocational evaluation from Katie Montoya. Ms. Montoya interviewed Claimant concerning her education, skills, and work history/experience. Claimant has a high school education. She took several computer programming and Excel classes between 1981 and 2000. Her work experience includes production work, inspecting pharmaceutical products, work as an administrative assistant, and work as a cashier. Ms. Montoya noted that in July 2013, shortly after Claimant's shoulder surgery, while her arm was still in a sling, Claimant applied for and was hired by Anthem. She began a six-week training course as a

customer service representative. Ultimately, however, Claimant quit that job, believing she was unable to complete the training while her arm was in a sling.

53. Ms. Montoya reviewed relevant labor market research materials, Claimant's work history, education, and experience, and the restrictions imposed by the physicians. Using the restrictions imposed by Dr. Beatty, Ms. Montoya opined that Claimant had transferrable skills based on her experience as a cashier, customer service rep, and administrative assistant. Ms. Montoya opined that Claimant could perform work as a clerk, lobby assistant, customer service clerk/representative, and appointment setter. Ms. Montoya reviewed recent job postings in the Denver metro area and located numerous jobs which she opined Claimant was able to perform within Dr. Beatty's restrictions.

54. Claimant testified at hearing that she is currently suffering neck pain; pain going down her shoulder, lower, and upper back; muscle spasms going down both arms; and the inability to user her right hand. Claimant testified that immediately after she fell, she only felt pain in her left knee, but by the next day she also felt pain in both shoulders, her neck, arms, and back, and included this information on her pain diagram. Claimant testified that she had a prior right shoulder surgery but that her condition was fine prior to the current injury. Claimant denied any prior neck problems. Claimant testified that she did have a prior low back injury that had also resolved prior to the current injury. Claimant testified that she had a left knee operation in 2005 and was doing fine prior to the current injury.

55. Claimant testified that her job at Employer was very fast-paced and physically demanding. Claimant was able to perform all the essential functions of her job prior to the current injury.

56. Claimant testified that:

- she experiences muscle spasms going from her neck to her left shoulder, and also across her shoulder blades.
- she has difficulty reaching with her left arm to even comb or wash her hair.
- when she performs range of motion she experiences pain in the front, top, and back of her shoulder region between her neck and shoulder capsule.
- With regard to her left knee, she walks "real slow" without her cane, and that her knee "goes out," and she loses her balance.
- she experiences pain, burning, and a bone-on-bone sensation in her knees. Claimant testified to a loss of strength in her left leg.
- she was able to walk for 15 minutes with her cane before she needed to sit down. She could stand for 30 minutes at a time, but could not stoop or kneel.
- she had referred pain in her left hip and down in to her right foot.

- she had neck spasms and headaches every day with limited range of motion in her neck.
- she has muscle spasms in her low back near her tailbone that radiate into her left hip.
- her right shoulder hurts everyday and she cannot lift anything, and was unable to comb or wash her hair, vacuum, iron or clean.
- she attempted to return to work as a customer service representative at Anthem Blue Cross/Blue Shield, but was unable to perform the job duties and stopped her training due to her injuries.
- her current level of function is less than when she tried working at Anthem.
- she has looked for jobs and sent out applications in hopes that her condition would improve.
- she believes her right shoulder, left shoulder, neck, back, and left knee were all injured in her fall.
- she does not feel she can work due to her pain, functional limitations, and inability to concentrate due to pain, medication, and sleep deprivation.

57. Doris Shriver testified at hearing on Claimant's behalf as a vocational expert and expert in occupational therapy. Ms. Shriver opined that based upon her workers' compensation evaluation of Claimant's physical, academic, cognitive and behavioral testing and medical history, that Claimant is unable to earn wages in the Denver labor market. Ms. Shriver testified to Claimant's performance in the McCarron-Dial Work Evaluation System, also utilized by the Colorado State Division of Vocational Rehabilitation. Ms. Shriver testified that Claimant performed in the 1st percentile in this standardized test wherein individuals need to score in at least the 15th percentile for employability. Ms. Shriver testified that Claimant's ability to function, both physically and cognitively, would be decreased by chronic pain and sleep deprivation. Respondents stipulated that Ms. Shriver opined that Claimant was unable to perform the jobs identified by Katie Montoya as a result of her work-restrictions. Ms. Shriver testified that Claimant's sedentary work-restrictions were the result of her left knee injury. Ms. Shriver testified that restrictions to sedentary, unskilled jobs removed 98% of all jobs. Ms. Shriver testified sedentary jobs restrictions eliminated 75-77% of available jobs. Ms. Shriver further testified that when considering whether Claimant could meet the requirements of certain jobs identified, she did not determine whether Claimant's work-related or non-work related restrictions prevented her from performing those jobs.

58. Katie Montoya testified as an expert in vocational rehabilitation on Respondents' behalf. Ms. Montoya performed a vocational assessment of Claimant, including review of her medical records, personally interviewing Claimant, and performing vocational research. In performing her assessment, Ms. Montoya used Dr. Beatty's restrictions and testified that, within those restrictions, Claimant was capable of returning to work as a cashier, in customer service, clerk, and appointment setter. Ms. Montoya identified several potential jobs that fell within Claimant's restrictions within the

Denver metro area. Ms. Montoya testified that even within the work-related restrictions issued by Dr. Hughes, which are more limiting than those of Dr. Beatty, Claimant would still be capable of working. Ms. Montoya assumed that Claimant was able to meet the pre-employment testing criteria with Anthem before being hired, and was able to understand and complete the training she participated in as evidence that Claimant's cognitive abilities were greater than revealed by Ms. Shriver's testing. Ms. Montoya ultimately opined that Claimant was capable of working within her work-related restrictions.

59. The ALJ finds Ms. Montoya's opinions flawed in that she adopts Dr. Beatty's work restrictions which the ALJ finds less appropriate than those of Dr. Hughes. Ms. Montoya's opinion also does not take into account Claimant's testimony, which the ALJ credits as persuasive, that Claimant was offered the training position at Anthem not based on her merits, but rather on her daughter's lengthy history of successful employment with the same employer.

60. The ALJ finds Claimant's testimony credible. Claimant's testimony that she is incapable of working is consistent with her inability to perform many daily functions such as cooking, personal hygiene, and washing dishes. Claimant has only limited abilities to drive, care for her granddaughter, and shop for herself, and her daughter and grandchildren help her with these tasks. She is only able to use a computer for a few minutes at a time because her dominant hand is weakened, and is limited to minimal standing and walking.

61. The ALJ finds that Claimant has shown by a preponderance of the evidence that she is permanently and totally disabled. This finding is supported by the opinions of Dr. Hughes, Ms. Shriver, and is acknowledged by Ms. Montoya. Claimant has proven by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. Claimant has shown by a preponderance of the evidence that her compensable injuries, including her left shoulder, left knee, cervical, and lumbar spine, are significant causative factors in her permanent total disability, at least in part because they restrict her to a sedentary job, and because they require medication, cause chronic pain, and deprive Claimant of sufficient sleep for her to function in terms of concentration, memory, and pace. Claimant has established a direct causal relationship between her industrial injury and her permanent total disability.

62. Claimant seeks reimbursement for mileage she recorded to attend massage therapy appointments and to meet with Respondents' vocational expert, Ms. Montoya. Claimant clarified some of the mileage numbers at hearing. According to Claimant's testimony, which the ALJ finds credible and persuasive on this issue, Claimant is entitled to reimbursement for a total of 400 miles.

63. In light of these findings, the ALJ need not address the remaining issues.

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. § 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.

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). 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).

PERMANENT TOTAL DISABILITY

To prove her claim that she is permanently and totally disabled, the 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. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather, the claimant must demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried*. Thus, while a condition may have been caused by a compensable injury, the ALJ must determine whether that condition caused a claimant to be unable to earn any wages.

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 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).

Respondents contend the evidence and facts in this matter are similar to those in *Wallace v. Current USA, Inc.*, W.C. No. 4-886-464 (ICAO December 24, 2014). There, according to Respondents, ALJ Felter found that claimant failed to establish a causal connection between her work injury and permanent total disability based on Ms. Montoya's testimony in that case that claimant was capable of working when only her work restrictions were considered. Respondents argue that here, only Ms. Montoya's and Dr. Cebrian's testimony addressed claimant's work-related restrictions.

The ALJ is not persuaded. In *Wallace*, the ICAO affirmed ALJ Walsh's denial of Claimant's request for permanent total disability benefits. There, the ALJ's denial was based on his finding that the opinions of the ATP and the DIME doctor that claimant's injuries were limited to her elbow were persuasive and credible. The ALJ found the opinion of a physical therapist – who the ALJ considered a lay person based on her lack of education and experience -- that the claimant's injuries included her shoulder, cervical spine, back, and right arm, to not be credible or compelling. In addition, the ALJ found that any restrictions caused by claimant's cervical spine, shoulder and right arm did not represent a disability proximately or significantly caused by her work injury. Accordingly, the ALJ denied the claimant's request for permanent total disability benefits. *Wallace* is distinguishable on the facts. Here, the ALJ found Dr. Hughes' more inclusive opinion on related injuries to be the most credible and persuasive. In addition, the ALJ found that work restrictions based on those related injuries were a significant cause of her inability to earn any wages.

The ALJ concludes that Claimant is unable to earn any wages. This conclusion is supported by the credible and persuasive opinions of Ms. Shriver and Dr. Hughes. It is further supported by Ms. Montoya's acknowledgment that if Dr. Hughes' work restrictions were to be imposed – as the ALJ has found they should be – Claimant's capacity to work is restricted.

In reaching this conclusion, the ALJ also considers human factors which she finds also prevent Claimant from earning any wages. Specifically, Claimant is fifty-nine years old; she is in poor physical condition, living a sedentary lifestyle and with a BMI associated with obesity; while she has a high school diploma, her vocational teting indicated her language and math skills are at a fourth or fifth grade level. In addition, Claimant's testimony and medical records support the conclusion that Claimant's ability to handle pain and her perception of pain are very low.

Claimant showed a direct causal relationship between her industrial injury and permanent total disability. Claimant's work related injuries consist of: (1) cervical spine sprain/strain with persistent generalized myofacial pain; (2) lumbar spine sprain/strain with persistent lumbosacral regional myofacial pain; (3) medically probable increase in the severity of Claimant's left knee patellofemoral arthritis; and (4) left shoulder arthrosis post work-related injury. These injuries are the basis of numerous restrictions imposed

by Dr. Hughes and are the bases, at least in significant part, of his restrictions on Claimant's walking, standing, bending, stooping, twisting, kneeling, crawling, lifting, and carrying. Additionally, these injuries have caused Claimant to require medications, suffer from chronic pain, and interfere with her sleep – all of which reduce her concentration, memory, and pace. Claimant's non-work related dominant hand restrictions additionally limit her ability to earn wages. The ALJ concludes that Claimant's injuries and ensuing work-related restrictions are a significant causative factor in her permanent total disability.

MILEAGE REIMBURSEMENT

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove entitlement to benefits by a preponderance of the evidence. Mileage expenses to and from authorized medical treatment are a compensable medical benefit. *Sigman Meat Co. v. ICAO,*761 P.2d 265 (Colo. App. 1988).

Respondents have not contested that the medical appointment to Dr. Sacha, Claimant's receipt of massage treatments, and Claimant's appointment with Ms. Montoya are not authorized reasonable, necessary, and related medical benefits arising out of Claimant's industrial injury. As a result, the mileage expenses to and from the authorized treatments is compensable.

As found, Claimant credibly testified that the mileage logs, corrected by her hearing testimony, accurately reflect the mileage she drove to and from the medical appointments after correction. Pursuant to W.C.R.P Rule 18-6 (E), Claimant shall be compensated $.52 per mile for 400 miles.

ORDER

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

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

2. Claimant is permanently and totally disabled from earning wages.

3. Respondents are liable to Claimant for mileage reimbursement for 400 miles reimbursed at $.52 per mile.

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

5. 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: August 13, 2015

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

Written transcripts of The evidentiary depositions of Neil Pitzer, M.D., taken on February 13, 2015 (Pitzer Depo. #1, followed by a page number) and August 3, 2015 (Pitzer Depo. #2, followed by a page number) were lodged with the Office of Administrative Courts on August 6, 2015.

At the conclusion of the hearing, the ALJ established a briefing schedule. Claimant's opening brief was filed on August 18, 2015. The Respondents' answer brief was filed on August 18, 2015. Claimant's reply brief was filed on August 24, 2015, at which time the matter was deemed submitted for decision.

PROCEDURAL

The matter was initially scheduled for hearing on the Claimant's application to overcome the opinion of the Division Independent Medical Examiner's (William S. Griffis, D.O.) that the Claimant was at maximum medical improvement (MMI) on January 22, 2014. At the time of hearing, the Claimant stipulated that he reached MMI on January 22, 2014, the date provided by DIME Dr. Griffis, but that he was no longer at MMI and needed medical care for the diagnosed L5-S1 allegedly work-related pars defect and the Claimant requested reinstatement of temporary total disability (TTD) benefits as of January 15, 2015 when he returned to surgeon Douglas Wong, M.D.

The parties agreed to try the issue of reopening by consent, although it was not listed as an issue for hearing. The Claimant filed a Petition to Reopen the claim, post-hearing, on August 13, 2015, alleging a change in condition and an allegedly mistaken diagnosis by Dr. Wong that the pars defect was **not work-related**.

The Claimant's hearing submission packet contains medical records that do not belong to the Claimant (Claimant 6 #131-134) and, therefore, are not considered as part of the record.

ISSUES

The issues to be determined by this decision concern the Claimant's request that his claim be reopened on the grounds of a change in condition or mistake of fact, based on a diagnosis of a worsening and disabling L5-S1 pars defect, allegedly work-related, which requires medical care and treatment and the Claimant's request for TTD benefits from January 15, 2015, the date surgeon Dr. Wong diagnosed the pars defect [which Independent Medical Examiner (IME), L. Barton Goldman, M.D. was of the opinion that the pars defect was a work-related consequence of the admitted injury of June 2, 2013].

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 June 2, 2013 when he fell from a roof; falling 15 to 20 feet hitting his back on a railing made of a large log before falling to the ground. He was employed as a roofing laborer, lifting 60 lbs and installing shingles on roofs.

2. Douglas Wong, M.D., evaluated the Claimant on June 12, 2013, and noted the presence of a bilateral L5 pars defect. He noted 40 degrees of kyptosis at T12-L1 with ligament disruption. The Claimant had mild compression fractures at T12-L1 and L2. Dr. Wong recommended posterior stabilization to correct the deformity and pain.

3. Dr. Douglas Wong began providing medical care for the Claimant on June 12, 2013. At the initial consultation, Dr. Wong reviewed MRI (magnetic resonance) scans and CT scans noting 40 degrees of kyptosis at T12-L1 with disruption of the lagamentum flavum, mild compression fractures at T12-L1 and L2, and a deformity and gapping of the facets. Dr. Wong also identified and diagnosed the Claimant with a bilateral L5 pars defect, asymptomatic**.**

4. Dr. Wong performed surgery on June 14, 2013 at St. Anthony's Hospital. The operative report documents a posterior spinal fusion at T10-T11; T11-T12; T-12-L1; L1-L2. Posterior segmental instrumentation of T10, T11, T12, L1, L2. Open reduction, internal fixation of T12 fracture and L1 and L2 fractures.

5. Dr. Wong in describing the indications for surgery noted that the patient appears to have asymptomatic **at this point** (emphasis added) L5 lyric pars defect noted on CT scan.

6. Following surgery, the Claimant continued to receive care with Dr. Wong until Dr. Wong placed him at maximum medical improvement (MMI) on November 19,

2013. Dr. Wong is not Level 2 accredited by the Division of Workers' Compensation (DOWC).

7. The Claimant's condition continued to improve and he was released from care by Dr. Wong on November 19, 2013, the date that Dr. Wong declared the Claimant to be at MMI. Dr. Wong also indicated that the Claimant should continue physical therapy, follow up as necessary, will set up FCE (Functional Capacity Evaluation) and impairment rating.

8. Dr. Wong noted that the Claimant could do sedentary work on November 19, 2013. He also noted the Claimant's concerns about working at heights since the Claimant injured himself falling from a roof. Claimant was also concerned about heavy lifting.

9. On January 8, 2014, Dr. Wong recommended home assistance for the Claimant to assist with the transition to home.

10. On December 23, 2013, an FCE assessment found the Claimant able to lift and carry 35 lbs., 25 lbs frequently and constant lifting of 10 lbs.

11. The Respondents referred the Claimant to Dr. Pitzer on January 22, 2014 for the purposes of MMI determination and impairment rating. Dr. Pitzer noted pain levels of 2 on a good day 4 on a bad day. Dr. Pitzer found the Claimant to be at MMI and provided him with a 28% whole person impairment rating for his lumbar spine. Dr. Pitzer, in his original impairment rating evaluation, stated the opinion that the Claimant should be able to work in the light to medium work category with maximum lifting up to 35 lbs.

12. Dr. Pitzer evaluated the Claimant on January 22, 2014 for MMI determination and permanent impairment. At that time, the Claimant reported that his pain levels varied from a 2/10 on good days to 4/10 on bad days. At the time of this evaluation, the Claimant was still utilizing the narcotic medication, Oxycodone, to treat his pain symptoms. Dr. Pitzer agreed that the Claimant had reached MMI and provided a 28% who person impairment, specific to the lumbar spine. Respondents' Exhibit C 0028-0030. He also agreed with the 35 lb. lifting restrictions as noted in the functional capacity evaluation.

Continued Treatment

13. Physical therapy records from January 17, 2014 through January 31, 2014, indicate that the Claimant did not just have low back pain, but also had symptoms of radiating pain that extended from his lower back to his lower extremities bilaterally. These symptoms existed at the time the Claimant was placed at MMI by the Dr. Pitzer on January 22, 2014.

14. During his course of care, the Claimant was also evaluated by PA-C (Physician's Assistant) Lisa Brozovich. PA-C Brozovich specifically evaluated the Claimant during the time just before being placed at MMI and also just after MMI. On January 7, 2014, PA-C Brozovich reported that the Claimant was "weak in his core and had decreased ROM (range of motion) of his left hip." The Claimant also self-reported the he could lift up to 15 lbs., but generally tried to stay at 10 lbs. On February 6, 2014, 18 days after his evaluation with Dr. Pitzer, PA-C Brozovich noted that the Claimant continued to take narcotic pain medications at night with noted increases of pain associated with weather changes. Again restrictions were limited to 10 pounds lifting, carrying and pushing/pulling with no crawling, kneeling squatting or climbing. By March 6, 2014, the Claimant noted that his pain seem to be the same on the level of 4/10 in the day and 6/10 after exercise and at bedtime. PA-C Brozovich noted that the Claimant's physical therapist had felt that he had maximized his benefits from therapy. She also noted that she would call Dr. Wong to determine if the Claimant's current levels of pain were cause for concern.

15. The Claimant's condition was continuing to improve with pain levels, reduction in pain medications and physical tolerances and by March of 2014 the Claimant reached a plateau.

16. Dr. Wong stated his opinion that the pars defect condition was not work-related in a hand-written note issued on March 13, 2015.

17. On March 18, 2014, Dr, Wong noted that the Claimant reported that he had an increase of back pain up to 5/10 with increased activities and lifting. PA-C Brozovich then saw the Claimant back on March 20, 2014 and assigned permanent work restrictions of 30 pounds lifting, 15 pounds repetitive lifting and 15 pounds carrying, 5 hours per day of walking, standing and sitting at ½ hour intervals, crawling, kneeling and squatting 12 minutes at a time, and no climbing.

Division Independent Medical Examination (DIME) by William S. Griffis, D.O.

18. Dr. Griffis performed a DIME on July 3, 2014. At that time, the Claimant was complaining of deep aching in his low back with sharp pains in the low back. The

Claimant indicated that his pain was worse with bending, stooping, twisting and lifting. He was not working and taking 5mg of oxycodone at night.

19. Dr. Griffis provided the Claimant with a 36% whole person impairment rating for the lumbar and thoracic spine injuries. Dr. Griffis was of the opinion that the Claimant would require maintenance care. Dr. Griffis provided an impression of chronic lumbosacral myofascial pain in addition to the surgical procedure.

20. On August 12, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for Dr. Griffis's impairment rating of 36% whole person, an MMI date of January 22, 2014 and post-MMI medical maintenance benefits (*Grover* medicals).

Functional Capacities Evaluation

21. A functional capacity evaluation (FCE) by OT Resources, Inc.. was performed on November 25, 2014 and completed on December 23, 2014 Respondents' Exhibit I—Report dated December 28, 2014), found that the Claimant able to lift and carry 35 lbs., 25 lbs. frequently, and 10 lbs. constantly. Contrary to the Respondents' assertions that the FCE illustrates that the Claimant's condition had not worsened, the FCE noted more restrictive lifting limitations, increased daily pain levels, and a significant impact of the admitted back injury on the Claimant's activities of daily living (ADLs), including an opinion that the Claimant was not capable of working at that time. The ALJ infers and finds that the ultimate thrust of the FCE illustrates a significant worsening of the Claimant's condition since being placed at MMI on January 22, 2014.

Progression of Claimant's Condition

22. By November 25, 2014, the Claimant was taking Ibuprofen for pain, and was complaining of constant pain in the left side of his hip, shoulder blade and incision. He indicated that the pain was an average of 4/10 daily. By November 25, 2014, the Claimant's lifting capacity was 10 lbs. (one time lift).

23. On January 16, 2015, the Claimant returned to Dr. Wong indicating that he had continued left lateral thigh pain that radiates to the knee, moderate low back pain that worsens when sitting or driving greater than one hour intervals, was last seen in March 2013 and noted back pain. The Claimant continued to note left sided back pain with radiation to the left thigh and knee and has been doing physical therapy. X-rays on this date showed lumbar disc narrowing and retrolisthesis and L5-S1 DDD. Dr. Wong indicated that an MRI (magnetic resonance imaging) would be ordered to check for left side neural compression to then consider ESI (epidural steroid injections). The Claimant had some left quad weakness. Dr. Wong recommended a follow-up after a

completion of work up for reevaluation, to review the MRI, to assess response to treatment. His diagnosis was lumbosacral neuritis and symptomatic lumbago.

24. According to the Claimant, his low back condition had worsened since he saw DIME Dr. Griffis. The Claimant testified that the pain on left side of his low back had gotten worse, and by the time he returned to see Dr. Wong in January of 2015 he was noticing left thigh pain which went to his knee with numbness in his leg.

25. Medical records prior to January 16, 2015 indicate that leg numbness had not been a documented problem.

26. On January 26, 2015, an MRI was performed at Advanced Medical Imaging.

27. The Claimant returned to Dr. Wong on February 17, 2015, and Dr. Wong noted continued left sided low back pain radiating to left thigh and knee with left quad weakness. Dr. Wong ordered a diagnostic left L2-L3 transforaminal ESI. Dr. Wong noted " if no relief, will consider diagnostic left L5-S1 epidural steroid injection." Dr. Wong prescribed Norco for pain and Robaxin for muscle spasms.

28. On March 5, 2015, Karen Knight, M.D., performed an L2-3 transforaminal ESI.

Follow Up Independent Medical Examination by Neil Pitzer, M.D.

29. On April 16, 2015, the Claimant returned to Dr. Pitzer for a follow up IME. According to Dr. Pitzer, there was pain in thoracolumbar spine with pain across the pelvic region. According to Dr. Pitzer, the Claimant did not indicate radiating pain and he had a pain level of 6/7 out of 10 on average.

30. Dr. Pitzer was of the opinion that there was not a significant change in the Claimant's condition and the Claimant remained at MMI. Dr. Pitzer noted that the significant changes and current restricted tolerances were not consistent with the previous FCE performed at the time of MMI.

31. Dr. Pitzer provided the Claimant with an increased impairment rating of 33% whole person and indicated that at the time of his previous impairment rating, Dr. Pitzer did not have the operative reports and should have included the thoracic spine in the rating.

Dr. Pitzer's Testimony

32. The testimony of Dr. Pitzer was taken two times, by evidentiary deposition, the first time on February 13, 2015. Dr. Pitzer testified that absent a new injury or some intervening aggravation he would not expect the Claimant's condition to get progressively worse (February 13, 2015 Pitzer deposition, p. 8, lns 1-7). Dr. Pitzer confirmed a 35 lb. lifting restriction during his deposition and a light to medium work category (February 13, 2015 Pitzer deposition p. 10, lns 12-25 and p. 11, lns 1-2). He confirmed a 20 lb. repetitive lift. (February 13, 2015 Pitzer deposition, p. 12, lns 3-4)

33. Dr. Pitzer testified that Dr. Wong's evaluations were new medical information to him, and he acknowledged that between Dr. Griffis DIME and the January 216, 2015 visit with Dr. Wong the Claimant had "a significant or worse" condition and was complaining of more pain symptoms, "which may require a change in restrictions (February 213, 2015 Pitzer deposition, p. 20, lns 22-25 and p. 21, lns 1-6).

34. In his February 13th deposition, Dr. Pitzer, when discussing the Claimant's new complaints of left lateral thigh pain, noted that it could be related to post-fusion changes or the Claimant's pars defects (February 13, 2015 Pitzer deposition, p. 27, lns 16-22) and that the Claimant's pars defects and degenerative changes at L5-S1 will make him more prone to have symptoms over time, and patients with this type of condition have increasing back symptoms over time even without injuries like the one Claimant sustained (February 13, 2015 Pitzer depo., p. 28, lns 18-25; 29, lns 1-8). Dr. Pitzer agreed in his August 3, 2015 deposition that the left lateral thigh complaints were new complaints (August 3, 2015 Pitzer deposition, p. 24, lns 19-25 and p. 25, lns 1-3).

35. Dr. Pitzer, in his February 13, 2015 deposition, testified that he would expect increased lifting activities to increase the Claimant's back pain, either due to the surgery, compression fracture or his pars defect (February 13, 2015 Pitzer deposition, p. 41, lns 1-5).

36. Dr. Pitzer re-evaluated the Claimant and a 2nd deposition occurred on August 3, 2015 (August 3, 2015 Pitzer deposition p. 3, lns 12-23) Dr. Pitzer indicated that Claimant was not really complaining of low back pain when he examined him on January 22, 2014 (August 3, 2015 Pitzer deposition, p. 9, lns 20-24).

37. Dr. Pitzer testified in his August 3, 2015 evidentiary deposition, that after re-evaluating the Claimant and comparing his findings between his first appointment and second, the Claimant remained at MMI. Specifically Dr. Pitzer attempted to support his ultimate opinion by noting:

- The Claimant's condition did wax and wane following MMI, which is to be expected.
- Just because a patient's symptoms may wax or wane over time, or if treatment modalities are changed, does not mean a case is

reopened. This just means that the Claimant's condition is being managed post-MMI as is to be expected.

- The Claimant's imaging had not changed since being placed at MMI.
- The Claimant showed no significant changes in range of motion from before and after MMI.
- The Claimant's functional levels had not changed significantly. There was no need for increased physical restrictions from when the Claimant was placed at MMI (nonetheless, Dr. Pitzer acknowledged increased restrictions).
- Likewise, the Claimant's condition has not caused him to suffer a greater impact on his work capacity since being placed at MMI. His approval of various jobs for the Claimant have not changed since when he placed him at MMI (the ALJ finds this vocational opinion beyond Dr. Pitzer's expertise and lacking in credibility)
- Upon examination he did not notice a neurologic involvement that was in any way different from when he examined the Claimant at the time he placed him at MMI.
- He did not detect any muscle weakness in the lower extremities when he evaluated him on April of 2015. .
- His diagnoses have not changed since he placed the Claimant at MMI.
- Patients who have had fusions often get maintenance treatment in the form of injections, whether epidural or facet blocks, for flare-ups of pain, but that doesn't change their overall status. Under these circumstances MMI would not be changed due to that type of treatment recommendation.
- There is nothing hard and fast to say that there has been a deterioration in the Claimant's functional or physical status since being placed at MMI.

38. Respondent argues that Dr. Pitzer was of the opinion that there is no objective evidence of worsening because there were no changes on imaging, because the pars defect pre-existed the injury, and "this is not a condition that you would expect to see changes on imaging." Dr. Pitzer was of the opinion that increased pain is not a basis for reopening a claim when, at the same time, he acknowledged the Claimant's increased pain levels. Dr. Pitzer's own reports and testimony document increased pain levels, significant worsening, changed restrictions and work categories. Dr. Pitzer did not provide a clear diagnosis, and to the extent that Dr. Pitzer is disagreeing with the diagnosis made by Dr. Wong of symptomatic L5-S1 pars defect, more weight is accorded to the opinions of Dr. Wong regarding the diagnoses and need for medical care.

39. The ALJ finds Dr. Pitzer's notations as of August 3, 2015 to be contrary to the weight of the evidence, and rationalizations to justify MMI as of January 22, 2014, despite the fact that the Claimant's restrictions and pain levels have increased since MMI. Indeed, Dr. Pitzer increased his former impairment rating as a result of the August 3, 2015 evaluation of the Claimant. It makes no sense to opine that the degree of impairment has increased despite the fact that MMI remains static although a lesser degree of impairment was assigned.

40. Dr. Pitzer testified that when he saw Claimant on January 22, 2014, the Claimant had pain levels on average of 3 out of 10 (August 3, 2015 Pitzer deposition, p. 13, lns 16-17) and that changes in pain complaints alone is not a worsening, and there would need to be objective signs of worsening (August 3, 2015 Pitzer deposition, p. 13, lns 20-25; p. 14, lns 1-11). The Claimant was reporting increased pain levels of 6/7 out of 10 during his 2015 reevaluation (August 3, 2015 Pitzer deposition p. 24, lns 3-8).

41. Dr. Pitzer testified that the Claimant could lift 10 lbs and would be in a sedentary to light duty work category following his April 2015 reevaluation (August 3, 2015 Pitzer deposition p. 21, lns 2-12). Dr. Pitzer also testified that he did not note quadriceps weakness on the left side at the time of his evaluation in April of 2015 (August 3, 2015 Pitzer deposition p. 21, lns 22-25).

42. Dr. Pitzer stated that epidural steroid injections are diagnostic as well as therapeutic (August 3, 2015 Pitzer deposition, p. 26, lns 17-20) and were done for the purpose of determining the current pain generator (August 3, 2015 Pitzer deposition, p. 36, lns 6-12).

43. Dr. Pitzer also agreed that the Claimant **was asymptomatic for his pars defect** prior to the work injury (August 3, 2015 Pitzer deposition, p. 27, lns 5-11), but indicated that he was not certain that the Claimant's problems were from a symptomatic pars defect because of the conflicting epidural steroid injection reports, and Dr. Wong was probably confused as a result (August 3, 2015 Pitzer deposition, p. 28).

44. After considerable discussion, Dr. Pitzer agreed that if the epidural steroid injection done was to the L2-L3 and not the L4-L5 then he would agree that the low back problems are more likely than not related to the pars defect (August 3, 2015 Pitzer deposition, p. 34, lns 14-25 and p. 35, lns 1-12).

<u>Return to Dr. Wong</u>

45. The Claimant returned to Dr. Wong on July 7, 2015 and noted an increase in thoracic back pain that began at the end of May and continued lumbar pain with left lower extremity radiculopathy and weakness.

46. Dr. Wong indicated that the Claimant's condition had worsened, but the worsening was due to the Claimant's bilateral L5-S1 pars defects "which are not work related." Dr. Wong noted that the Claimant had an IME with Dr. Pitzer.

47. Dr. Wong diagnosed an acute thoracic sprain and referred the Claimant to physical therapy for the thoracic spine and made a referral to Dr. Horner (physiatry) if there was continued pain. On examination, Dr. Wong noted that there was burning pain above the surgical incision. On physical examination, the Claimant also had maximum tenderness in the paraspinous areas and pain with motion. The Clamant had difficulty walking, parathesia and muscle weakness.

48. According to the Claimant, his current therapy is different than the therapy provided post operatively, and his condition has worsened in that he is not able to do all the activities that he was doing at the time he was released, he is more restricted and has more problems bending twisting and lifting. Now he can only lift about 10 lbs.

Medical Records Review and Testimony of L. Barton Goldman, M.D.

49. On July 15, 2015, Dr. Goldman performed a medical records review at the request of the Claimant. Dr. Goldman testified at hearing that the only reason he did not perform a physical examination of the Claimant was because of his inability to see the Claimant in a timely manner for the legal deadlines in the case.

50. Dr. Goldman also testified that in forming his opinion he was relying on Dr. Wong's opinions regarding diagnosis and treatment recommendations. Dr. Goldman stated that he knew Dr. Wong and trusted his judgment and treatment recommendations, but disagreed with his causation opinions, specifically, with Dr. Wong's opinion that the L5-S1 pars defect, and its worsening effects, was not work-related.

51. Dr. Goldman indicated in his report and testified at hearing that the pars defect is a congenital or preexisting condition and because the Claimant has no past medical history for prior back pain it would be an asymptomatic finding and apparently not caused by this particular injury. The fractures from essentially T12 all the way down through the L4 levels would certainly create abnormal body mechanics and increased loading on the posterior elements at the L5 and S1 levels that could be symptomatically aggravating to the pars defects as described, the facet joints at L4-L5 and L5-S1 as well

as creating additional stress in both the multifid and the iliocostalis musculature as well as the iliopsoas stabilizing anterior musculature.

52. Dr. Goldman indicated that the pars defect probably represents an asymptomatic and preexisting condition in terms of the pars defect, but certainly the nature of the injury biomechanically could create an aggravation if not at the pars level at the posterior elements surrounding the pars defect where deep muscle core stabilization would already be suboptimal (although asymptomatic) as a result of the pars defect.

53. Dr. Goldman discussed the probable biomechanical reason for the Claimant's now symptomatic L5-S1 pars defect as a consequence of the work related injury. Dr. Goldman is of the opinion that the L5-S1 pars defect was not caused by the work-related injury as best we can tell, but the mechanical changes that the patient's spine has had to undergo as well as the overall core de-conditioning has led to a very physiologic record of accelerating symptoms once the patient's functional abilities and physical therapy moved into a more solid light to medium work category. Dr. Goldman indicated that it is certainly a clinical picture that he sees all too often. There is no documentation of any other injury or non-physiologic findings. The records that Dr. Goldman reviewed document a reasonably thorough physical examination and are consistent with Dr. Wong's assessment. Dr. Goldman concluded that within a strong medical probability the patient's current low back pain more likely than not is a direct result of acceleration of preexisting but asymptomatic conditions in the lower lumbar spine that have now needed to bear a greater load in a postural and core strength and endurance context and apparently are unable to do so.

54. Although Dr. Goldman was of the opinion that there was a good possibility Claimant was not and may never have been at MMI, the Claimant is currently no longer at MMI, according to Dr. Goldman. Dr. Goldman is of the opinion that if one used the determined prior date of MMI of January 22, 2014, as opined by Dr. Pitzer and agreed to by Dr. Griffis, one could propose that the patient was "temporarily at maximal medical improvement," by March 25, 2014, once he had completed his most intensive treatment in terms of his follow up at the Frisco Clinic and with Dr. Wong as well as at Avalanche Physical Therapy. Dr. Goldman states "once Dr. Wong determined as of March 13, 2015, his clinically probably (*sic*) opinion that the patient's symptoms were due to what this reviewer has established as a preexisting and asymptomatic but now aggravated L5-S1 pars defect as a result of the patient's work related injury, the case at the very least should have been reopened as of at least March 13, 2015 if not even January 16, 2015, when Dr. Wong reinitiated the workup that led to this clinically pertinent diagnosis."

55. Dr. Goldman indicated that he contemplated the issue of the Claimant no longer being at MMI, and he re-reviewed the records, to the degree that the providers in the case did not have the advantage of "20/20" hindsight, the most reasonable date of MMI in this case would either have been March 25, 2014, when the patient completed his physical therapy or perhaps more definitively July 3, 2014, after DIME. Dr. Goldman also indicated that the claim should be reopened as of January 16, 2015 for further workup of the condition that is due to a work-related aggravation of the patient's preexisting L5-S1 pars defect.

Temporary Total Disability (TTD)

56. The Claimant has been unable to return to his former occupation as a result of his admitted work injury. he has not been offered modified work and he has not found work in another occupation.

57. The Claimant has proven, by preponderant evidence, that he has increased restrictions since he was declared to be at MMI on January 22, 2014, and these increased restrictions result in a "greater impact on the Claimant's temporary work capacity than he had originally sustained as a result of the" injury. The Claimant's testimony in this regard is not only un-refuted but it is supported by the Respondents' IME, Dr. Pitzer.

58. The ALJ finds that the Claimant has not only experienced a change of condition, but he has experienced a newly diagnosed condition which is amounts to a mistake or error as of the time the Claimant was placed at MMI, specifically, the work-relatedness of the aggravation and acceleration of the pars defect and its subsequent disabling effects. The Claimant has increased restrictions, which result in a greater impact to his temporary work capacity.

59. According to Dr. Goldman, in his experience the Claimant's type of injury would cause an increase in pain and restrictions. The medical records document more restrictive work capabilities from 35 lbs and a light to medium work category by Dr. Pitzer in January of 2014, to his repeat evaluation in April of 2015 when he limited the Claimant to 10 lbs and a sedentary to modified light work category.

60. Dr. Pitzer's evaluation also documents an increase in pain levels from 2 to 4 in January of 2014; and, from 6 to 7 in April of 2015. According to Dr. Pitzer, there was not much in the way of low back problems documented in 2014 as compared to 2015, and that the development of left lateral thigh pain was new and is a symptom that can be associated with L5-S1 pars defect. For the reasons outlined herein below, the ALJ does not find Dr. Pitzer's opinion that the Claimant has remained at MMI **credible.**

61. The Claimant testified credibly that he is worse and not able to do as many things now as he could when he was initially placed at MMI by the doctors. The ALJ finds that this testimony is un-refuted and, indeed, supported by the medical records.

62. The ALJ finds that Claimant has proven that he has been temporarily and totally disabled since January 16, 2015, the date he returned to Dr. Wong.

The claimant's worsened condition has resulted in greater physical restrictions and has had a greater impact on the claimant's temporary work capacity beyond that which existed at MMI. This is supported by the following:

1) The Claimant credibly testified that his condition had worsened and this worsening has affected his activities of daily living and he is less able to care for himself and perform many of the things that he was able to do prior to the injury and at MMI.

2) Claimant reported pain levels of 2 on a good day and 4 on a bad day in January of 2014 to Dr. Pitzer: in April of 2015 Claimant had pain levels of 6/7.

3) There is a newly diagnosed medical condition of a symptomatic L5S1 pars defect, with additional findings of radiation to Claimant's left thigh and knee, including numbness and documented weakness in Claimant's left quadriceps muscle. Dr. Goldman testified that in his experience this type of diagnosis and condition will cause increased pain and limitations

4) Dr. Wong indicated as of January 16, 2015 Claimant's condition had worsened and required further diagnostic work up in order to diagnosis and treat Claimant's condition, this included X-rays, MRI's, and diagnostic L2L3 injections

5) The Claimant testified he cannot perform the job that he did at the time of injury and is not able to work at this time

6) There has been a increase in Claimant's work restrictions since MMI on January 22, 2014 from a valid FCE in December of 2013 indicating that Claimant was able to lift and carry 35 lbs, 25 lbs frequently and 10 lbs constantly; permanent restrictions from the ATP of lifting up to 30 lbs, 15 lbs repetitive lifting. By November of 2014 a FCE performed by OT Resources confirms that Claimant has a lifting ability of 10 lbs-one time lift, and employability opinion that Claimant is not able to work at that time

7) There is change of work capacity level from Dr. Pitzer. In January of 2014 he indicated Claimant should be able to work in the light to medium work category with a maximum lift of 35 lbs and repetitive lifting of 20 lbs; In April of 2015 Dr. Pitzer indicates that Claimant's work capacity is now a sedentary to light work category with lifting of 10 lbs

Claimant is entitled to an award of temporary total disability benefits because the worsened condition has resulted in a "greater impact" of his work capacity than existed at the time of MMI, and even with the limitations that he had at the time of MMI, he is even more limited now.

Work-Relatedness of the Aggravation of the Pars Defect and the Consequences Thereof

63. The Claimant's back pain and associated symptoms are causally related to the admitted compensable injury of June 2, 2013, specifically, any symptoms related to a pre-existing but previously asymptomatic L5 pars defect were aggravated and accelerated by the admitted compensable injury, but the diagnosis that the pars defect had become symptomatic did not occur until Dr. Wong's visit of January 16, 2015..

64. The Claimant has a documented change of subjective symptoms after MMI and a new diagnosis of a symptomatic L5-S1 pars defect. Diagnostic testing was performed that confirms that this is the current pain generator that requires treatment. Although the pars defect is pre-existing and most likely congenital, Dr. Goldman is of the opinion that it can be aggravated by trauma and the type of surgery performed to cure and relieve the effects of the work related injury in this case. Dr. Goldman is also of the opinion that the fusion surgery also altered the biomechanics of the spine and as a result the previously asymptomatic pars defect became symptomatic as a consequence. In this case there was significant alteration in the spinal biomechanics due to the fractures, pain and fixation, not to mention the injury itself. Although Dr. Goldman did a medical records review and did not physically examine the Claimant, the ALJ finds his opinion concerning the work-relatedness of the aggravation and acceleration of the pars defect and its effect on the biomechanics of the spine more credible and persuasive than the opinions of Dr. Wong and Dr. Pitzer that the aggravation of the pars defect is not work-related.

65. Although the Claimant's initial pain drawings document lower lumbar spine and some lower leg problems and the Respondents argued that these were not new symptoms, Dr. Goldman is of the opinion that the pars defect symptoms began "perculating" when the Claimant became more active and was participating in his work hardening therapy program.

66. The ALJ accords more weight to the opinions of Dr. Goldman regarding whether the work injury rendered the Claimant's previous asymptomatic lumbar L5-S1 pars defect symptomatic. Among other credentials bearing upon his expertise, Dr. Goldman is Level II Accredited and helped develop and teaches the Level II curriculum to physicians seeking Level II accreditation. Dr. Goldman is the only physician to have performed a complete review of the medical records in forming his opinion. His thoroughness and greater expertise shine through in his opinion of the critical issue, "work-relatedness of the pars defect and its contribution to the Claimant's worsened condition since originally having been declared to be at MMI. Dr. Goldman did not rely on the subjective complaints of Claimant, but relied upon a thorough review of the medical records in a historic and reflective manner.

67. The medical records portended the potential development of a symptomatic L5-S1 pars defect as early as Dr. Wong's operative report which notes "Claimant's L5-S1 pars defect is not symptomatic yet." Dr. Goldman notes as early as June 12, 2013 that there is a degradation and incompetency, particularly of the posterior thoracolumbar muscular, which potentially would effect (*sic*)whether there would be further decompensation at the proximate levels to the documented fractures*, i.e.* at the L5 level (Respondents' Exhibit H, p. 79)

68. Dr. Goldman is of the opinion that Claimant is not currently at MMI because the Claimant's condition worsened, new symptoms were present (left lateral thigh pain and numbness radiating to knee), which required diagnostic testing (x-rays, MRI, epidural steroid injections) to identify a new condition subsequently diagnosed as a result*, i.e*. symptomatic L5-S1 pars defect.

69. Dr. Goldman is of the opinion that the Claimant's L5-S1 pars defect was not caused by the industrial injury, it was pre-existing and probably congenital. Dr. Wong indicated that Claimant had worsened and it was more likely than not related to his L5-S1 pars defect. Dr. Goldman disagreed with Dr. Wong's opinions that the pars defect was not related to the work injury because it pre-existed the work injury. He was disagreeing with Dr. Wong if Dr. Wong's opinions were that the current treatment necessary for the pars defect was not related to the work injury, because the treatment for and subsequent changes to the Claimant's spine rendered those defects symptomatic and were proximately and causally related to the consequences of the original admitted work-related injury.

<u>Ultimate Findings</u>

70. The ALJ finds the Claimant's testimony credible and un-impeached. Further, the ALJ finds the opinions of Dr. Goldman on the work-related consequences of

the aggravation and acceleration of the Claimant's pars defect more credible and persuasive than the opinions of Dr. Pitzer and Dr. Wong to the contrary because Dr. Goldman's opinions are more consistent with the totality of the medical evidence and the product of a more thorough consideration of the Claimant's medical case, despite the fact that Dr. Goldman performed a medical records review without physically examining the Claimant.

71. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of Dr. Goldman and to reject any and all opinions to the contrary on the issue of a work-related worsening condition, and mistaken failure to diagnose the aggravation and acceleration of the work related consequences of the worsening of the pars defect.

72. The mistake, as hereby found with the benefit of hindsight in reliance on Dr. Goldman's ultimate opinion, was Dr. Wong's and Dr. Pitzer's acknowledgment of the fact that the Claimant's pars defect had become symptomatic and disabled the Claimant more than he was disabled as of the MMI date of January 22, 2014, but their failure to correctly diagnose that the symptomatic pars defect and the consequences thereof, including its effect on the Claimant's biomechanics, was within the proximate chain of causation stemming from the original admitted low back injury of June 2, 2013.

73. The Claimant has proven, by a preponderance of the evidence that his work-related condition has changed/worsened since the MMI date of January 22, 2014 by virtue of the work-related consequences of the aggravation and acceleration of his underlying pars defect, and this worsening occurred as of January 16, 2015.

74. The Claimant has proven, by preponderant evidence, that he has been temporarily and totally disabled since January 16, 2015 and continuing. The period from January 16, 2015 through August 8, 2015, the hearing date, both dates inclusive, equals 205 days. The admitted TTD rate is $351.22 per week, or $50.17 per day. Aggregate past due TTD benefits for the above-mention range of dates, equal $12,543.57.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible and un-impeached. Further, as found, the opinions of Dr. Goldman on the work-related consequences of the aggravation and acceleration of the Claimant's pars defect were more credible and persuasive than the opinions of Dr. Pitzer and Dr. Wong to the contrary because Dr. Goldman's opinions were more consistent with the totality of the medical evidence and the product of a more thorough consideration of the Claimant's medical case, despite the fact that Dr. Goldman performed a medical records review without physically examining the Claimant.

Substantial Evidence

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

Re-Opening

c. The Claimant agreed that he was at MMI on January 22, 2014, pursuant the opinion of the DIME examiner, Dr. Griffis. He is now requesting that his case be reopened effective January 16, 2015, because he was no longer at MMI as of that date. The DIME process does not govern the determination of whether a claimant's condition has worsened after MMI, and whether such worsening is causally-related to the original industrial injury. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002) A change in condition refers to either a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328, 1330 (Colo. App. 1985); accord *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323, 330 (Colo. 2004).

d. A mistake in diagnosis is sufficient to justify reopening. *See Standard Metals Corp. v. Gallegos,* 781 P.2d 142 (Colo. App. 1989) [under circumstances where there is a mistake in diagnosis because the medical technology available to the treating physician at the time of the initial order is limited, a petition to reopen based on a mistake of fact may properly be granted]. At the time a final award is entered, *available medical information may be inadequate*, a diagnosis may be incorrect, or a worker may

experience an unexpected or unforeseeable change in condition subsequent to the entry of a final award. When such circumstances occur, § 8-43-303, C.R.S., provides recourse to both the injured worker and the employer by giving either party the opportunity to file a petition to reopen the award. The reopening provision, therefore, reflects a legislative determination that in "worker's compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute." *Standard Metals Corp v. Gallegos, supra,* at 146 (quoting *Grover v. Indus. Comm'n,* 759 P.2d 705 (Colo. 1988).

e. In *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270, 273 (Colo. App. 2005), the Court cites the Larson treatise on Workers' Compensation (8A. Larson, *Larson's Workers' Compensation Law* § 131.05 [2] [b], at 13-162 (2004):

> "[T]he desirability of preserving a right to reopen for genuine mistake seems too self-evident for argument. In the nature of things, there are bound to be many occasions when even the most thorough and [skillful] diagnosis misses some hidden compensable condition. Should the Claimant then be penalized because of an erroneous disposition, either by award or settlement, when the only fault lies in the imperfections of medical science?"

Reopening is permitted on several grounds, including mistake. *See* § 8-43-303(1), C.R.S. "The grounds of 'mistake' as used in [section 8-43-303] means any mistake, whether of law or fact." *Ward v. Azotea Contractors,* 748 P.2d 338, 341 (Colo. 1987). A mistake in diagnosis may be "sufficient to justify reopening." *Berg v. Indus. Claim Appeals Office, supra.* The *Berg* court rejected the argument that the claimant's failure to timely object to a Final Admission and obtain a DIME forfeits his right to reopen his claim. As found, the mistake, as hereby determined with the benefit of hindsight in reliance on Dr. Goldman's ultimate opinion, was Dr. Wong's and Dr. Pitzer's acknowledgment of the fact that the Claimant's pars defect had become symptomatic and disabled the Claimant more than he was disabled as of the MMI date of January 22, 2014, but their failure to correctly diagnose that the symptomatic pars defect and the consequences thereof, including its effect on the Claimant's biomechanics, was within the proximate chain of causation stemming from the original admitted low back injury of June 2, 2013.

<u>Temporary Total Disability</u>

f. As found, the Claimant has been unable to return to his former occupation as a result of his work injury. Claimant was not offered modified work and has not found work in another occupation. In City *of Colorado Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997), the Court held that in order to receive TTD benefits based on a change of condition reopening, a claimant must show increased restrictions which result in a "greater impact on the Claimant's temporary work capacity than he had originally sustained as a result of the" injury (emphasis in original), 954 P.2d at 639-640. The disability, however, need not be proven by medical evidence alone. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, this is a case not only of a change of condition, but also a case of a newly diagnosed condition (the work-relatedness of the pars defect and its consequences on MMI and ability to work) which amounts to a mistake or error. As found, the Claimant has proven he has increased restrictions, which result in a greater impact to his temporary work capacity.

g. As found, Dr. Goldman testified that in his experience this type of injury would cause an increase in pain and restrictions. The medical records document more restrictive work capabilities from 35 lb and a light to medium work category by Dr. Pitzer in January of 2014, to his repeat evaluation in April of 2015 when he limited Claimant to 10 lbs and a sedentary to modified light work category. Dr. Pitzer's evaluation also documents an increase in pain levels from 2 to 4 in January of 2014; from 6 to 7 in April of 2015. Dr. Pitzer also testified that there was not much in the way of low back problems documented in 2014 as compared to 2015, and that the development of left lateral thigh pain was new and is a symptom that can be associated with L5-S1 pars defect. As found, the Claimant testified credibly that he is worse and not able to do as many things now as he could when he was initially placed at MMI by the doctors. January 16, 2015, the date he returned to Dr. Wong. Consequently, as found, the Claimant has proven temporary total disability since January 16, 2015 and continuing.

h. In determining entitlement to temporary total benefits it is the impact of the claimant's work "capacity," not proof of an actual wage loss, which determines whether the claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI.

i. The Industrial Claim Appeals Office determined that *City of Colorado Springs v. Indus. Claim Appeals Office, supra,* stands for the proposition that a worsening of condition after MMI may entitle a claimant to additional temporary disability benefits if the worsened condition caused a "greater impact" on the claimant's temporary work capacity than existed at the time of MMI. *Root v. Great American Insurance Company,* W.C. No. 4-534-254 [Indus. Claim Appeals Office (ICAO), (April 15, 2009]. Further, the ICAO that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss" where, for example, the claimant was not working

immediately before the worsened condition. *Moss v. Denny's Restaurants,* W.C. No. 4-440-517 (ICAO, September 27, 2006).

j. In *Sheryl Friesz v. Wal-mart Stores, Inc. and American Home Assurance,* W.C. No. 4-823-944-01 (ICAO, December 21, 2012*),* ICAO determined that the critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on the claimant's temporary work "capacity." *See El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Ridley v. K-Mart Corp.,* W.C. No. 4-263-123 (ICAO, May 27, 2003). It therefore follows that it is the impact of the claimant's work "capacity," not proof of an actual wage loss, which determines whether a claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI. In *Sheryl Friesz v. Wal-mart Stores, Inc. and American Home Assurance, supra,* the claimant suffered a work related condition that at the time of MMI rendered her incapable of working. The claimant had CRPS that significantly impaired her ability to work at the time of MMI. The ALJ relied on the claimant's report of increased pain, and testimony regarding a decrease in her ability to participate in activities of daily living and in her reported physical abilities to sustain the award of temporary disability benefits. ICAO noted that even though it is true that the claimant's open labor market options were quite limited at the time of MMI and excluded her from working for her employer, her options were even more limited after her worsening and the reopening. In *Sandra E. Ridley v. K-mart Corp. (Store No. 4918)* W. C. No. 4-263-123 (ICAO, 2003) The lack of change in permanent work restrictions assigned at the time of MMI did not prevent a finding of entitlement to TTD after worsening. In *Annie Moss v. Denny's Restaurants*, W. C. No. 4-440-517 (ICAO, 2006) ICAO determined that the ALJ may rely on Claimant's anecdotal reports of symptoms and perceptions of his\her own limitations as well as on the medical evidence in order to determine whether there has been an impact of claimant's work "capacity." As found, the ALJ relied, in part, on the Claimant's reports of symptoms. These reports, however, as found, were corroborated by the medical record.

k. the Claimant temporary total disability benefits at the admitted rate of $351.22 per week, or $50.17 per day, from January 16, 2015 through August 8, 2015, the date of hearing, both dates inclusive, a total of 205 days, in the aggregate amount of $10,284.85, which is payable retroactively and forthwith. The Respondents shall continue paying the Claimant temporary total disability benefits of $351.22 per week from August 9, 2015 and continuing until cessation thereof is warranted by law.

<u>Burden of Proof</u>

l. The party attempting to reopen a claim "shall bear the burden of proof as to any issues sought to be reopened." § 8-43-303(4), C.R.S. Thus, the Claimant bears

the burden of demonstrating that a mistake meriting reopening had occurred. *See Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002); *City & Cnty. of Denver v. Indus. Claim Appeals Office,* 58 P.3d 1162, 1164 (Colo. App. 2002). An ALJ has broad discretionary authority to determine whether a claimant has met his burden of proof justifying reopening. *See Renz v. Larimer Cnty. Sch. Dist. Poudre* R-1, 924 P.2d 1177, 1181 (Colo. App. 1996). Indeed, § 8-43-303 states simply that an ALJ "may" reopen a claim if a change in condition or mistake is demonstrated. The statutory reopening authority granted ALJ's is thus permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Indus. Claim Appeals Office, supra.*

m. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of establishing whether a case should be re-opened and entitlement to additional 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 with respect to a changed condition, mistake at the time he was declared to be at MMI, and entitlement to additional TTD benefits from January 16, 2015 and continuing.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 4-920-110-04 is hereby re-opened, effective January 16, 2015.

B. The Respondents shall pay the Claimant temporary total disability benefits at the admitted rate of $351.22 per week, or $50.17 per day, from January 16, 2015 through August 8, 2015, the date of hearing, both dates inclusive, a total of 205 days, in the aggregate amount of $10,284.85, which is payable retroactively and forthwith.

C. The Respondents shall continue paying the Claimant temporary total disability benefits of $351.22 per week from August 9, 2015 and continuing until cessation thereof is warranted by law.

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 August 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*.

ISSUES

The issues for determination at the hearing were:

1. Whether the Respondents have overcome by clear and convincing evidence the DIME opinion of Dr. Jonathan Bloch regarding the Claimant's status related to maximum medical improvement ("MMI").

2. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to medical treatment recommended by the DIME examiner that is reasonably necessary to cure and relieve the effects of the Claimant's April 23, 2013 work injury.

3. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits after May 31, 2014 and ongoing.

FINDINGS OF FACT

1. The Claimant suffered a work injury on April 23, 2013 when slipped and fell on a ladder next to an upright tank. He fell through the area where a safety rail was not in place and he landed on the ground in a sitting position. He immediately felt pain in his back and legs. The Claimant was injured on the last day of an 8-day "hitch" and was then scheduled to have 6 days off.

2. The Claimant has a history of low back issues prior to April 25, 2013 and had recently undergone surgery. With respect to the prior surgery, the Claimant had been evaluated by Dr. Donn Turner in late November of 2012 for persistent low back pain. An MRI showed spondylosis at L5-S1 contributing to left lateral recessed stenosis and moderate canal stenosis. He first underwent and injection and then on January 30, 2013, the Claimant underwent the surgical procedure of a left-sided L5-S hemilaminectomy and medial facetectomy and foraminotomy with a left L5-S1 discectomy performed by Dr. Turner. By March 4, 2013, the Claimant reported that he was doing better initially after the surgery but he was having some recurrent symptoms. As of April 9, 2013, Dr. Turner noted the Claimant was progressively better. He was experiencing soreness in the mornings and some trouble sleeping at night, but the sciatica symptoms had pretty much resolved during daytime activities.

3. After the April 23, 2013 fall, the Claimant again saw Dr. Turner for a neurosurgical consultation. Dr. Turner evaluated the Claimant on April 25, 2013 and noted the Claimant had right shoulder surgery in 2010 and spine surgery in 2013. Consistent with medical records discussing the prior January 30, 2013 surgery, the Claimant completed a questionnaire for the current visit with Dr. Turner on April 25,

2013 in which he reported that he had back surgery in January of 2013 and he stated that his pain began after the surgery but it got worse after he fell.

4. Dr. Turner referred the Claimant for an MRI of the lumbar spine which was performed on April 26, 2013 and showed no evidence of recurrent disc herniation although there was a bulge on the left side. Dr. Turner recommended a left S1 selective nerve root block and if there was no improvement, then consideration of an L5-S1 fusion.

5. By May 14, 2013, the Claimant had not improved with therapy and an injection, and the Claimant was still not able to return to work secondary to his pain. Therefore, Dr. Turner recommended the L5-S1 fusion.

6. On May 28, 2013, the Claimant underwent L5-S1 decompression and fusion surgery performed by Dr. Turner.

7. On June 25, 2013, the Claimant reported he was doing much better with no nerve pain whatsoever and only a little bit of a sore back. The Claimant was started on physical therapy to get him ready to return to his heavy duty job.

8. By August 20, 2013, Dr. Turner noted the Claimant was doing better and had no sciatica whatsoever, only a little bit of back discomfort. The Claimant wanted to return to work and Dr. Turner returned him to work full duty and provided work restrictions of up to 40 pounds frequent lifting and 50 pounds infrequent lifting with a caution regarding limits for walking on stairs. Due to concerns of the employer regarding the Claimant's fitness for duty, Dr. Turner was provided with a statement of the essential job functions for Lease Operator #3 and was asked to clarify and verify that the Claimant could perform all essential functions of the job with no restrictions or accommodations. The Claimant advised Dr. Turner that he really wanted to return to work and so, on October 16, 2013, Dr. Turner opined that the Claimant could perform all essential functions, including being able to lift 51-100 lbs. for 2-5 hours of his shift. However, after starting physical therapy, the Claimant advised Dr. Turner that he was not as strong as he thought. Dr. Turner took the Claimant off work again until the Claimant completed physical therapy.

9. By December 24, 2013, the Claimant had completed physical therapy but was still not at the level required for his job description, so Dr. Turner ordered work hardening with a functional capacity evaluation at the conclusion.

10. On May 28, 2014, Dr. Turner reported that the Claimant had been doing a lot of walking and he felt great and wanted to return to work without any further studies or tests. Dr. Turner noted, "therefore, I am going to say he is at maximum medical improvement as of 5/31/2014, and he can return to work at his regular job on 6/1/2014 with a 75 pound maximum weight lifting restriction." Dr. Turner noted that if an impairment rating is needed, he would refer the Claimant to a physiatrist to obtain one. Dr. Turner further noted that he was canceling a planned selective nerve root block, a lumbar MRI, CT and x-rays since the Claimant was requesting to be put at MMI. While

Dr. Turner apparently complied with the Claimant's request to be put at MMI so the Claimant could return to work, Dr. Turner had recommended the additional studies and only appears to have canceled them due to his patient's request.

11. Dr. Rafer Leach evaluated the Claimant on October 17, 2014 for the purposes of providing a Level II physician impairment rating. Dr. Leach reviewed medical records and conducted a physical examination of the Claimant. On physical examination, Dr. Leach noted that the Claimant was "clearly uncomfortable with sitting" and had "difficulty moving from the table to the chair and certainly performing lumbar range of motion impairment measurements using dual inclinometry, but he does give valid and good effort." Based on the review of medical records and the physical evaluation, Dr. Leach opined that the Claimant was not at MMI as he believed that additional pain generators in the lumbar spine might be at play. He recommended interventional pain management and further evaluation and diagnostic studies.

12. On January 30, 2015, Dr. Jonathan Bloch evaluated the Claimant for a Division IME. He reviewed medical records prior and subsequent to the incident on April 23, 2013, took a history from the Claimant regarding the mechanism of injury, reviewed diagnostic studies and conducted a physical examination. Dr. Bloch opined that he agreed with Dr. Leach that the Claimant was not at MMI for the April 2013 injury if the Claimant was willing to undergo additional treatment. Dr. Bloch specifically recommended the Claimant undergo a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage.

13. On March 4, 2015, Dr. Turner transferred care of the Claimant to Dr. Rafer Leach.

14. On March 25, 2015, the Claimant saw Dr. Leach for evaluation and additional treatment. The Claimant complained of lumbar back pain at an 8/10 pain level. Dr. Leach performed a physical examination and noted that he agreed with the recommendations by Dr. Bloch. Dr. Leach referred the Claimant to Dr. Ken Allen for medication management and interventional pain management treatment. Dr. Leach recommended a surgical evaluation and he recommended that physical therapy and manual therapies and possibly cold laser, acupuncture and massage be implemented per the DIME recommendation. Dr. Leach also referred the Claimant for an MRI of the lumbar spine.

15. On April 20, 2015, the Claimant started to implement the treatment plan from Dr. Leach, as suggested by Dr. Bloch. Dr. Leach noted that medications would be changed, and increased for an interim period, with the goal of decreasing pain and increasing function, so that the Claimant could engage in more aggressive physical therapy and conservative modalities. The Claimant also had an initial evaluation with physical therapy at MSK Medical to develop an independent home exercise program and engage in physical therapy for progressive cervical, thoracic, and lumbar spinal

stabilization exercises and neuromuscular re-educations over a 6-8 week period with a frequency of 2-3 times per week.

16. On May 4, 2015, Dr. Lawrence Lesnak performed an IME of the Claimant, taking a history from the Claimant and conducting a physical examination. Subsequent to the IME, Dr. Lesnak also reviewed the medical records of Dr. Bloch, Dr. Turner and Dr. Leach and prepared a thorough summary of the medical records. Dr. Lesnak found that the Claimant had a long history of low back pains and bilateral leg symptoms that predated his April 23, 2013 work injury. Dr. Lesnak noted that he was seeing Dr. Turner prior to the work injury for follow up after a January 30, 2013 L5-S1 decompression/foraminotomy and discectomy procedure and had been off work until mid-March 2013 secondary to that procedure. After the work injury, the Claimant first went to the emergency room and then returned to Dr. Turner for a neurosurgical evaluation. Dr. Lesnak opined that he found no reported evidence of traumatic lumbar spine pathology on the MRI and he questioned Dr. Turner performing a posterior L5-S1 arthrodesis procedure on May 28, 2013. Dr. Lesnak then noted that Dr. Turner placed the Claimant at MMI on May 31, 2014 and sent the Claimant to Dr. Leach for an impairment rating. Dr. Lesnak opined that he agrees with Dr. Turner's placement of the Claimant at MMI on May 28, 2014 and he disagrees with Dr. Leach and Dr. Bloch's opinions that the Claimant is not at MMI. Dr. Lesnak opined that while the Claimant may require some post-MMI medical maintenance treatments, including a brief course of physical therapy and a gym pass, he did not feel that this would affect the MMI status as determined by Dr. Turner. Dr. Lesnak opines that a lumbar discogram procedure would by unnecessary and that EMG testing and other diagnostic testing is not likely to lead to surgical intervention or other treatment that would affect MMI status. Dr. Lesnak also opines that Dr. Bloch "significantly erred" in calculating the Claimant's impairment rating because of improper range of motion measurements and the failure to apportion for the Claimant's pre-existing lumbar spine pathology and surgical procedure.

17. On June 18, 2015, Dr. Leach authored a rebuttal opinion to the IME report of Dr. Lesnak. With respect to MMI, Dr. Leach continues to opine the Claimant was not at MMI as of May 31, 2014 as his symptoms and function have worsened and there are additional interventions that may improve symptoms and function. Only if the Claimant elects not to undergo these procedures, is MMI appropriately applied. Regarding apportionment, Dr. Leach notes it may be appropriate to apportion, but he defers to Dr. Bloch and Dr. Turner on this issue. As for the range of motion measurements, Dr. Leach noted that his measurements were valid and not affected by fear, inhibition, pain or neuromuscular inhibition and they were very similar to those obtained by Dr. Block.

18. At the hearing, Dr. Lesnak testified generally in accordance with his IME report dated May 4, 2015. He testified that in comparing the Claimant's 2 MRI reports, from before and after the April 23, 2013 fall, he found that the only change were expected post-surgical changes from the Claimant's prior January 2013 surgery. Dr. Lesnak testified that between the Claimant's second May 28, 2013 surgery and being placed at MMI by Dr. Turner on May 31, 2014, the Claimant was on medications, in physical therapy and work hardening. Dr. Lesnak attributes the Claimant's continuing

low back pain to the lack of movement in his fused section. He opined that an MRI or referral to an interventional physiatrist will not change the Claimant's function. He further opined that being at MMI does not necessarily mean that a patient is "fixed" or "cured" but only that there is no more active care that is likely to improve the condition. Thus, in spite of Dr. Bloch's recommendations, Dr. Lesnak finds that Dr. Bloch is incorrect when he opines that the Claimant is not at MMI because the Claimant's condition is stable. He further testified that the advisory impairment rating by Dr. Bloch is incorrect due to the failure to apportion and the calculation of the impairment rating itself. On cross-examination, Dr. Lesnak testified that the diagnostics and modalities recommended by Dr. Bloch, including: additional MRI, pool therapy, physical therapy, work hardening, cold laser therapy, acupuncture and massage are not likely to be curative in nature and are not going to solve the Claimant's anatomic condition. He went on to testify that earlier on these modalities are more helpful, but at this juncture in the Claimant's care, the passive, manual modalities are not recommended by the Medical Treatment Guidelines because they are not likely to be curative. He did concede that if there is a flare of the Claimant's symptoms, that the modalities could be helpful and reasonable, but opined that this would be in the nature of maintenance medical care.

19. At the hearing the Claimant testified that after his January 2013 spinal surgery, he was released to return to work without any restrictions and could lift up to 100 lbs. as per his job requirements. Before his work injury on April 23, 2013, the Claimant testified that he would be a little sore in the mornings but could perform all of the essential functions of his job. The Claimant testified that had he not had the work injury, he had no plans to return to Dr. Turner. The Claimant also testified that once he was cleared for work after recovering from his January 2013 surgery, he did not use any narcotic drugs because that could cause him to lose his job. He testified that he still had some narcotics left over from when he was off work for the surgery and recovery, but that he no longer took them once he went back to work.

20. In weighing the competing opinions of Dr. Leach and Dr. Lesnak, the ALJ finds the opinion of Dr. Leach to be more persuasive. The ALJ is not persuaded that Dr. Turner's opinion as to MMI supports Dr. Lesnak either. Dr. Turner was clearly recommending additional treatment and diagnostics aimed at identifying whether the Claimant was a surgical candidate or if there was further medical treatment to recommend for improvement of the Claimant's condition. Dr. Turner only placed the Claimant at MMI as the Claimant requested he do so at that time in accordance with the Claimant's desire to return to full time, unrestricted work. To the extent that the Claimant is unable to return to work due to an inability to meet essential job functions, as is the case, then the opinion of Dr. Turner as to MMI status is questionable. Moreover, the DIME physician found the Claimant was not at MMI and made reasonable recommendations for diagnostics and continued treatment aimed at improving the Claimant's function and condition. Dr. Lesnak's opinion clearly varies from that of Dr. Bloch. However, Dr. Lesnak's opinion amounts to a mere difference of opinion with Dr. Bloch. The Respondents failed to establish that Dr. Bloch's opinion regarding MMI was in error.

CONCLUSIONS OF LAW

Generally

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

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

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

Burden of Proof for Challenging an Opinion on MMI Rendered by a DIME Physician

The DIME physician's findings include his subsequent opinions, as well as his initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning a claimant's medical impairment rating is binding on the parties unless it is overcome only by clear and convincing evidence. C.R.S. §8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015 (Colo. App. 2002).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." C.R.S. §8-40-201(11.5), C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's finding that a party has or has not reached MMI is binding unless overcome by clear and convincing evidence. Whether a party has overcome the Division IME's opinion as to MMI is a question of fact for the ALJ as the sole arbiter of conflicting medical evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A finding that the claimant needs additional medical treatment (including surgery) to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures which offer a reasonable prospect for defining the claimant's condition or suggesting further treatment are warranted would be consistent with a finding that a Claimant was not at MMI. *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (I.C.A.O. August 11, 2000). However, the requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of MMI per C.R.S. § 8-40-201(11.5), nor does the need for recommended diagnostic testing solely to assist in the maintenance of a claimant's condition. *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

Here, the Respondents have failed to meet their burden of proof to show that it is highly probable that the opinion of Dr. Bloch on the determination of the Claimant's MMI status was clearly incorrect. Dr. Lesnak disagrees with Dr. Bloch's opinion that the Claimant is not at MMI. Dr. Bloch found that the Claimant is not at MMI because he opined that there were additional medical treatment options to improve the Claimant's low back condition, which, if the Claimant were willing to undergo such treatment, would not be consistent with a finding of MMI. He specifically recommended the Claimant undergo a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage. The opinion of Dr. Bloch is further supported by that of Dr. Leach who strongly disagrees

with Dr. Lesnak because he opines that there is a likelihood of discogenic pain generators and he believes that the recommended modalities are likely to improve the Claimant's function and overall condition.

The conclusion of Dr. Lesnak that the Claimant is at MMI for his low back condition amounts to a difference of opinion with Dr. Bloch, which is not sufficient to overcome the DIME physician's opinion. Thus, Dr. Bloch's determination that the Claimant is not at MMI has not been overcome by clear and convincing evidence. Therefore, Respondents' application to overcome the DIME opinion is denied and dismissed.

Medical Benefits–Authorized, Reasonably Necessary and Causally Related

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

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical

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

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

The Claimant continues to suffer from low back pain attendant to his April 23, 2013 work injury. Both the DIME physician Dr. Bloch and the Claimant's current ATP, Dr. Leach recommend the Claimant undergo a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage. The Claimant's surgeon, Dr. Turner had also recommended additional diagnostics and treatment, but cancelled them as the Claimant voiced a strong preference to return to work with no work restrictions which necessarily required a finding of MMI. The Claimant has been unable to return to work as the Claimant cannot perform essential job functions and he is not at MMI per Dr. Bloch and Dr. Leach and as found herein. While Dr. Lesnak disagrees and opines that that the recommended treatment is not likely to result in improvement, his opinion on this issue is less persuasive than that of Dr. Leach.

Thus, the Claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. Leach and Dr. Bloch is reasonably necessary to cure and relieve the Claimant of the effects of his April 23, 2013 work injury.

Temporary Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires 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(d)(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office*, supra. Pursuant to statute, temporary total disability benefits may cease at the first occurrence of any one of the following:

(a) the employee reaches maximum medical improvement;
(b) the employee returns to regular or modified employment;
(c) the attending physician gives the employee a written release to return to regular employment; or
(d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

Through testimony and the exhibits, it was established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. Although the Claimant was placed at MMI for this work injury by Dr. Turner, and Dr. Turner returned him to work with no restrictions effective June 1, 2014, the Claimant was ultimately unable to return to work. The Claimant's condition left him with the inability to meet the essential functions of his job duties, as required by his employer, and he was not permitted to return to work. As Drs. Leach and Bloch found, the Claimant was not at MMI and his physical abilities did not correspond to the Claimant's ability to return to regular employment. The Claimant suffered a wage loss as a result of his April 23, 2013 work injury. Therefore, the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 1, 2014 ongoing until the occurrence of one of the events set forth in C.R.S. 8-42-105 (d)(3).

ORDER

It is therefore ordered that:

1. The Respondents have failed to meet the burden of proving, by clear and convincing evidence that the DIME physician is in error as to his determination that the Claimant is not at MMI.

2. The Respondents' application to overcome the DIME opinion is denied and dismissed.

3. The Respondents shall provide medical treatment to the Claimant consisting of the treatment recommendations by Drs. Bloch and Leach, including a repeat MRI, evaluation with an interventional physiatrist and a neurosurgeon to rule out instability or associated discogenic pain generators above the level of fusion, possibly steroid injections and ongoing manual therapies, including physical therapy with progression to work hardening, cold laser therapy, acupuncture and massage.

4. The Claimant is entitled to receive temporary total disability indemnity benefits commencing on June 1, 2014, the day after Dr. Turner placed the Claimant at MMI and the day that Dr. Turner returned the Claimant to work with no restrictions. The Claimant's TTD benefits shall be calculated and paid in accordance with C.R.S. § 8-42-105.

5. Respondents shall pay statutory interest at the rate of 8% per annum on all amounts due and 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 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: August 7, 2015

Kimberly A. Allegretti

#JJHHHFCF0D198Vv 12

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

ISSUES

- Is Claimant entitled to a change of physician pursuant to 8-43-404(5)(a)(VI), C.R.S.?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant suffered a compensable industrial injury on October 17, 2013 while working for Respondent-Employer. Claimant injured her low back when she was lifting a fan while in an awkward position. An E-1 was filed by Employer on October 8, 2013.

2. Claimant was initially evaluated by Laura Rosi at Concentra, who assessed Claimant as suffering a lumbosacral strain. Claimant was next evaluated by Darla Draper, M.D. who noted experienced a significant increase in back pain after Claimant started physical therapy.

3. John Aschberger, M.D. at Concentra became an authorized treating physician for Claimant in early 2014. Dr. Aschberger conservatively treated Claimant with medications and massage therapy. From January 17, 2014 through February 28, 2104, Dr. Aschberger noted symptom improvement.

4. Claimant saw Dr. Draper on March 7, 2014, at which time it was noted that she was stable and "close to discharge".

5. On May 2, 2014, Dr. Aschberger determined that Claimant was at maximum medical improvement ("MMI") and assigned a 9% whole person impairment.

6. On May 7, 2014, Claimant was seen for follow-up evaluation by Dr. Draper, who noted Claimant attained MMI today and ordered massage therapy 1/wk for 4wks, medication and monitoring appointments with Dr. Aschberger for one year, 1-2 steroid injections if needed for radicular symptoms.

7. Claimant was seen by Dr. Aschberger on June 27, 2014, at which time she reported increasing symptoms. They discussed treatment options and Dr. Aschberger prescribed additional hydrocodone, as well as naproxen.

8. Claimant was next seen by Dr. Aschberger on July 25, 2014 and she reported increasing symptoms. Dr. Aschberger noted that previous recommendations including massage therapy and a repeat injection were denied. Dr. Aschberger recommended electrodiagnostic testing and noted that he considered her treatment to be maintenance, but "if there is objective deterioration MMI may need to be reassessed". Dr. Aschberger gave Claimant a flector patch for additional symptom relief.

9. Dr. Aschberger examined Ms. Goff on September 12, 2014 at which time he noted that Claimant had pain in her back and right leg. His assessment was lumbar radicular symptoms with a L3-L4 disc protrusion. He testified these were worsening symptoms. He recommended a repeat epidural at L4, since Ms. Goff had a response to the previous epidural injection. Dr. Aschberger referred Claimant to Dr. Sacha.

10. Greg Reichhardt, M.D. conducted a Division of Worker's Compensation Independent Medical Examination on September 18, 2014. Claimant reported aching pain in her low back, with pain extending down the posterior aspect of the right thigh and calf with tingling in the plantar medial aspect of the foot. Dr. Reichhardt concluded that Claimant was not at MMI.

11. Dr. Reichhardt recommended that Claimant be evaluated by a psychologist to consider whether she suffered from work-related depression. He noted: "If she does have work-related depression it would be reasonable to consider use of an antidepressant. One might consider Cymbalta to see if this helps with her pain as well as her depression." Dr. Reichhardt stated that he could not assign an impairment rating for her subjective report of depression, as he could not make a medically probable diagnosis of work-related depression. In his testimony at hearing, Dr. Aschberger agreed that it was reasonable to refer Claimant for a psychological evaluation.

12. Dr. Reichhardt also opined that it would be reasonable for Claimant to be reevaluated by Dr. Sacha for consideration of a repeat epidural steroid injection. Dr. Reichhardt stated that an electrodiagnostic evaluation would also be appropriate given her report of a feeling of "near giving way with the right leg, as well as her recurrent symptoms". Dr. Reichhardt observed that Dr. Aschberger also felt that this might help direct treatment.

13. Dr. Aschberger testified at the hearing[1] and stated Ms. Goff has not voiced any opposition to him treating her. In treating patients within the worker's compensation system, Dr. Aschberger testified that he has experienced the situation where the DIME physician overruled his finding of MMI for a patient he was treating. He testified that he did not have a problem treating a Claimant when his determination of MMI was overruled by the DIME physician. He had no problem providing the treatment to Claimant which was recommended by the DIME physician, Dr. Reichhardt.

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[1] Although he was not offered as an expert, Dr. Aschberger is board-certified in Physical Medicine and Rehabilitation and is Level II accredited pursuant to the *Worker's Compensation Rules of Procedure.*

14. Dr. Aschberger did not talk with Claimant about the DIME report issued by Dr. Reichhardt and had not received a copy of the DIME report. Claimant testified that she did not provide a copy of the DIME report to Dr. Aschberger, nor did she discuss it with him. Dr. Aschberger testified he generally receives the copy of the DIME report from the insurance carrier. He was not aware of the specific recommendations made by Dr. Reichhardt. Dr. Aschberger also stated that he is not in contact with the carrier as to whether the claim is open or closed.

15. Dr. Aschberger saw Claimant in follow-up on October 7, 2014 and her complaints were pain in the back and into the anterior thigh. It was noted that he had referred her for a repeat lumbar epidural injection, which was denied. Dr. Aschberger opined that given her worsening symptoms and signs of weakness, Claimant did not appear to be at MMI. He referred her for a surgical evaluation by an orthopedic spine specialist.

16. On October 9, 2014 Claimant's counsel (Patrick Barnes, Esq.) sent a letter [via facsimile] to Respondents' counsel requesting a change of physician to Stephen Lindenbaum, M.D. Claimant testified that this letter expressed her wish to change treating physicians. There was no response to this correspondence, which was admitted into evidence.

17. Claimant was evaluated by Gary Ghiselli, M.D. on October 16, 2014, at which time he reviewed her symptoms, as well as the 2013 MRI. Dr. Ghiselli's assessment was continued low back and right anterior thigh pain following 10/7/13 work injury. Claimant was noted to have been failing non-operative treatment thus far, but another injection was scheduled next week. Degeneration of lumbar or lumbosacral intervertebral disc, as well as displacement of lumbar or lumbar intervertebral disc (without) myelopathy), lumbago, radiculitis (thoracic lumbosacral neuritis or radiculitis unspecified) was noted. Dr. Ghiselli felt it would be good for Claimant to proceed with the injection and if there she did not get lasting relief, recommended a new updated MRI.

18. Claimant received a bilateral L4 transforaminal epidural injection/spinal nerve root block on October 23, 2014 which was administered by Dr. Sacha. His report indicated Claimant reported a 90% relief of her pain.

19. Dr. Aschberger saw Claimant on October 31, 2014, noting she had a diagnostic response to her epidural injection. Immediately post-injection, she had resolution of leg as well as back pain. Dr. Aschberger described this as an excellent response to the injection.

20. A General Admission of Liability ("GAL") was filed on November 5, 2014. In the remarks section, it noted that the "per DIME" Claimant was not at MMI. Respondents admitted for medical benefits pursuant to the GAL.

21. Dr. Aschberger re-evaluated Claimant on January 2, 2015, at which time his assessment was lumbar radiculitis. Dr. Ghiselli's report was reviewed. Claimant's

previous EMG findings were described as “mild”, but supportive of an L4 distribution abnormality. Since Ms. Goff indicated that she would consider surgical intervention, Dr. Aschberger ordered a repeat MRI.

22. Dr. Aschberger next saw Claimant on February 13, 2015 and his assessment was chronic low back pain and lumbar radiculitis. Her MRI scan of 2/10/15 showed improvements over her previous test, with degenerative disc changes at L3-4 and a small central bulge which was less prominent. Ms. Goff’s electrodiagnostic testing was positive and described as “mild”. Dr. Aschberger opined she was an unlikely candidate to proceed with surgical intervention and he renewed her medication. He noted that he would see her back in two months for maintenance.

23. Claimant returned to Concentra on March 17, 2015 and was evaluated by Jennifer Huldin, M.D. Dr. Huldin’s office note indicated that Claimant presented for work note, had been at MMI for nearly a year and that she saw Dr. Aschberger monthly for medical maintenance. Dr. Huldin’s assessment was lumbosacral strain and the neurological finding of leg weakness was noted. Dr. Huldin’s plan was for Claimant to follow-up with Dr. Aschberger.

24. Claimant was seen by Dr. Aschberger on March 19, 2015 and reported a flare-up of her back symptoms. She reported pain in her back and right leg. Dr. Aschberger noted myofascial tightness and restriction upon examination, which were described as “objective findings that coincide with her symptomatology”. He recommended that she continue on her medication regimen and advised Ms. Goff to pursue a home exercise program. He also prescribed Robaxin.

25. Claimant testified at hearing that she returned to Concentra on one occasion and was not seen. She was told her case was closed. She did not specify when this occurred.

26. Dr. Aschberger examined Claimant on March 27, 2015, noting she continued to have significant irritation and the she had tenderness at the right lumbar parpaspinal levels with restricted flexion. The report for this appointment referred to the date of MMI as May 7, 2014. Claimant testified that she had spoken to Dr. Aschberger about and injection and he agreed with her. Dr. Aschberger referred her for an L4 selective nerve route block. A copy of the written referral was admitted into evidence at hearing.

27. Dr. Aschberger saw in her follow-up on April 3, 2015 and he diagnosed recurrent lumbar radiculitis. Dr. Aschberger was noted that Claimant would contact him if there was anything he could do to help expedite getting the injection authorized.

28. Dr. Aschberger examined Ms. Goff on April 17, 2015, the day after she received her injection. She did not respond well, reporting increased symptoms in her leg. The assessment was recurrent lumbar radiculitis and Dr. Aschberger recommended that Claimant continue with the hydrocodone, a muscle relaxant and naproxen.

29. Dr. Aschberger saw Claimant one week later on April 24, 2015. At that time, Claimant reported persistent irritation at the right leg, with an improvement in back pain after the injection. Dr. Aschberger concluded that Claimant was suffering from low back pain with radiated symptomatology into the lower extremity, which he felt suggested some component of sciatica. Dr. Aschberger recommended that Claimant reinitiate gabapentin and pursue a home exercise program.

30. Dr. Aschberger saw Ms. Goff for a follow-up evaluation on May 27, 2015 and noted that she had low back pain and symptoms of radiculitis. He reviewed the MRI from 2/10/15, which showed no real changes with some mild degenerative change at the L3 L4 disc. Dr. Aschberger felt that the MRI looked mild over her previous MRI scan, with improvement. He recommended a short trial of chiropractic and stated beyond that she will need to continue with "maintenance care".

31. In his appointment with Claimant on June 15, 2015, Dr. Aschberger noted that Claimant reported persistent pain in her low back, including some issues of pain radiating into the right leg. He reiterated his recommendation for a short course of chiropractic and wanted Claimant to pursue her home exercise program. Dr. Aschberger planned to see Claimant in 6-8 weeks.

32. Claimant was seen by John Mobus, D.O. on June 22, 2015 upon referral by Dr. Aschberger. Claimant was noted to have right–sided belt line low back pain, aching and throbbing into right lateral thigh, but no motor or sensory deficit. Dr. Mobus' diagnosis was chronic repetitive right lumbar pelvic strain. Dr. Mobus provided treatment in the form of manipulation of lower thoracic spine, lower lumbar spine and right SI joint. Claimant returned to Dr. Mobus on June 25th for a re-check, at which time he noted she felt some benefit from the previous appointment, but was experiencing ongoing unresolved back pain.

33. Claimant returned to Dr. Mobus on June 29, 2015, reporting continued bilateral belt line low back pain, somewhat stronger on the right. Claimant reported her back pain improved 20%. Range of motion was notable for mild aggravation of right low back pain bilaterally. Ms. Goff was treated with myofascial release to the right lumbar and gluteal musculature, therapeutic stretching to the lower extremities. Neuromuscular therapies to the right lumbar pelvic region with pelvic blocking were also provided.

34. Claimant was seen by Dr. Mobus on July 2, 205, who noted she had complaints of regional right SI, low back and lumbopelvc pain. Ms. Goff denied radiation, referral or radicular complaints. She noted moderate improvement in her pain with treatment, with symptoms returning the following day. Dr. Mobus provided active myofascial release to the affected area, therapeutic stretching to the lower extremities and neuromuscular therapies to the right lumbar pelvic region with pelvic blocking. Claimant was scheduled for follow-up in one week.

35. Claimant testified that she wanted to change physicians because that she wasn't getting the medical attention she needed. She felt that Dr. Aschberger should

have been provided a copy of the DIME report and that he should have had all the information related to her care.

36. Claimant has experienced symptoms of depression. She has not had a conversation with Dr. Aschberger or other medical personnel at his office regarding a referral to a psychologist. As of the date of hearing, she had not been referred for a psychological evaluation.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following 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).

Change of Physician

The ALJ considered the two possible bases for change of physician under the Act. More particularly, change of physician is governed by Section 8-43-404(5)(a)(III)[2], C.R.S [effective April 1, 2015], which provides in pertinent part:

"An employee may obtain a one-time change of the designated authorized treating physician under this section by providing notice that meets the following requirements:

(A) The notice is provided within **ninety days after the date of injury**, but before the injured worker reaches maximum medical improvement.

[2] See also W.C.R.P. Rule 8-5

(B) The notice is in writing and submitted on a form designated by the director. The notice provided in this subparagraph (III) shall also serve as a request and authorization to the initially authorized treating physician to release all relevant medical records to the newly authorized treating physician.

(C) The notice is directed to the insurance carrier or to the employer's authorized representative, if self-insured, **and to the initially authorized treating physician** and is deposited in the U.S. mail or hand-delivered to the employer, who shall notify the insurance carrier, if necessary, and the initially authorized treating physician." [Emphasis added]

…

The ALJ concludes that this section of the Act does not apply in this instance, as notice was not provided within ninety days (90) after the date of injury and no copy was sent to the initially authorized treating physician. Further the request was not submitted on the form prescribed by the Director of the DOWC. Therefore, Claimant's request for change of physician does not meet the requirements of this section.

Alternatively, the ALJ considered whether Claimant is entitled to a change of physician pursuant to Section 8-43-404(5)(a)(VI), C.R.S.[3] This section provides in relevant part:

"In addition to the one-time change of physician allowed in subparagraph (III) of this paragraph (a), upon written request to the insurance carrier or to the employer's representative, if self-insured, an injured employee may procure written permission **to have a personal physician or chiropractor** treat the employee. If permission is neither granted nor refused within twenty days, the employer or insurance carrier shall be deemed to have waived any objection to the employee's request. Objection shall be in writing and shall be deposited in the United States mail or hand-delivered to the employee within twenty days…" [Emphasis added]

As a starting point, the evidence establishes that a one-time change of physician request was sent to counsel for Respondents and there was no response to this request within twenty (20) days. Under this section, this would constitute a waiver by Respondents to the request for change of physician.

However, in reviewing the other part of this statute, the ALJ concludes Claimant has failed to satisfy her burden of proof to change the authorized treating physician under the foregoing provision in two respects. First, there is no evidence before the ALJ that Dr. Lindebaum was (or is) a personal treating physician of the Claimant. The ALJ is bound to apply the plain meaning of the statute. "To discern the legislative intent, we look first to the plain and ordinary meaning of the statutory language." *City of Brighton v. Rodriguez*, -P.3d –, 2104 CO 7, 2104 Colo Lexis 61(Colo. 2014) quoting *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). A commonly accepted meaning is preferred

[3] See also W.C.R.P. Rule 8-7

over a strained or forced interpretation. *M.S. v. People*, 812 P.2d 632, 636 (Colo. 1991). Additionally, courts look to the overall statutory context when construing meaning. *Bd. of Cnty. Comm'rs. v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1066 (Colo. 2009).

The plain language of Section 8-43-404(5)(a)(VI), C.R.S. requires Claimant to request a change of physician to a personal physician or chiropractor. Since there is no evidence before the ALJ that Dr. Lindenbaum is a personal physician, this request for change of physician does not meet the Act's requirements.

Second, the inference that is drawn from this language in the statute is that the Colorado Legislature intended to impose some limitation on requests for change of physician. The use of the terms "personal physician or chiropractor" is evidence of the Legislature's intent to limit the circumstances where the injured employee can change physicians. Absent a showing that meets the requirements of the statute, the ALJ concludes that Claimant has not met her burden of proof and is not entitled to a change of physician.

The ALJ also considered Claimant's argument that the relationship between Ms. Goff and Dr. Aschberger warrants a change of physician. In this regard the ALJ considered cases decided under the prior version(s) of the Act to determine whether Claimant satisfied her burden of proof with regard to change of physician. The ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. See *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). The claimant may procure a change of physician where he/she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995).

In this case, Claimant expressed misgivings about Dr. Aschberger's treatment of her, since he had not seen the DIME report. She offered her belief that he should have all relevant information concerning her care. While this undoubtedly is true, this falls short of a showing that she and Dr. Aschberger were unable to communicate or that she did not trust him. Dr. Aschberger's treatment notes reflect that over the course of his appointments with Ms. Goff, he has discussed treatment options with her. These discussions took place at regular intervals, as Dr. Aschberger was evaluating Ms. Goff every 1-2 months. Dr. Aschberger's testimony at hearing also demonstrated to the ALJ that he was knowledgeable about Ms. Goff's course of treatment and continued to provide treatment, including referrals despite not having the DIME report. Dr. Aschberger has also offered to assist Claimant in securing authorization for treatment, as documented in his April 3, 2015 note and his testimony at hearing.

Under these circumstances, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *See Greenwalt-*

Beltmain v. Department of Regulatory Agencies, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

The ALJ notes that Claimant has received extensive medical treatment from Dr. Aschberger, both before and after MMI. The latter treatment was provided despite the fact that he had not seen the DIME report. Dr. Aschberger testified credibly that he has no problem providing treatment to a patient where MMI was reversed by the DIME physician.

Indeed, Dr. Aschberger has continued to provide treatment to Ms. Goff, despite not having a copy of Dr. Reichhardt's DIME report. The ALJ notes that the medical records admitted at hearing document the fact that Claimant had 12 appointments with Dr. Aschberger since the DIME was conducted on September 18, 2014. Dr. Aschberger's treatment records and his testimony evince a willingness to consider various treatment options and modalities. He has made multiple referrals including referrals for injections, electrodiagnostic testing and chiropractic treatment. Claimant has been able to see Dr. Aschberger (as well as Dr. Huldin) on non-scheduled appointment days. Dr. Aschberger also made referrals to other providers such as Dr. Sacha and Dr. Mobus. A repeat MRI was also performed after the DIME. Dr. Aschberger also agreed that it would be appropriate to refer Claimant for a psychological evaluation. Thus, the ALJ concludes that Claimant has continued to receive adequate treatment from Dr. Aschberger to cure and relieve the effects of her industrial injury. The ALJ is also persuaded by Dr. Aschberger's testimony that it is not unusual to have a DIME physician determine that patient is not at MMI and he would not have a problem continuing to treat Ms. Goff.

The ALJ has considered Respondents' contention that Dr. Aschberger has provided a significant amount of treatment after the DIME was conducted. The ALJ is persuaded by this argument and notes further that much of Dr. Aschberger's post MMI treatment is consistent with what was recommended by Dr. Reichhardt. This is not a case where the authorized treating physician has refused to provide treatment to the Claimant. Under these facts, a change of physician is not warranted.

In light of Dr. Aschberger's testimony concerning a psychiatric referral and Respondents' argument above, the ALJ concludes that Respondents should provide further treatment in the form of psychiatric referral for Claimant. This is reasonable given the conclusions of the DIME physician, Dr. Reichhardt and the testimony of Dr. Aschberger.

ORDER

It is therefore ordered that:

1. Claimant's request for change of physician is denied and dismissed.

2. Respondents shall provide the remaining medical treatment, as outlined in Dr. Reichardt's DIME report, including a referral for psychological treatment and prescription(s).

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: August 7, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-962-842-01

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 June 10, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 6/10/15, Courtroom 1, beginning at 8:30 AM, and ending at 12:15 PM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection, with the exception of Exhibit 12 to which there was a relevance objection, which was overruled. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, a deadline of 30 days for the filing of the evidentiary depositions of Danny Lopez , Rebecca Hohnstein, and the Claimant's rebuttal deposition was established. Thereafter, a responsive briefing schedule was established. Written transcripts of all three evidentiary depositions were filed on July 2, 2015. Instead of filing an opening brief, the Claimant filed a document labeled proposed order ('Findings of fact, Conclusions of Law and Order") on July 17, 2015, indicating that he had not reviewed the Respondents' brief. Despite the labeling of the document, the ALJ construes it as the Claimant's opening brief. On July 15, 2015, the Respondents' filed what was labeled as "Respondents Position Statement," which the ALJ construes as Respondents' answer brief. On July 20, 2015, the Respondents filed an unopposed

"Motion to File Response to Claimant's" Proposed Findings of Fact, Conclusions of Law and Order," which was granted on July 27, 2015. On July 28, 2015, the Respondents filed what is labeled as "Respondents' Answer Brief," which the ALJ construes as the Respondents' reply brief. Based on the actions of the parties in taking and filing post-hearing depositions of all witnesses listed on the Respondents' case information Sheet (CIS), and the rebuttal evidentiary deposition of the Claimant, plus the fact that **no** continuation hearing has been set, the ALJ determines that the Respondents completed their case-in-chief by evidentiary depositions, and the Claimant completed his case in rebuttal by his evidentiary deposition. Consequently, as of the filing of the Respondents' reply brief on July 28, 2015, the ALJ deems the matter submitted for decision as of that date.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits, average weekly wage (AWW); and, a reservation of the issue of temporary total disability (TTD) benefits. The respondents raised the affirmative defense of 'responsibility for termination," and the issue of unemployment insurance (UI) offset.

Despite the fact that the Respondents initiated the hearing on all issues (which accounts for the mislabeling of the briefs), the Claimant bears the burden of proof, by a preponderance of the evidence, with the exception of the issues of "responsibility for termination,' and UI offset, in which case the Respondents bear the burden of proof, by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds if compensable, to an AWW of $1,315.32.

2. The Claimant was born on January 7, 1953, and he was 62 years of age at the date of the hearing. The Claimant is right hand dominant.

3. Claimant was hired by Employer on or about July 22, 2014 as a delivery truck driver. The job required Claimant to make multiple local deliveries of petroleum in each shift. Deliveries required Claimant to drive and handle truck hoses to deliver product to customers.

Procedural History

4. The Claimant testified that he prepared a memorandum reporting his injury (Exhibit 6), which he hand delivered to the base office on a date uncertain, but before October 3.

5. On September 30, 2014, the Claimant called Rebecca Hohnstein (hereinafter "Hohnstein"), co owner of the Employer. Hohnstein advised the Claimant to bring in his access card, radio, and uniforms. She advised him that he was fired.

6. On October 3, 2014, the Claimant turned in his access card, radio and uniforms at the base office.

7. The Respondents filed a "First Report of Injury or Illness" on October 6, 2014.

8. The Respondents filed a Notice of Contest on October 14, 2014.

Prelude to the Injury Incident

9. It is undisputed from the testimony of the Claimant and Danny Lopez, the Employer's Dispatch and Operations Manager, that on September 22, 2014, the Claimant noticed a leak in one of the hoses attached to his delivery truck. He called Lopez and informed him of the leak. Lopez told him to return to the Employer's base of operations at 725 S. Main Street in Brighton ("Base"). The Claimant alleges he suffered a right shoulder injury from attempting to twist off the hose after returning to Base. The Employer denies that the Claimant engaged in that activity and suffered an injury. The ALJ finds that the Claimant did **not** suffer a right shoulder injury at this time, or at any time in the course and scope of his employment for the Employer herein.

10. The Claimant's counsel called Lopez as an adverse witness in his case-in chief, and Lopez also testified by post-hearing deposition in the Respondents' case-in-chief. According to Lopez, his responsibilities include monitoring the warehouse, ensuring employees complete their assigned tasks, and dispatching drivers to deliveries. At his deposition, Lopez testified that the Claimant was aware he was the Claimant's supervisor because new employees are informed of this during the interview process and employees know that Lopez is their supervisor simply from the course of their work. Rebecca Hohnstein corroborates Lopez, and she testified, in her evidentiary deposition, that she told the Claimant that Lopez was his supervisor. The Claimant denies that Lopez was his supervisor. The ALJ finds no plausible reason for Lopez and Hohnstein to say that Lopez was the Claimant's supervisor, if he was not. The Claimant's denial of this fact impairs his credibility. The ALJ finds that the Claimant knew, at all relevant times, that Danny Lopez was his supervisor.

The Injury Incident

11. According to Lopez, on September 22, 2014, the Claimant returned to Base around 4:00 PM. The leak was at a 3" hose connection where the fuel is sucked out from the storage container on the truck. Lopez testified the hose fits into a mount on the body of the truck, and the hose fits into the mount with a male/female coupling. The attachment is secured by flipping two ears prongs. Lopez testified to remove the hose, the ears would be unhooked, and then the hose pulled out. To put the hose back into the mount, it would be inserted, and the two ears would be secured. This contradicts the Claimant's version that the hose had to be twisted round to unhook it. The ALJ finds that Lopez's testimony concerning the removal of the hose is accurate and the Claimant's testimony in this regard is **not** accurate.

12. It is undisputed that the Claimant notified Lopez of the leak and then returned to Base for Lopez to examine the leak. Lopez testified he had removed a hose of this type on occasions in the past, including when he himself had worked as a delivery driver. It is entirely logical that Lopez inspected the hose and removed the hose from the truck after the Claimant returned to Base for the specific purpose of having Lopez examine the hose and determine what repairs were required

13. Also, according to Lopez, when the Claimant returned to Base, another employee, Josh Peak, was in the vicinity and came over to assist. Lopez positively testified that the Claimant did not assist with removing the hose from the truck. Rather, Lopez asked Peak to grab a bucket for the leaking fuel while he removed the hose, and Lopez himself unhooked the hose and drained the remaining fuel from the hose into the bucket. At his deposition, Lopez testified that, when he removed the hose, it did not feel stuck or difficult to pull out. This squarely contradicts the Claimant's version of events. According to Lopez there was no indication that Tabares had tried to unhook the hose. Also Lopez stated that Tabares did not inform him that he had injured his shoulder, nor did he appear to be in discomfort. The ALJ finds that Lopez, and not the Claimant, removed the hose.

14. The Claimant testified that he knelt on the ground, and then tried to detach the hose from the truck mount. He testified that detaching the hose was not easy, that he had to put some force and twisting action into the detachment and that, in the process, he hurt his right shoulder. He further testified that Peak had to finish detaching the hose. He also testified that Lopez never touched the hose. This contradicts Lopez's testimony that Lopez had to unhook the hose. The Claimant further testified that he did not say anything to Lopez or Peak about his shoulder since he considered neither of these individuals to be his supervisor. In his mind, the co-owner, Becky Hohnstein ("Hohnstein"), was his only supervisor. The ALJ infers and finds that the Claimant's belief in this regard is contrary to reality. The Claimant's testimony

contradicts Hohnstein's and Lopez's testimony. The ALJ finds that Lopez, and not the Claimant, removed the hose.

15. Lopez positively testified that it was unnecessary for the Claimant to have tried to twist the hose to remove it. Lopez stated there was no twisting involved with unhooking the latches or pulling the hose out. Rather, it required a forward and backward movement to insert or remove the hose. Lopez clarified in his post-hearing deposition that the hose was a suction hose, which only required lifting the ears and pulling out the hose. He also testified that the male/female interlocking parts did not even allow the hose to be moved from one side or the other once inserted. Lopez testified at hearing that the Claimant's description in his written statement that he tried to "unhook and twist off the hose" did not make sense with how the hose would be removed. The ALJ accepts Lopez's version of the "hose removal," and rejects the Claimant's version because Lopez has no direct interest in the outcome of this claim, there has been no showing of animosity for the Claimant as a motive, and Lopez version makes sense and the Claimant's version makes **no** sense.

16. According to the Claimant, he injured his right shoulder at approximately 4:00 PM, on September 22, 2014 at Base. The Claimant testified that when he returned with the truck to Base, Lopez instructed him to take the hose off the mount. The Claimant testified that he knelt down to remove the hose. He further testified that after the ears were pulled back it was difficult disconnecting the male/female connection. He testified he could not pull out the hose. He testified while trying to twist the hose off he hurt his right shoulder, he immediately stood up, backed away from the truck, and put his left hand on his right shoulder. The Claimant testified that he felt something ripping in his right shoulder. He testified his pain at that time was 10/10, where 10/10 was so severe one would want to commit suicide. He testified he did not tell Lopez he was hurt, because Lopez was just a dispatcher and not his boss. The Claimant's testimony is contradicted by Lopez, who has no direct interest in the outcome of this claim. The ALJ finds the Claimant's version of the alleged hose removal incident as lacking in credibility. Moreover, the ALJ finds Lopez's version more credible than the Claimant's version of the incident and, as found, the Claimant did **not** remove the hose.

17. The Claimant acknowledged that the hose had a male/female part where the male part on the hose fit into grooves of the female mount, which would require the hose to be inserted and pulled out in backwards and forwards motions. Despite this, he stated that twisting the hose helped with removing it, and the twisting caused his right shoulder injury. Based on the Claimant's concession concerning the male/female mounts and the pulling backwards and forwards to remove the hose, as also testified to by Lopez and Peak, the Claimant's "twisting" version makes no sense, and it undermines his version of the mechanics of his right shoulder injury.

18. According to the Claimant, after he moved away from the vehicle in pain, Josh Peak wound up disconnecting the hose. The Claimant testified that Peak put a

bucket under the hose to allow it to drain, and the Claimant testified that Peak lifted the center part of his hose with his left hand to finish draining the fuel. The ALJ infers and finds the Claimant's version of Peak finishing the disconnection of the hose disingenuous insofar as it attempts to be consistent with Peak's role in the removal of the hose. Lopez, however, testified that he removed the hose, and the Claimant had no role in the removal of the hose.

Aftermath of the Incident

19. After the hose was removed, according to Lopez, he told the Claimant to use the other mounts on his truck to finish his scheduled deliveries for that day, and that the Claimant was to take the truck to have the leaking hose repaired the next morning. At that point, according to Lopez, the Claimant requested the set-up of the mounting location be changed as well to be moved higher and closer to the front of the truck. Lopez told the Claimant that he would not approve that change, because it would be costly (there is an indication that it would cost between $15 and $20 thousand dollars), it would take the truck out of service, it was not necessary to fix the leak, and the company has never had issues related to the location of the mounting and hose. According to Lopez, the Claimant appeared frustrated at this denial, shook his head, and then left Base for the day. The ALJ finds Lopez's testimony in this regard accurate.

20. Lopez prepares a dispatch sheet every evening assigning deliveries for his drivers the following day. He would post this dispatch sheet in the office for his drivers to see the next morning, and he placed tickets for the individual jobs in a basket that was next to the dispatch sheet. He also stated he would fax the sheet to his other warehouse in Commerce City, so that the warehouse would know what product to pull for the drivers. According to Lopez, drivers became aware of their assigned deliveries by checking the dispatch sheet and grabbing their tickets when they arrived in the morning. Lopez never assigns work by walking up to drivers and delivering tickets, contrary to what the Claimant testified he expected the next morning. The Claimant's written statement, which noted that the Claimant waited outside for deliveries to be assigned, is contrary to Lopez's, the dispatcher, testimony (*See* Respondents' Exhibit). E. The only way deliveries would be assigned would be by the dispatch sheet. In this regard, the ALJ finds Lopez's testimony credible and the Claimant's testimony lacking in credibility.

21. According to Lopez, the dispatch sheet (Respondents' Exhibit D, p. 12), is the sheet he prepared the night of September 22, 2014, for September 23, 2014. Lopez testified that the copy of the dispatch sheet used at hearing was the same as the one he prepared on the evening of September 22, and it had not been altered since that time. At his deposition, he stated that the time stamp on the bottom of the page which states "Received Time Sep. 22 2014 6:13PM No. 7737," is a fax confirmation showing receipt of the sheet to the Commerce City warehouse on that date.

22. The Claimant is identified as "TJ" on the dispatch sheet. Lopez testified that on September 23, 2014, the Claimant was required to complete his deliveries from the day before that were held up due to the discovery of the leak, taking the truck in for the repair, and then completing those deliveries listed under his name on the September 23, 2014 dispatch sheet. Lopez understood that the Claimant may not have been able to finish all of his assigned September 23 deliveries, but Lopez testified that he expected the Claimant to begin those jobs after the quick repair was completed.

The Hose Leak Repair

23. According to Lopez, the next day, on September 23, he received a call from an employee of the repair vendor, Polar, advising that the Claimant was requesting the location of the hose mounting of the truck be moved, as the Claimant had proposed to Lopez the day before. Lopez responded that the change was not authorized, only the repair of the leaking hose. At this time, Lopez was still not aware that the Claimant was alleging he had suffered a right shoulder injury the day before.

24. Lopez saw the Claimant return from Polar with the repaired vehicle at approximately 12:00 PM, and then he saw the Claimant leave Base in his personal vehicle. Lopez tried calling the Claimant on his cell phone when he saw him leaving, but the Claimant did not answer or call him back that day. Lopez assumed that the Claimant simply went off-site for lunch at the time he saw him leave. Lopez discovered, however, two or three hours later, that the Claimant's tickets for his jobs assigned for that day were still in the basket next to the dispatch sheet and had not been picked up or completed by the Claimant. Lopez assumed that the Claimant had quit due to the Claimant's leaving work without completing his deliveries. Lopez was still not aware that the Claimant was alleging a work-related right shoulder injury.

September 24, 2014/Claimant's Termination

25. Lopez prepared a dispatch sheet for September 24, 2014 on the evening of September 23, 2014 (Respondents' Exhibit D, p. 13). He did not assign any jobs to the Claimant based upon his assumption that the Claimant had quit. He specifically disputed the Claimant's written statement that he had covered up the Claimant's name with white tape on the dispatch sheet at the time it was posted. In this regard, the ALJ finds Lopez credible and the Claimant's testimony lacking in credibility.

26. On September 24, 2015, Lopez arrived at work around 7:00 AM. He stated that the Claimant came into the office and asked if there was any work for him, and Lopez told him "no." It was Lopez's decision to not assign the Claimant work due to the events of the prior day, and Lopez had not yet consulted with Rebecca Hohnstein regarding the Claimant's employment status. As a result, Lopez had nothing more to inform the Claimant at that time. On September 24, 2014, Lopez informed Hochstein of

the events from the previous day involving the Claimant. Lopez stated that Hochstein informed him (Lopez) at that time that the Claimant was fired.

27. Lopez's drivers prepared logs documenting their deliveries. The log marked as Respondents' Exhibit D, p. 10, was the Claimant's log for his work on September 22 and 23, 2014. According to Lopez, the deliveries applicable for September 22, 2014 run through the Valley Crest entry. *Id.* According to Lopez, the Sinclaire entry thereafter documented the Claimant's arrival at the Employer's terminal at 5:40 AM on the following day, followed by two off-site deliveries. *Id.* Lopez further testified that the sheet shows the Claimant's time at Polar for the repairs and return to Base at 12:20 PM. *Id.* The jobs listed on the September 23, 2014 dispatch sheet are not listed on the Claimant's September 23, 2014 daily log, showing that he did not complete those jobs. *See Id.* at pp. 10 & 12.

<u>The Hose Repair and Subsequent Deliveries According to the Claimant</u>

28. According to the Claimant, after the hose had been removed, Lopez instructed him to use the other mounts to complete his deliveries and have the truck repaired the next day. The Claimant testified that he then suggested to Lopez that they change the location of the mount. According to the Claimant, Lopez did not acknowledge his request.

<u>The Claimant's Testimony Concerning the Hose Repair</u>

29. According to the Claimant, the next day he completed two deliveries and then was instructed by Lopez to take the truck to Polar for the repairs. The Claimant stated that he called Rebecca Hohnstein, the owner, from Polar after being told that Lopez had not authorized his suggestion. The Claimant testified that he requested from Hohnstein that the mount be moved on the truck, and that he told her about the alleged injury at that time. He testified that she "didn't say anything" about the injury and did not approve the redesign. Hohnstein denies that the Claimant informed her of a work-related injury at the time, however, she admits that she would not approve the Claimant's suggested repair of re-doing the mounts.

30. According to the Claimant, when he came back to Base, he went inside to look for more work on the dispatch sheet. The Claimant testified the September 23, 2014 dispatch sheet had his name whited out and there were no work assignments under his name. He testified the dispatch sheet entered into evidence as *Respondents' Exhibit D*, p. 12, was not the same sheet as what was posted. He also suggested that the dispatch sheet was therefore modified after the fact to make it seem like he had jobs on that day. The Claimant stated he cleaned his truck, waited outside to see if someone would bring him more work, and clocked out and left. The ALJ infers that the Claimant's actions of looking for work are inconsistent with his allegedly "severe" right shoulder injury. As found herein above, the ALJ does not find the Claimant's version of

the “whited out” dispatch sheet credible. It is contradicted by Lopez’s testimony, and it makes no sense for Lopez to have “whited” out the Claimant’s name for September 24, 2014. Lopez testimony has indicia of regularity in keeping dispatch sheets. The Claimant’s version suggests a “grand conspiracy theory,” without any other supporting evidence than the Claimant’s bald statement.

31. According to the Claimant, he clocked in when he arrived in the morning. He did not see any assignments on the dispatch sheet for him so he left. He testified he did not see or talk to Lopez on that day. He testified he assumed that the Employer did not want to assign him any jobs because he suffered an injury, and he did not show up to work on subsequent days because he was not assigned work on September 24, 2014. The Claimant testified he talked with Hohnstein over the phone on September 30, 2014, and he alleged she told him to turn in his equipment. He testified that he interpreted that as him being fired. The ALJ infers and finds that the Claimant’s testimony, regarding his informing Hohnstein of his injury is contradicted by Hohnstein. It makes no sense for Hohnstein to ask the Claimant to turn in his equipment and fire him after he reported an injury to Hohnstein.

Rebecca Hohnstein

32. Rebecca Hohnstein testified by post-hearing deposition. She positively testified that Lopez was the Claimant’s supervisor, which included determining the Claimant’s work schedule, coordinating repairs of the vehicles, managing deliveries, and “anything that has to do with the trucks, and the drivers, and deliveries to customers” (Hohnstein Depo, p. 4, ll. 2-18), and the ALJ so finds. She testified that she told the Claimant that Lopez was his supervisor, and the ALJ so finds.

33. According to Hohnstein, the first time she was aware of the leaking hose was on September 23, 2014, when the Claimant called her from Polar requesting authorization for the redesign changes to the truck. She testified that the Claimant told her that Lopez had denied the changes, and she agreed with the denial. She also testified that the Claimant sounded aggravated with her denial based upon the tone of his voice. Hohnstein positively testified that the Claimant did not inform her that he had suffered an injury, and the ALJ so finds.

34. The next time Hohnstein heard of any issues involving the Claimant was the next day when Lopez informed her that the Claimant had left the job site the prior day without completing his deliveries.

35. According to Hohnstein, she figured that the Claimant had quit because he was mad that his requested changes were not approved. She also testified the Claimant’s leaving the job site without completing his tasks were grounds for termination. In Hohnstein’s opinion, the Claimant’s return to work on the morning of September 24, 2014 did not cure his abandonment the prior day. Hohnstein did not call

the Claimant on that day because she expected him to be calling her in the next couple days anyway to pick up his final check. She stated that he did call her four or five days later to arrange for dropping off his equipment and picking up his check, and she confirmed with him at that time that his employment was terminated. Hohnstein positively testified that the Claimant had not informed her of an injury as of that date, and the ALJ so finds.

36. There is an undertone in the Claimant's argument that Lopez and Hohnstein conspired against the Claimant in creating an argument that he did not complete deliveries to which he was assigned on September 23, 2014 and that the Claimant could have completed his remaining September 22 assignments, have the truck repaired, and completed additional assigned deliveries on September 23. The Claimant cites a portion of Lopez's deposition for the proposition that Lopez did not know how long the repairs were to take. Lopez shortly thereafter, in his deposition, went on to clarify that he did not believe the repairs would take long or prevent the Claimant from completing his additional deliveries, as follows:

> Q: And we established you didn't know how long would take. Correct?
>
> A: It was just a hose. I didn't think it was going to take that long.
>
> Q: Okay. So what you are saying is you expected him to do the two jobs he hadn't done, get the hose repaired, and complete five deliveries?
>
> A: Correct. Yeah, correct.

The complete picture of Lopez's testimony paints a different picture than that portrayed by the Claimant. The actual timing of the events proved Lopez's testimony to be true. The Driver's Daily Log for September 23, 2015 shows that Claimant completed his two carryover repairs from the prior day early on the 23rd [Brannan Mix and 5280 Waste]. Respondents' Ex. D, p. 10. The Claimant then took the truck in for repairs, which were completed by noon. Lopez's testimony that he assigned the Claimant additional assignments for September 23, 2015, because he felt the Claimant could complete his remaining repairs from the prior day and have the hose fixed in a short amount of time was proven true. The Claimant had the entire afternoon to complete a new set of assigned deliveries. The Claimant's position that it is not credible that Lopez would have assigned the Claimant additional jobs for September 23, 2014 is itself lacking in credibility when the Claimant himself admitted he had completed with his work and the repairs by noon on that date, and that he was looking for additional work.

Medical

37. On October 9, 2014, the Claimant saw Paul Raford, M.D. who noted a chief complaint of "right shoulder pain" and noted a history, given by the Claimant, as follows: "He tried to bend down and find the valve between the bumper and another

valve and twisted, facing toward the left and kneeling. He then had acute onset of right shoulder pain and felt a 'grating'." (Exhibit C, Bate p.7). The ALJ finds that the history the Claimant gave Dr. Raford is **not** accurate because the Claimant did not unhook the valve (hose). Lopez unhooked it.

38. Dr. Raford assessed "right biceps tendon, shoulder sprain, and moderate suspicion for internal derangement." He recommended occupational therapy, naproxen and topical creams. Dr. Raford returned the Claimant to "full duty modified duty with a 5-pound weight limit with the right upper extremity, no over-stomach-level motion, and no climbing of ladders" (Exhibit C, Bate pp. 8-9). Because the Claimant has failed to prove an injury arising out of the course and scope of his employment for the Employer herein, Dr. Raford's evaluations and treatments are **not** work-related.

39. Claimant has not received any further treatment because, according to him, he does not have personal health insurance.

Ultimate Findings

40. The ALJ finds the Claimant's testimony lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, the ALJ finds Lopez's and Peak's version of events credible.

41. The ALJ makes a rational choice, between conflicting testimonies, to accept the credibility of testimonies of Danny Lopez and Rebecca Hohnstein and to reject the credibility of the Claimant's testimony.

42. This case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. The Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein, and it is not credible. This lack of credibility undermines the Claimant's theory of an injury occurring within the course and scope of his employment, and arising out of his employment. Therefore, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014, arising out of the course and scope of his employment.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony is lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, Lopez's and Peak's version of events is credible, and the Claimant's version is **not** credible.

Substantial Evidence

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

Compensability

c. "Course of employment" deals with the time, place and circumstances of an employee's injury. *See General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994). As found, the Claimant failed to prove, by preponderant evidence that he sustained the right shoulder injury in the course and scope of his employment for the Employer herein. "Arising out of employment" deals with the proximate causal connection between the employment and the injury. *See L.E.L Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), *rev'd on other grounds, L.E.L. Construction v. Goode,* 867 P.2d 875 (Colo. 1994). The Claimant failed to prove a proximate causal connection between his right shoulder condition and his work for the Employer.

d. An "unexplained injury satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the injury would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he was injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** As found

herein above, the Claimant failed to prove that his right shoulder condition even happened while he was at work.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, this case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. As found, the Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein and the Claimant's version is not credible. This lack of credibility undermines the Claimant's theory of compensability. Therefore, as found, the Claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of August 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 August 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ALJ took administrative notice of the Guides and overruled the objection. Respondents' Exhibits A through T were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on August 18, 2015. On August 19, 2015, the Respondents filed some objections to the Claimant's proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

In this admitted claim, the issue to be determined by this decision is whether the Respondents' have overcome the finding of the Division Independent Medical Examiner's opinion (DIME), Frederick Scherr, M.D., that the Claimant is not at maximum medical improvement (MMI).

FINDINGS OF FACT

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

Preliminary Findings

1. This matter initially went to hearing before ALJ Peter Cannici on the issues of average weekly wage (AWW), temporary total disability (TTD) and temporary partial disability (TPD) benefits. ALJ Cannici, based on a stipulation of the parties, determined that the Claimant's AWW was $422.05, and he awarded the Claimant TTD benefits from December 4, 2013 through December 19, 2013; and, TPD benefits from December 20, 2013 through February 17, 2014. The respondents had previously filed a General Admission of Liability (GAL).

2. Thereafter, the Claimant received treatment from Ted Villavicencio, M.D. [who became the Claimant's authorized treating physician (ATP)] at Concentra, and Samuel Chan, M.D.

3. The Claimant underwent a right shoulder arthrogram on December 24, 2013. This was interpreted by Pinnacol Advisor Christopher Isaacs, D.O., as depicting a right rotator cuff tendonitis and impingement, along with AC arthritis.

4. The Claimant underwent surgery with Mark S. Failinger, M.D., on June 20, 2014.

5. After the surgery, the Claimant was prescribed physical therapy but missed several appointments, some of which she rescheduled.

6. According t the Claimant, after the surgery her symptoms had not markedly improved.

7. The Claimant was placed at MMI on November 18, 2014, by ATP Dr. Villavicencio, who accorded her a right upper extremity (RUE) rating of 11% for a distal clavicle resection, as well as for loss of range of motion, and placed her at MMI, effective November 18, 2014.

9. According to the Claimant, she received only minimal relief from the medical modalities given to her, which included physical therapy, chiropractic treatment, injections, pain medications and surgery, with the exception of a stimulator which she used and continues to use with relative frequency.

10. The Respondents filed a Final Admission of Liability (FAL) admitting for an extremity rating of 11% RUE, and admitting for post-MMI maintenance medical benefits (*Grover* medicals). The Respondents request that *Grover* medicals be limited "as recommended by ATP Villavicencio in his report, dated 11/18/14." An injured worker is ordinarily entitled to a **general award of future medical benefits**, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Consequently, the Respondents objection in this regard is modified.

11. When the Claimant was placed at MMI by Dr. Villavicencio on November 18, 2014, Dr. Villavicencio recommended that she follow up with Dr. Chan for six months. Dr. Villvicencio made no specific recommendation in this regard, and the Claimant did not follow up because she did not believe the follow up would help her condition. The Respondents scheduled a follow up visit with Dr. Chan on July 28, 2015, which the Claimant attended. Dr. Chan indicated: "In general, the patient is in no acute distress…cervical range of motion is within functional limits…." Ultimately, Dr. Chan had nothing to offer the Claimant. Consequently, the July 28, 2015 visit confirms that Dr. Chan did not help her condition. At some point, the Claimant went to the emergency room (ER) for her pain and used her private insurance for this purpose. The Respondents' request to add this ER visit implies, without sufficient foundation, that the Claimant's pain is either not real or not related. The ALJ rejects this implication.

12. The Respondents make an underlying implication that the Claimant did not cooperate with medical care after being declared to be at MMI, and after her

ATPs, Dr, Villavicencio and Dr. Chan told her that there was nothing more that they could do for her. The ALJ rejects this implication as unsupported by the medical record.

Division Independent Medical Examination (DIME) by Frederick Scherr, M.D.

13. The Claimant timely objected to this FAL and requested a DIME, which was performed by Dr. Scherr. DIME Dr. Scherr was of the opinion that the Claimant was not at MMI and gave her a tentative rating of approximately 25% upper extremity which he converted to 15% whole person [as required by the *AMA Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. (hereinafter the "*AMA Guides"*)].

14. DIME Dr. Scheer made numerous recommendations with regard to diagnoses and treatment. He specifically recommended an MRI (magnetic resonance imaging) arthrogram to ascertain whether there was new pathology, including adhesive capsulitis. He also recommended that following the results of the MRI the Claimant be treated under the Division's Treatment Guidelines ("*Guidelines*"). He emphasized that the Claimant's must be complaint with this treatment since her prior non-compliance had contributed to her current situation. It was DIME Dr. Scherr's opinion that if the MRI of the right shoulder "does not indicate any new pathology **then [Claimant] will be at MMI** (Respondents' Exhibit Q, p. 273).

15. The Claimant was asked why she did not return to treatment after MMI, although this treatment had been admitted under the FAL. She credibly testified that she did not return to ATP Dr. Villavicencio or Dr. Chan **because both had informed her there was nothing further they would be able to do to help her symptoms**. According to the Claimant, the only treatment that she had thereafter was a visit to an ER. She did not know the date.

Respondents' Independent Medical Examination by Eric O. Ridings, M.D.

16. The Claimant underwent an IME at Respondents' expense with Dr. Ridings. Dr. Ridings disagreed with the opinion of DIME Dr. Scherr on both MMI, and the Claimant's loss of range of motion. Dr. Ridings, a physiatrist with no credentials in psychiatry or moral judgments, stated the opinion that the Claimant was **consciously malingering.** He did not present a psychological basis for this opinion nor, for that matter, any basis for this moral judgment. He was also of the

opinion that the Claimant's range of motion loss was exaggerated and was not valid. His explanation for this related to his view that the Claimant **was consciously malingering.** Thus, even though he had found significant range of motion loss he did not accord any impairment for this loss.

17. Concerning DIME Dr. Scherr's opinion on the potential of adhesive capsulitis, Dr. Ridings stated the opinion that if adhesive capsulitis was found it would not be work related. This is contrary to DIME Dr. Scherr's determination that any capsulitis would be attributable to this injury. .Dr. Ridings has a mere difference of opinion with DIME Dr. Scherr on all issues, and this difference of opinion does not rise to the level of making it highly probable, unmistakable and free from serious and substantial doubt that any of DIME Dr. Scherr's opinions are in error. Indeed, Dr. Ridings' moral judgment of "consciously malingering' underlies his entire opinion and, thus, significantly compromises his credibility.

18. Contrary to Dr. Ridings opinion the ALJ finds that DIME Dr. Scherr's MMI opinion, is supported by the record and demonstrates his proper use of the *AMA Guides.* Thus, even though Dr. Ridings may disagree with the DIME's conclusion on MMI, the ALJ finds that the evidence shows that DIME Dr. Scherr properly applied the *AMA Guides.*

The Claimant

19. The Claimant has continued to work on a part-time basis at the Dollar Tree, but she could only use her left hand for cashiering. Dr. Ridings, without further questioning of the Claimant and without further investigation, questioned that the Claimant's continued ability to work was evidence of the fact that she was magnifying her symptoms. Thus, his opinion is that her work at Dollar Tree is "incompatible" with an inability to perform "job duties". At the same time, he did not comment on the fact that the Claimant was unable to use her left arm for performing job functions there.

Ultimate Findings

20. The ALJ finds the Claimant's testimony credible, supported by the medical record, and the ALJ rejects the implication that the Claimant did not cooperate with medical treatment after being declared to be at MMI on November 18, 2014. Indeed, her ATPs, Dr. Villvicencio and Dr. Chan, told her that they had nothing more to offer her. Further, the ALJ finds the opinions of DIME Dr. Scherr more credible and persuasive than the opinions of Respondents' IME Dr. Ridings because DIME Dr. Scherr's opinions are more consistent with the totality of the medical evidence and the product of a more thorough treatment of the Claimant's medical case. Indeed, Dr. Ridings' opinions lack credibility because they are primarily founded on his unsupported moral judgment that the Claimant "is consciously malingering."

21. The ALJ makes a rational choice, between conflicting medical opinions, to accept the opinions of DIME Dr. Scherr and to reject any and all opinions to the contrary.

22. The Respondent has failed to prove that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Scherr's ultimate opinion that the Claimant is not at MMI is in error. Dr. Ridings maintains a mere difference of opinion with Dr. Scherr, and even that difference of opinion, as found, is not credible, however, if the MRI of the right shoulder does not show any new pathology, according to DIME Dr. Scherr, then the Claimant is at MMI. Consequently, DIME Dr. Scherr's opinion is subject to his potential declaration that the Claimant has been at MMI since November 18, 2014, the admitted MMI date.

23. The Claimant has proven, by a preponderance of the evidence, that post-MMI medical maintenance care is warranted in the discretion of the Claimant's ATPs.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible, supported by the medical record and the ALJ rejected the implication that the Claimant did not cooperate with medical treatment after being declared to be at MMI on November 18, 2014. Indeed, her ATPs, Dr. Villvicencio and Dr. Chan, told her that they had nothing more to offer her. Further, as found, the opinions of DIME Dr. Scherr were more credible and persuasive than the opinions of Respondents' IME Dr. Ridings because DIME Dr. Scherr's opinions were more consistent with the totality of the medical evidence and the product of a more thorough treatment of the Claimant's medical case. Indeed, Dr. Ridings' opinions lacked credibility because they are primarily founded on his unsupported moral judgment that the Claimant "is consciously malingering."

Substantial Evidence

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

Overcoming the Division Independent Medical Examination

c. Section 8-42-101(3.7), C.R.S. mandates that physicians evaluating injured workers' impairments follow the *AMA Guides.* A DIME's physician's finding concerning MMI is binding unless overcome by clear and convincing evidence. § 8-42-107(8) (b) (III), C.R.S; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002). Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; **it is evidence that his highly probable and free from serious and substantial doubt** (emphasis supplied)**."** *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980).

d. 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. Indus. Claim Appeals Office,* 961590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses resulting from the industrial injury as part of the DIME's assessment process the DIME physician's opinion regarding causation of those losses, including pain, is also subject to the same enhanced burden of proof. *Qual-Med, Inc. v. Industrial Claim Appeals Office, supra*.

e. To overcome DIME Dr. Scherr's MMI finding, the Respondents were required to present clear and convincing evidence*, i.e.*, evidence which is unmistakable and free from serious or substantial doubt. *De Leo v. Koltnow,* 613 P.2d 318 (Colo. 1980). Respondents did not meet their burden through Dr. Riding's testimony. Dr. Riding's testimony challenged DIME Dr. Scherr's opinion on MMI, yet he failed to credibly demonstrate the DIME's error. *See Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202, 204 (Colo. App. 2002); *McLane Western v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999). Although medical providers, as reasonable professionals, may disagree, this difference of opinion alone does not constitute clear and convincing evidence. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 [Indus. Claim Appeals Office (ICAO), July 19, 2004]; see *Shultz v. Anheuser Busch, Inc.*, W.C. # No.-380-560 (ICAO, November 17, 2000). As found, dr. Ridings maintained a difference of opinion with DIME Dr. Scherr but this difference of opinion did not rise to the level of "clear and convincing evidence." Indeed, Dr. Ridings' difference of opinion was not credible as well.

f. Dr. Riding' challenges DIME Dr. Scherr's application of the *AMA Guide*s. Deviation from the *AMA Guides* is only one evidentiary fact which the ALJ may consider among others in determining the overall question of whether the DIME physician's rating has been overcome. *Paredes v. ABM Industries Inc.,* W.C. No. 4-862-312 (ICAO, Nov.

13, 2014); *Almanza v. Majestic Industries*, W.C. No. 4-490-054 (ICAO, Nov. 13, 2003); *Smith v. Public Service Company of Colorado*, W.C. No. 4-313-575 (ICAIO, May 20, 2002); See, *Rivale v. Beta Metals*, *Inc.*, W.C. No. 4-265-360 (ICAO, April 16, 1998), *aff'd., Rivale v. Industrial Claim Appeals Office*, (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication). Contrary to Dr. Ridings opinion, as found, DIME Dr. Scherr's MMI opinion, is supported by the record and demonstrates his proper use of the *AMA Guides.* Thus, even though Dr. Ridings disagreed with the DIME's conclusion on MMI, as found, the evidence showed that DIME Dr. Scherr properly applied the *AMA Guides.* Thus, the DIME's opinion on both causation, and his determination that the Claimant is not at MMI must stand. *See* § 8-42-107(8) (c), C.R.S; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra.*

Maximum Medical Improvement

g. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). See *also MGM Supply Co., v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Co. App. 2002). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. Also *see Villela v. Xcel*, W.C. No. 4-400-281, (ICAO, Feb. 26 2006). As found, the Respondents failed to overcome, by clear and convincing evidence, the DIME physician's opinions that the Claimant is not at MMI because DIME Dr. Scherr ordered an MRI to see is there is any new pathology. If there is no new pathology disclosed on the MRI, then Dr. Scherr would be of the opinion that the Claimant is at MMI.

h. As DIME Dr. Scheer implicitly recognized in his report, a finding of MMI is premature when a claimant is willing to submit herself to a course of medical treatment, including, diagnostic testing, which may have a reasonable prospect of improving her condition. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080 (Colo. App. 1990). The determination that further testing would assist in this is one which is clearly within the DIME's purview as an evaluator.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents having failed to overcome the Division Independent Medical Examination of Frederick Scherr, M.D., the Claimant is not presently at maximum medical improvement.

B. Any and all issues, including whether Dr. Scherr determines, after reviewing the latest MRI results, that the Claimant previously reached maximum medical improvement and temporary disability benefits are reserved for future decision.

DATED this_____day of August 2015.

_____
EDWIN L. FELTER, JR.

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Administrative Law Judge

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

ISSUES

The issues presented for determination 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.

FINDINGS OF FACT

General Findings

1. The Respondent contracts with insurance carriers to market the carriers' products directly to potential consumers. The Respondent markets such products through sales agents.

2. On September 9, 2009, the Claimant executed a contract to become a "Career Agent I" for the Respondent.[1]

3. James Beard was Claimant's Regional Sales Director from September 2009 through January 12, 2012. Beard essentially recruited the Claimant with the belief that Claimant would be good at sales and eventually move into a management position.

4. The Respondent terminated Beard's position in January 2012 after which Claimant reported to Andy Dastur. Dastur left the company then Claimant reported to Daniela Karrow. Karrow testified that Claimant was her "subordinate."

5. Claimant's initial responsibilities included selling Medicare supplement insurance plans and other insurance products.

6. Claimant lacked experience in selling insurance products prior to working with the Respondent although he had prior sales experience.

The Independent Contractor Agreement

7. During the hearing, the Claimant recalled the contents of the 2009 contract.

8. The Respondent asserts that Claimant electronically signed a second contract in July 2012 entitled New Agency Contract (hereinafter "contract"). Claimant does not remember signing a contract in July 2012. The July 2012 contract contains Claimant's

[1] The ALJ declined to admit the 2009 New Agent Contract (exhibit G) because the Respondent failed to exchange it within 20 days prior to either hearing. Respondent's counsel admitted that he received exhibit G just a few days prior to the second hearing.

type written name, but no actual signature. According to Claimant, every other document related to his work with the Respondent contained original wet signatures and he personally signed the documents.

9. The Claimant agreed that his home address is on the July 2012 contract.

10. The Claimant testified that "until all of this happened" he believed he continued to be subject to the 2009 contract. Claimant agreed that the 2009 and 2012 contracts are the same or substantially similar other than the dates.

11. The ALJ finds that Claimant was subject to the New Agent Contract signed on July 5, 2012. Regardless, the contract fails to meet the criteria set forth in §8-40-202(2)(b)(IV), C.R.S., thus it does not create a rebuttable presumption of an independent contractor relationship between the Claimant and Respondent.

Content of the Contract Relevant to these Proceedings

12. The second numbered paragraph of the contract is labeled, "**INDEPENDENT CONTRACTOR**." Under that heading, the contract reads:

> You are a non-exclusive independent contractor authorized to solicit insurance applications subject to the terms of this Contract. Nothing in this Contract shall be construed to create the relationship of principal and agent or master and servant or employer and employee. You are responsible for filing all the necessary income tax returns and reports to the Federal and State government to reflect all self-employment income as required by under any federal state, or local laws and regulations.

13. The 2012 contract describes Claimant's obligations to pay all expenses relating to the sale of insurance, and states that nothing in the contract "shall be construed to abridge your independent judgment as to the place, time, and manner of soliciting applications."

14. While the 2012 contract conferred Claimant independent judgment, the contract notes that the insurance sales industry is heavily regulated and therefore Respondent "may prescribe standards of conduct and procedures regarding the conduct of the insurance sales business, with the purpose ensuring that all Agents comply with the applicable Federal and State laws and insurance regulations."

15. Paragraph 13 of the 2012 contract is entitled "Termination" in bold all capital letters, and states:

> Either you or UIG may terminate this Contract without cause by giving the other party fifteen (15) days written notice . . . . This Contract shall terminate in the event of (a) your death, (b) your

> becoming totally or permanently disabled as determined by us, (c) your breach of any provision of this Contract or (d) our withdrawal from the territories where you are licensed. After termination of this Contract for any reasons, all debts or commission advances owed to us by you are due and payable immediately without further notice or demand.
>
> You understand and agree that because of the administrative and overhead costs and expenses incurred by [Respondent] in providing support to you, [Respondent] expects you to qualify consistently as an "Active Agent" as described in the CAS. If you cease to qualify as an Active Agent for any calendar quarter, [Respondent] has the right, but is not required, to declare your failure to qualify as an Active Agent for any calendar quarter as a breach of this Contract by you.

16. The contract also allows the Respondent to terminate the contract for cause based on conduct prohibited under paragraph 5 of the contract. The contract allows the Respondent to withhold renewal commissions if the agent is terminated for cause.

17. The contract states under paragraph 18:

> **FUNDS AND SUPPLIES.** All books, correspondence, documents, vouchers, receipts, lists, notices, or other papers of any kind used by you in any transaction involving us and any other personal property furnished by us shall remain our property, shall be open to inspection at all times, and shall be returned to us at termination of this Contract or at our demand. The demand may be made by sending you notification through the ARC. We reserve the right not to pay you commissions if you are holding such property after we demand you return the property to us.

18. The 2012 contract also contains a non-compete clause. The non-compete clause states the following:

> During the term of this Contract and during the period beginning with the date of termination of this Contract, and ending two years following the termination of this Contract, you shall not contract with any other agency or company to sell any insurance product issued by an insurance company represented by [Respondent] as of the date of the termination of this Contract. In addition, [Respondent] will not release agents to sell insurance for an agency that represents an insurance company that is also represented by [Respondent].

19. A document entitled "Representative Responsibilities" accompanied the contract. By his electronic signature dated July 5, 2012, the Claimant acknowledged that he would comply with Respondent's guidelines concerning federal regulations; that he has received a copy of the Respondent's handbook on compliance and telemarketing restrictions and that he will comply with such rules; and that he understood he would be subject to discipline including termination of his appointment with the Respondent, and all its insuring partners.

20. The contract required the Claimant to purchase errors and omissions insurance. The contract is silent as to workers' compensation insurance.

Exclusivity

21. Beard worked for the Respondent as a Regional Sales Director from 2009 through January 2012. Beard received a W2 tax form and was not considered an independent contractor.

22. At the time of hearing, Beard worked for another insurance carrier selling insurance as an employee and not an independent contractor. Beard testified that sales agents are typically exclusive to an agency or carrier. In his present position, he is not permitted to sell products for any other carrier.

23. Beard has held positions in insurance sales for various companies. At times he was an independent contractor and at other times, an employee.

24. Beard worked at the office identified in paragraph 5 above, with an administrative assistant who was also a W2 employee.

25. Beard testified that all of the career agents for the Respondent were independent contractors per the independent contractor agreement; however, he also testified that in his 38 years of experience selling insurance, that the term "career agent" typically meant that the agent was exclusive.

26. Beard explained that the Respondent had 12,000 independent brokers around the country and about 300 career agents. The brokers were not exclusive whereas the career agents were exclusive. Claimant was considered a career agent.

27. According to Karrow, the difference between the brokers and the career agents were that the brokers received higher commissions and less support than the career agents.

28. Beard testified he had "marching orders" to terminate the contracts of Career Agents if the Respondent determined that the Career Agent had a contract to sell insurance products for an insurance carrier not affiliated with Respondent. The Respondent required Beard to provide proof that the Career Agent terminated his or her contract with competitors.

29. Beard believed that sales agents such as the Claimant were not permitted to sell products not affiliated with the Respondent based on his experience with the Respondent.

30. Beard terminated two DSMs right after he began working for the Respondent.

31. Although the contract says “non-exclusive” Claimant, Marjory Leight and Beard disagreed with this characterization. Marjory Leight was also a Career Agent for Respondent.

32. Claimant testified that he earned 100% of his income from Respondent.

33. Claimant was involved in a business called E.Oliver, a hard money lender with no connection to insurance. The Claimant earned no money from E.Oliver in 2013.

34. On October 15, 2013, the Claimant exchanged e-mail messages with Steven Hensley. Hensley is the Vice President of Administration and Compliance for the parent company of Respondent. Hensley contacted the Claimant concerning E.Oliver.

35. The initial e-mail Hensley sent to Claimant references an attachment which was not offered into evidence. The ALJ infers the attachment mentioned E.Oliver. Hensley asked for a response from Claimant concerning the content of the attachment and imposed a deadline of November 17, 2013.

36. The Claimant responded to Hensley’s message and explained that E.Oliver is a hard money lender that takes small investors. Claimant stated, “I want to make sure everyone is clear on this that they are not insurance company.” Claimant continued to explain details concerning a specific individual and the issues that individual had with E.Oliver.

37. Hensley testified that he made the inquiry with the Claimant because Claimant used a Respondent business card to conduct the E.Oliver business. Claimant, however, believes Hensley inquired about it because he wanted to be sure Claimant was not selling insurance products that were not affiliated with Respondent.

38. Claimant testified that the Respondent “made no bones” about terminating agents if those agents had appointments with insurance carries not affiliated with the Respondent.

Training

39. The Claimant lacked experience in selling insurance products prior to working with the Respondent although he had prior sales experience

40. When Claimant first became a Career Agent I, he received training at an office located in Colorado and leased by Respondent.

41. The initial training provided by Beard lasted three and one-half days in the local office. The training consisted of classes on Medicare regulations, appointment setting, reviewing scripts used to make sales calls, and learning the Respondent's expectations. The Respondent offered several scripts depending on the potential customer and insurance product.

42. Karrow testified that Respondent required use of the scripts for the purpose of complying with Medicare rules.

43. Ongoing training included weekly mandatory sales meetings with Beard and the sales agents. The meetings included reviewing appointments scheduled for the upcoming week and scheduling more appointments if not enough appointments were already scheduled. Beard provided scripts to the sales agents along with the leads. He monitored the sales calls to ensure the agents were making correct statements to the potential customers.

44. On a monthly basis, the Respondent offered classes about products and sales techniques.

45. The Respondent also offered additional training on specialized products, which were not mandatory.

46. The Respondent required the Claimant to pass its tests in order to receive approval to go into the field to sell insurance products.

47. Training generally lasted two months before the sales agents were confident enough to be in the field without supervision.

48. According to Beard and Claimant, the Respondent wanted the agents to represent the company and products in the best way which could not be accomplished without proper training. In addition, the Respondent required compliance with the Medicare rules, which required extensive training.

49. The Claimant also received the New Agent Starter Kit, which was essentially a training manual. The manual contained "Rules of Engagement" setting forth the rules an agent must adhere to when making sales calls.

50. The manual also contained the scripts for making sales calls for both Medicare and non-Medicare products.

51. The Respondent also provided the Claimant a document entitled Sales Practice Guidelines – Prohibited Marketing and Selling Behaviors. This document provides a detailed list of prohibited marketing and sales behaviors.

Compensation, Duties, Quality Standard, and Time of Performance

52. The Respondent compensates its sales agents, including the Claimant, on a commission basis for each sale. The Respondent does not pay a salary or provide any

benefits. The Claimant has no ability to negotiate the amount of the commission. The commission amounts are solely set by Respondent.

53. The Respondent paid the Claimant personally. Claimant did not maintain a trade name.

54. Claimant's responsibilities included selling Medicare supplement insurance plans and other insurance products.

55. Selling the insurance products involved face-to-face meetings with the clients whether at the clients' homes or in alternative locations.

56. Sales agents, including the Claimant, must travel to meet with the potential clients. Sales agents typically use their own private vehicle to travel to sales meetings.

57. The Respondent does not reimburse the agents for any travel expenses the agents incur.

58. In March 2010, the Respondent promoted Claimant to District Sales Manager ("DSM") which resulted in additional responsibilities.

59. The Respondent maintained a list of qualifications for a DSM which included the following:

- Preference for one or more years of insurance background in life and health
- Team player
- Maintains 15 or more appointments per week
- Professional dress, speech, performance and relates to others
- Know the product footprint for marketing area
- Experience selling all product lines
- Willingness to demonstrate use of marketing plan
- Adaptability
- Positive, optimistic attitude
- In the top 25% of field for production

60. The District Sales Managers, including the Claimant, also signed a separate Independent Contractor Agreement which outlined the compensation and production requirements for the DSM position. For instance, the agreement Claimant signed on March 11, 2011 indicated that Claimant would receive $250 per week for maintaining at

least four producing agents who are submitting a combined average of four or more applications per week. The agreement also states that the DSM will meet additional production targets and "assist with managerial responsibilities in the Territory."

61. The DSM Agreement Claimant signed on March 11, 2011 also stated that the agreement was terminable at will by either party upon notice to the non-terminating party, and that parties agree that arrangement described in the agreement constitutes an independent contractor arrangement and not an employment arrangement.

62. Claimant began receiving a weekly training allowance in the amount of $500 to assist in the cost of training new sales agents.

63. As a DSM, Claimant's duties included, but were not limited to, the following:

- Monitoring his agent's daily activity
- Recruiting and training new agents including accompanying agents in the field
- Knowledge of the three-step recruiting system
- Maintaining minimum sales or production requirements for the agents he managed
- Reviewing future leads with his agents
- Ongoing training with agents

64. The Respondent still required Claimant to meet his own sales goals. If Claimant failed to meet his production goals or his team failed to meet production goals, Respondent could issue a corrective action and demote him or terminate his position.

65. The Claimant was subjected to a Performance Evaluation Plan in December 2010, which included production goals, and activity ratings. The activities ranged from agent training and development to communication with agents.

66. Beard and Claimant testified that the Respondent placed DSMs on a "CAP" or corrective action plan if the DSM failed to meet his or her production goals.

67. When Claimant first became a Career Agent, the Denver office had 14 cubicles for the agents to use to make sales calls.

68. The Respondent provided sales scripts and guidelines to the agents to follow when making sales calls and discussing products with potential customers.

69. The Respondent confined the agents' sales radius to 10 miles from his or her residence unless exceptions applied such as a lack of agents within a 20-mile radius of a potential customer.

70. The Respondent has a sales lead program through its own telemarketing company. The Respondent solicits potential leads via telemarketing and mail and provides the information to the agents. The telemarketing company schedules appointments between the leads and the sales agents.

71. The telemarketing company vetted the potential clients by learning about their needs providing notes to the sales agents.

72. According to Karrow, the sales agents could modify their appointments with the leads, although Claimant testified that he could not.

73. Respondent requires that the sales agents "close" on 20 percent of the leads provided. If the agent is not meeting the 20 percent closing goal the Respondent investigates the reasons.

74. The Respondent reduces the number of leads it provides to an agent if that agent is not making a sufficient number of sales. The Respondent also suspends provision of leads or cuts leads entirely when an agent fails to meet the closing goals.

75. The Respondent prohibited the sales agents from selling insurance products not affiliated with Respondents to the leads provided by Respondent. This condition is not found in the contract.

76. The Respondent shut down the brick and mortar office located in Colorado and terminated all of its Regional Sales Directors, including Beard. Sales agents then primarily worked from home with some exceptions.

77. The Respondent had previously provided the agents with access to a web application known as the Agent Resource Center ("ARC").

78. Instead of face-to-face time in the office, the Respondent directed the agents to rely more heavily upon the ARC. The ARC website offered a multitude of information including a calendar of the appointments scheduled by the telemarketing team. Claimant testified that he could not change the appointments made for him in the ARC system.

79. After the office in Denver closed, the Respondent assumed the cost for one weekly two-day UPS package for shipment of documents to the Respondent's home office. The Respondent also provided a scanner to the agents, the cost of which was "heavily subsidized" based on the agent's level of production. The Respondent also provided access to an IT help desk and software for scanning and uploading documents.

80. The Claimant was responsible for purchasing his own computer, internet access, fax machine and telephone.

81. After the brick and mortar offices closed, the Respondent also paid for the agents to receive new business cards to reflect the change in address.

82. The Respondent also paid to rent office space in the Denver area when necessary.

83. On June 11, 2012, Dastur sent an e-mail message to Claimant requiring that Claimant submit a plan by June 18, 2012 to increase sales, improve team's conversion performance, and expand his team.

84. On January 29, 2013, Dastur sent an e-mail to Claimant containing "Do's" and "Don't's" regarding the DSMs' management of new agents. After the list, Dastur commented that he has occasionally received calls from new agents complaining about the DSMs not communicating enough. Dastur reminded the DSMs that they get paid for communicating and assisting new agents. He then set a goal for the DSMs to recruit one new agent per quarter.

85. Karrow testified that Claimant did not recruit new agents and that Respondent did not require him to do so.

86. Karrow also communicated with the Claimant and other DSMs via e-mail. On January 2, 2014, Karrow sent the Claimant an e-mail message instructing him to create a DSM business plan by the close of business on January 10, 2014.

87. Claimant testified, and Karrow agreed, that Claimant needed approval from the Respondent to terminate agents or hire new agents. The Claimant did not have independent judgment in hiring or terminating new agents.

Termination of the Contract

88. As the contract states, either the agent or the Respondent can terminate the contract without cause with 15 days notice to the other party. Respondent also maintains the right to terminate an agent for cause. No liability attached to Respondent if either party terminated the contract other than outstanding commissions owed to the Claimant. Claimant also owed Respondent nothing upon termination of the contract unless he had an outstanding debt to Respondent.

Ultimate Findings

89. The Claimant did not have a trade name, and only received commissions based on his sales. He received a "training allowance" once he became a DSM.

90. The witnesses offered conflicting testimony as to whether the Respondent required the Claimant to work exclusively for it given that the contract specifically states that agents are non-exclusive. The ALJ finds that the testimony of Claimant and Beard was more credible than that of Karrow and Hensley regarding the Respondent's practices concerning exclusivity.

91. The contract itself contains provisions that are somewhat in conflict. While the contract states the sales agent is considered "non-exclusive," the "non-compete" clause limits the agents to selling insurance only for carriers not affiliated with the Respondent.

There was no evidence concerning the number of insurers affiliated with the Respondent. As such, the non-compete clause could be so limiting as to render the Claimant exclusive for all practical purposes. Regardless, the credible testimony of Beard and Claimant is persuasive. Beard's testimony is most persuasive because it was the least likely to be self-serving contrary to Respondent's assertions. Beard no longer works the Respondent, he has a new job, and he has no interest in the outcome of this case. As such, the ALJ finds that the Respondent required the Claimant only to sell insurance products on its behalf, and for no other carrier or agency.

92. Although the independent contractor agreement existed and contained a statement concerning Claimant's ability to exercise independent judgment, the Respondent did not truly allow the Claimant to exercise independent judgment. As an example, the Respondent promoted Claimant to a DSM, a position which required the recruitment of new agents, yet the Claimant had no authority to actually hire a new agent. He could only recommend people and the Respondent had to approve them.

93. As found above, the Respondent provided tools that include, but are not limited to the following: extensive training, an office (then access to an office if necessary), access to a web application, UPS shipments, a reduced cost scanner, sales leads, and scripts.

94. The Respondent dictated the time and manner in which the Claimant performed his work duties. The Respondent took an active role in scheduling appointments for the Claimant, assisted the Claimant with selling its products by providing training, and provided access to an office (including a Regional Manager) and then a web application for further assistance. The Respondent required the Claimant to follow scripts depending on the product he was selling. The Respondent maintained rules pertaining to Claimant's sales footprint. The Respondents required the Claimant to close on 20 percent of the leads it provided to him or risk the punishment of a suspension of good leads. The Respondent required the Claimant to meet certain sales goals or risk termination of his contract with Respondent. The Respondent required the Claimant to provide access to the documents used in transactions related to his work for the Respondent.

95. As found above, the Respondent provided extensive training in more areas than just regulatory compliance. The training included, but was not limited to the following: sales techniques, scripts, manuals, best practices, agent recruiting techniques, product-specific training and training in the field.

96. The Respondent maintained a strict quality standard. While it is true the Respondent did not oversee Claimant's day-to-day work activities, the Respondent required the Claimant to develop plans for increasing business, maintain communications with the sales agents in his "downline", follow scripts and guidelines when selling insurance and when recruiting new agents. As a DSM, the Claimant was required to monitor is agent's "daily activity" and provide ongoing training to the agents. He was required to dress professionally, be a team player and have a positive, optimistic attitude.

Automobile Accident

97. On January 2, 2014, Claimant was involved in an automobile accident on CR 27 near Fort Lupton, CO. He was on his way to Arvada, CO for a 1:00 p.m. appointment with a potential client. Prior to the accident, he had gone to the Fort Lupton post office to mail documents to the Respondent pertaining to another client.

98. The Respondent had scheduled the appointment with potential client on January 2, 2014.

99. The Claimant's injuries as a result of the accident include, but are not limited to a broken left femur, right ankle dislocation, left rotator cuff shoulder injury, left knee injury and traumatic brain injury including a brain bleed and vision impairment. He has had multiple surgeries on his right leg and additional surgeries are anticipated.

100. The Claimant was hospitalized for six months as a result of the injuries he received in the January 2, 2014 automobile accident.

101. As of the date of the hearing, Claimant's medical bills exceed $2.5 million.

102. The Claimant was in the "scope of his employment" at the time of the auto accident.

103. The Claimant's injuries "arise out of" his employment UIG.

104. Shortly after the accident, the Claimant's wife reported to the Respondent that Claimant had been involved in a serious automobile accident.

105. Prior to the accident, the parties had never discussed the fact that the Respondent did not provide workers' compensation insurance. The contract is silent regarding workers' compensation coverage.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following conclusions of law:

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

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

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

Employment Status

4. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

5. The putative "employer" may establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and whether the person is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), 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.*

6. In addition to proving that the Claimant is free from control, 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.

7. In this case, the Respondent has failed to prove that Claimant was an independent contractor. The Respondent failed to show that Claimant was free from direction and control in the performance of his duties. To the contrary, Respondent exercised an abundance of control over Claimant's performance of his duties as an insurance sales agent. The ALJ is not persuaded by Respondent's argument that the control was limited to legal compliance concerns. The Respondent basically set Claimant's daily schedule, built in punishment for failure to comply with its rules and regulations, maintained performance and quality standards, provided tools and extensive training, and paid the Claimant a non-negotiable commission to him personally and not to a trade name.

8. The Respondent also failed to prove that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. The only persuasive evidence on this issue arose from Beard's testimony. Beard testified that he has been a W2 employee in his last three positions in insurance sales, and he has also been an independent contractor. He provided no explanation for the reasons.

9. Balancing all of the factors enumerated in §8-40-202(2)(a), C.R.S., and considering the nature of the relationship between the Claimant and Respondent, the ALJ determines concludes that the Respondent has failed to overcome the presumption, by a preponderance of the evidence, that Claimant was an employee under the Workers' Compensation Act.

Compensability

10. 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).

11. The Claimant has proven that he sustained injuries arising from an automobile accident while he was in the course and scope of his employment with the Employer. The Claimant's testimony was credible and persuasive regarding his activities on January 2, 2014. He had finished performing a work activity and was en route to another work-related appointment when the accident occurred. It is clear that the Respondent contemplated that Claimant would travel by car to appointments. As such, Claimant's claim for workers' compensation benefits is granted.

ORDER

It is therefore ordered that:

1. Claimant is an employee rather than independent contractor.

2. Claimant's claim for workers' compensation benefits is granted.

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

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

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

DATED: August 28, 2015

DIGITAL SIGNATURE:

L. Broniak

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

#JD1J7DQU0D1DECv 2

ISSUE

Whether Claimant has established by a preponderance of the evidence that a right total hip arthroplasty is reasonable, necessary, and related to his August 1, 2013 work injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver and furniture delivery person for approximately two years.

2. On August 1, 2013 Claimant suffered an admitted injury while carrying a sofa with a co-worker. Claimant was lifting and moving a sofa when he twisted, felt a pop in his right hip, and had pain in his groin area.

3. Claimant reported the injury to Employer and began treating with Gary Zuehlsdorff, D.O.

4. Following the injury Claimant underwent several weeks of conservative treatment including pain medications and physical therapy. On October 4, 2013 Dr. Zuehlsdorff ordered a right hip MRI.

5. Claimant underwent an MRI on October 10, 2013 that was interpreted by Scott Lowe, M.D. Dr. Lowe assessed moderate degenerative changes within the right hip, tearing of the anteriosuperior and superolateral acetabular labrums, mild insertional tendonitis and partial tearing of the gluteus medius and minimus tendons on their insertion at the greater trochanter, and mild degenerative changes centered at the pubic symphysis. *See* Exhibit C.

6. On October 21, 2013 Dr. Zuehlsdorff reviewed the MRI results and referred Claimant to Brian White, M.D. for surgical evaluation. *See* Exhibit A.

7. On November 1, 2013, Claimant was evaluated by Dr. White's physician assistant (PA), Shawn Karns. PA Karns obtained pelvic and cross lateral view x-rays. Claimant was diagnosed with femoroacetabular impingement, labral tear, trochanteric bursitis, and low back pain. PA Karns ordered a diagnostic intra-articular hip injection to determine if Claimant was a candidate for a hip arthroscopy. *See* Exhibit B.

8. On November 14, 2013 Joseph Morgan, M.D. administered a right hip intra-articular injection. Dr. Morgan noted that "the patient reported a pain level of 9/10 before the procedure with no change after the procedure." *See* Exhibit C.

9. On November 19, 2013, PA Karns spoke to Claimant and noted that Claimant noticed no difference after the injection and essentially Claimant's pain stayed the same. PA Karns opined that the result from the injection made the hip joint less likely to be Claimant's pain generator. PA Karns reviewed the results of the injection with Dr. White and they recommended a repeat diagnostic injection, noting that if Claimant still did not obtain relief he should be seen by Dr. Zuehlsdorff to have a low back and/or hernia workup going forward. *See* Exhibit B.

10. On December 19, 2013 Eric White, M.D. performed a second right hip intra-articular injection. Claimant reported his pain decreased from a 10/10 prior to injection to a 6/10 after injection. *See* Exhibit C.

11. On December 31, 2013 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff noted Claimant reported 40% temporary relief following the second right hip intra-articular injection and described it as minimally diagnostic. Dr. Zuehlsdorff opined the injection was "probably at least minimal enough to go forward with surgery." *See* Exhibit B.

12. On January 22, 2014 Claimant was evaluated by Dr. White. Dr. White confirmed the diagnosis of right hip impingement and labral tear and concluded Claimant was a candidate for right hip arthroscopy surgery. *See* Exhibit B.

13. On March 10, 2014 Claimant underwent right hip arthroscopy performed by Dr. White. Claimant's labrum was torn beyond repair and Dr. White removed Claimant's labrum and reconstructed it. Dr. White noted that Claimant had delaminated cartilage on the edge of the cup such that he had to have a microfracture procedure to re-grow cartilage and noted that the deep lamination was pretty far medial into the cup. Dr. White opined that the surgery usually has a high success rate, but was complicated by the microfracture procedure and by the size of the microfracture. *See* Exhibit B.

14. Following surgery, it was noted by multiple providers that Claimant was doing well.

15. On March 21, 2014, Dr. White evaluated Claimant and noted Claimant was doing very well post-operatively. On April 1, 2014 Dr. Zuehlsdorff evaluated Claimant and also noted Claimant was doing very well. On May 2, 2014 PA Karns evaluated Claimant and noted Claimant's hip joint motion felt nice and smooth without any discomfort, and Claimant reported he was progressing well. On May 14, 2014, Dr. Zuehlsdorff evaluated Claimant and indicated Claimant was doing well, was actively participating in therapy and home exercises, and had improving range of motion. On June 12, 2014, PA Karns evaluated Claimant and noted Claimant's hip joint moved nice and smooth without catching. PA Karns also reviewed pelvis and right hip x-rays which showed that Claimant's joint space was well preserved, and that the osteoplasties had healed nicely. On June 18, 2014, Dr. Zuehlsdorff evaluated Claimant and noted

Claimant was walking smoother, and was "doing great" three months out from surgery. *See* Exhibit E, Exhibit F.

16. On July 7, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Claimant reported that on July 5, 2014 he was at a barbeque and as he was getting up from a chair he felt a lot of immediate acute pain in his groin surgical area. Dr. Zuehlsdorff assessed acute exacerbation, noted Claimant was much worse, and noted Claimant could barely bear weight on his right foot and had to limp. Dr. Zuehlsdorff noted that when laying down flat any movement of the hip joint caused Claimant a moderate to high degree of pain. Dr. Zuehlsdorff obtained x-rays and saw postsurgical changes but could not tell if there was anything acute. Dr. Zuehlsdorff ordered an MRI/arthrogram. *See* Exhibit E.

17. On July 8, 2014 Claimant underwent a right hip MRI/arthrogram interpreted by Cameron Bahr, M.D. Dr. Bahr gave the impression of: postsurgical changes in the right hip with slight blunting of the superolateral and anterior acetabular labrum and focus of magnetic susceptibility at the right femoral head-neck junction; slightly irregular contrast extending into the posterior labrum suspicious for tear; complete resolution of the mild marrow edema in the superolateral acetabular labrum since the prior MRI with no new areas of marrow edema; no fracture or osteonescriosis; and mild tendinosis of the gluteus medius tendons bilaterally at their insertions onto the greater trochanters. *See* Exhibit G.

18. On July 10, 2014 Claimant was evaluated by PA Karns. PA Karns noted that Claimant had a very guarded gait, very contracted and guarded muscles in the hip flexor region, and assessed an acute flare and hyperspastic muscle spasms of the hip flexors and quads. PA Karns noted that x-rays showed the joint space in the hip was well preserved, that the femoral and acetabular osteoplasties had healed very nicely and that there were no acute findings. PA Karns noted the MRI results were reviewed in detail with Dr. White and that they show the labral reconstruction was in good position with no evidence of any complication, tearing, or displacement and no significant hip joint effusion, no evidence of fracture or osteonecrosis, and that the femoral osteoplasty looked well healed. PA Karns noted that Claimant was reassured that it did not appear there were any acute findings to be concerned of. PA Karns noted Claimant should alter his physical therapy regimen as Claimant reported doing straight leg raises which inflamed and hurt his hip and that straight leg raises should never have been performed in the course of Claimant's rehabilitation protocol. *See* Exhibit F.

19. On July 14, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff noted the x-ray had been negative and that Dr. White reviewed and felt the surgical site was clean. Dr. White expressed concern to Dr. Zuehlsdorff that Claimant was doing straight leg raises and was not supposed to. Claimant reported to Dr. Zuehlsdorff he was feeling much better, and Dr. Zuehlsdorff noted Claimant could move and transition a lot better. Dr. Zuehlsdorff noted discrepancies between the hip arthroscopic protocol and the prescription that would be fixed and switched Claimant to Proaxis physical therapy.

20. On August 6, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Claimant reported he continued to have as much pain as he had prior to surgery and reported feeling very frustrated. He complained of continued pain in the right groin area radiating around to the right buttock area. Dr. Zuehlsdorff assessed Claimant with situational depression and referred Claimant to Ricardo Esparza, PhD for counseling.

21. On September 2, 2014 Claimant was evaluated by Dr. Esparza. Dr. Esparza noted Claimant was having a difficult time emotionally and diagnosed major depression, moderate to severe somatic symptom disorder, and generalized anxiety disorder. Dr. Esparza recommended psychological counseling and after attending a couple of sessions, Claimant abandoned care at the end of September. See Exhibit I.

22. On September 10, 2014 Claimant was evaluated by Dr. White. Dr. White noted Claimant still had pain, was not functioning well, had guarded range of motion, and that his hip did not move well. Dr. White opined that the joint space from the x-rays and the MRI looked good and that the labral reconstruction through the MRI looked good. Dr. White noted that the hip joint itself looked pretty reasonable. Dr. White noted in his assessment that he was concerned as to whether Claimant was having a soft tissue issue or a joint issue since Claimant had not responded well to the surgery despite what looks good technically on x-ray, MRI, and arthroscopic images. Dr. White planned for a period of 6-8 weeks to see if Claimant made improvement and if not planned to do a diagnostic injection. Dr. White indicated that after paying attention to the diagnostic injection he would consider a total hip replacement. Dr. White opined that he was unsure if this would provide complete resolution of pain, but that it would take out the joint component. *See* Exhibit F.

23. On September 17, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff noted that he had spoken with Dr. White who was concerned about the hip joint itself and that there could be pathology that Dr. Zuehlsdorff had been concerned about in July. Dr. White suggested to Dr. Zuehlsdorff possibly an injection, but said he might have to just go to a total hip replacement. Claimant reported to Dr. Zuehlsdorff that he wanted a second opinion. *See* Exhibit 1.

24. On October 7, 2014 Claimant was evaluated by Michael Ellman, M.D. Dr. Ellman opined that Claimant's exam was out of proportion to the imaging findings. Dr. Ellman noted Claimant had significant guarding on exam making it difficult to delineate any extra-articular versus intra-articular etiology for his pain. Dr. Ellman noted Claimant had a high degree of muscle spasm occurring in and about the hip as well as potentially some intra-articular pathology. Dr. Ellman thought it would be reasonable to proceed with a diagnostic and therapeutic cortisone intra-articular injection to help elucidate whether Claimant's pain was emanating from the joint itself versus from the soft tissue around the joint. Dr. Ellman opined that Claimant likely had elements of both and that the injection would give them a good idea of how much pain is emanating from the joint itself. Dr. Ellman opined that Claimant would not be a good candidate to rush back into another surgery. Dr. Ellman reviewed the July 8, 2014 MRI and noted that the labrum

appeared well fixed around the acetabulum and that even though it was read as a labral tear, he opined it was not a tear but showed normal postsurgical changes. *See* Exhibit 5.

25. On December 10, 2014, Claimant was evaluated by Dr. White. Dr. White noted Claimant was continuing to get worse. Dr. White noted on imaging there was no interval loss of joint space. Dr. White opined that Claimant had done poorly after arthroscopy and that in his mind the surgery had failed. He recommended a diagnostic/small potential therapeutic cortico steroid injection of the right hip and noted that if Claimant got relief from the injection, his recommendation would be to move forward with a total hip replacement. *See* Exhibit F.

26. On December 15, 2014, Joseph Morgan, M.D. administered a right hip intra-articular injection of local anesthetic and corticosteroid. Dr. Morgan noted that contrast material was seen in the right hip joint space on the spot images and that Claimant reported a pain level of 8/10 prior to the procedure with slight improvement to a level of 6/10 following the injection. *See* Exhibit K.

27. On December 17, 2014 Claimant called PA Karns. Claimant reported to PA Karns that for the first several hours after the injection, he got about 70-75 percent relief of his symptoms and then the pain gradually returned. PA Karns noted that per Dr. White Claimant would be a candidate for a right total hip replacement. *See* Exhibit F.

28. On December 19, 2014 Claimant was evaluated by Dr. Zuehlsdorff. Claimant reported he received 75% relief from the injection for a few hours but that now his pain was back to where it was prior to the injection. Dr. Zuehlsdorff concurred with the recommendation of Dr. White for a total hip replacement.

29. On December 22, 2014 Jon Erickson, M.D. performed a physician advisory review regarding the request for a total hip replacement. Dr. Erickson recommended denying the request for a total hip replacement pending an Independent Medical Evaluation (IME) with an individual with expertise in the hip joint. Dr. Erickson noted that from review of the MRI it appeared Claimant did not have advanced arthritis of the hip joint and questioned whether it would be appropriate to do a total hip replacement even if Claimant had intra-articular abnormalities causing his pain. *See* Exhibit L.

30. On January 19, 2015 Dr. Zuehlsdorff evaluated Claimant and reviewed Dr. Erickson's opinion. Dr. Zuehlsdorff disagreed with Dr. Erikson's denial of total hip replacement and disagreed with several of Dr. Erikson's opinions. Dr. Zuehlsdorff opined that Dr. White is one of the more elite specialists in the area regarding hip pathology including arthroplasties and replacements. *See* Exhibit 1.

31. On February 10, 2015 James Lindberg, M.D. performed an IME. Dr. Lindberg is an orthopedic surgeon with more than thirty years of experience performing

total hip replacements. Dr. Lindberg obtained a history from Claimant, which was audio-recorded. Dr. Lindberg also performed a medical record review, reviewed Claimant's MRI/arthrogram, and performed a physical examination. *See* Exhibit N.

32. Dr. Lindberg opined that the MRI/arthrogram showed no significant pathology and that it was virtually normal. He noted that Claimant's symptoms and response to physical examination were out of proportion to the pathology on the MRI/arthrogram, and that Claimant had a highly abnormal physical examination. Dr. Lindberg strongly recommended against a total hip replacement. *See* Exhibit N.

33. Claimant was questioned by Dr. Lindberg about whether the injections had helped his pain. When asked about the three injections Claimant reported "I guess they last for an hour…it felt good after they gave the shot, but then after an hour the pain was just right back." Claimant reported initially he got a little bit of pain relief but not a lot. Claimant reported the last shot didn't do anything, the pain was still there. Claimant then reported that he received "not a lot" of pain relief from the first two injections in the first hour, but "after it wore off it was right back where it was." Claimant reported the third injection was in December and that "the last one just didn't do anything because they told me –Dr. White told me to call in and let them know if I got anything, and then I let them know right away, and I told them it was nothing, that it was still the same." *See* Exhibit O.

34. On February 23, 2015 Dr. Erickson performed a second physician advisory review of the total hip replacement request. Dr. Erikson noted that Claimant had undergone a very extensive arthroscopic surgical procedure performed March 10, 2014 by Dr. White and has not done well after the procedure. Dr. Erikson noted his prior letter recommending denial for a total hip replacement based on the fact that it had not been determined that Claimant had advanced degenerative arthritis. Dr. Erickson opined that this was an extremely complex case. Dr. Erikson recommended addressing Claimant's psychiatric difficulties and chronic opioid use, and opined that Claimant's pain and lack of alternatives to a total hip replacement was not adequate justification for a major surgical procedure which may have substantial psychiatric overlay. *See* Exhibit P.

35. On March 20, 2015 Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff continued to recommend a total hip replacement. Dr. Zuehlsdorff noted that after the July, 2014 MRI he was concerned for a re-tear of the acetabular labrum. Dr. Zuehlsdorff again noted that Claimant reported to him four days following the injection that he had received 75% relief for a few hours. Dr. Zuehlsdorff disagreed with Dr. Lindberg's opinion that the MRI was benign and opined that the MRI showed significant concern for suspected re-tear consistent with Claimant's July re-injury, worsening, and the fact that Claimant had not recovered since July. Dr. Zuehlsdorff noted that Claimant reported to Dr. Lindberg that when the injection wore off he went back to his normal pain level and opined that Dr. Lindberg misinterpreted Claimant's responses. Dr. Zuehlsdorff dramatically differed with Dr. Lindberg's review. *See* Exhibit E.

36. Claimant testified at hearing surrounding his continued pain and limitations due to his right hip injury. Claimant stated that after the three injections wore off, he was in pain again and that the pain returned after approximately an hour. Claimant is found credible and persuasive in his testimony surrounding his current pain, limitations, and function. His testimony is consistent with reports throughout his medical treatment.

37. Dr. Lindberg testified at hearing. Dr. Lindberg opined that the primary basis of Dr. White's recommendation for a total hip replacement was Claimant's subjective report of 70-75% relief following the December injection, but that Claimant told Dr. Morgan the injection only reduced his pain from 8/10 to 6/10 and that Claimant told him that the injection provided no relief.

38. Dr. Lindberg opined that if Claimant's pain is from an extra-articular source that doesn't have to do with the hip joint, then a total hip replacement would not be appropriate. Dr. Lindberg opined that in this case, Claimant is not a candidate for a total hip replacement since he has only subjective complaints of pain, with no evidence of a hip joint issue, a virtually normal MRI, an intra-articular injection that provided no relief, primarily extra articular issues on physical exam, and lack of severe osteoarthritis.

39. Dr. Lindberg opined that the hip joint is not the source of Claimant's pain. Dr. Lindberg noted that the purpose of the injection was to rule out intra-articular versus extra-articular pain sources and that the injection was negative for an intra-articular source of pain since it provided no relief. Dr. Lindberg opined that the lidocaine works immediately to numb the area but that the marcaine is more slowly acting and that the steroid part of the injection would kick in and last longer, and would provide significant relief. Dr. Lindberg opined that if Claimant's pain was from the hip joint, he would expect 60-80% relief from the injection. Dr. Lindberg opined that a total hip replacement was not appropriate, that Claimant did not meet the medical treatment guidelines of surgical indications for a total hip replacement, and that other sources of Claimant's pain should be investigated.

40. Dr. Zuehlsdorff also testified at hearing. Dr. Zuehlsdorff opined that a total hip replacement was reasonable and necessary at this time. Dr. Zuehlsdorff opined that the intra-articular hip injection was diagnostic and that Claimant received 75% relief. Dr. Zuehlsdorff agreed that if the injection provided no relief, then it would be non-diagnostic and that if Claimant's pain source was extra-articular then a total hip replacement might not be needed. Dr. Zuehlsdorff opined that Claimant's pain source was intra-articular and that the tests for intra-articular sources including a supine flex hip, flex knee, and external internal rotation showed support for an intra-articular source of pain. Dr. Zuehlsdorff further indicated that Claimant may have some alteration of the extra articular area, implicating the surrounding musculature including the back, the hip, and the gluteus, but opined that was not the primary cause of Claimant's pain.

41. Dr. White testified via deposition. Dr. White opined that Claimant's hip joint is the problem, but that Claimant does not have end stage arthritis, the classic indication for a total hip replacement. Dr. White noted that the hip joint is the problem

and did not get better with the labrum arthroscopy and that a total hip replacement is the only viable solution for Claimant. Dr. White noted that Claimant's joint space looks good on imaging, but that Claimant has a significant area where he is missing cartilage and that Claimant continues to have poor function.

42. Dr. White opined that the steroid injection for the hip joint does not work for a long period of time and that it can work for a day or two days or three days or one hour depending on the patient. Dr. White opined that the diagnostic portion of the injection, the lidocane, should work for about an hour and that if the injection worked for the defined hour it would show objectively that the hip joint is the source of continued pain. Dr. White noted that Claimant may have some other issues coming from his back, sciatic joint and muscles around the hip joint but that the procedure to help Claimant is a total hip replacement. Dr. White opined that when a hip scope doesn't work, it doesn't work catastrophically and a lot of associated symptoms occur around the hip joint, especially muscle spasm and poor function in general and that Claimant fits that picture.

43. Dr. White opined that Claimant had clear intra-articular sources of pain and that everything in clinical examination pointed to a hip joint issues.

44. The Medical Treatment Guideline address total hip replacements in Rule 17.6.E.5. The surgical indications and considerations are listed as severe osteoarthritis and all reasonable conservative measures have been exhausted and other reasonable surgical options have been considered or implemented. *See* Exhibit Q.

45. The opinions of Dr. White and Dr. Zuehlsdorff are found credible and persuasive. Their opinions are consistent with findings on MRI, consistent with Claimant's continued pain and poor function, and are supported by physical examinations showing intra-articular sources of pain. Further, the opinion of Dr. Ellman consistently opines that Claimant likely has intra-articular sources of pain.

46. The opinion of Dr. Lindberg is not found as credible or persuasive. Dr. Lindberg's opinion that the MRI was virtually normal is inconsistent with the noted suspected labral tear on MRI, and opines that Claimant's subjective reporting of pain is inconsistent with the pathology. However, Claimant is found credible in his subjective reporting which has been consistent throughout the claim. Overall, Dr. Lindberg is not as persuasive as Dr. White and Dr. Zuehlsdorff.

CONCLUSIONS OF LAW

Generally

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

entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

Medical Benefits

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).). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the 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).

Claimant has met his burden to show, more likely than not, that a right total hip replacement is reasonable and necessary. The testimony and opinions of Dr. White and Dr. Zuehlsdorff are found credible and persuasive. Claimant underwent an initial right hip arthroscopy after clinical indicators, MRI, and an intra-articular injection pointed

to the hip joint as his pain source. The surgery was a significant surgery complicated by microfracture procedure and showed a complete tear of Claimant's labrum. Claimant performed well following the initial surgery until July 5, 2014 when a fairly benign act of rising from a chair at a BBQ caused him intense pain. Claimant has continued to fair poorly following the July 5, 2014 incident. An MRI in July of 2014 was interpreted by the radiologist as suspicious for a re-tear in the posterior labrum. After waiting some time to see if Claimant's symptoms would improve with conservative treatment, Dr. White ultimately opined that the initial surgery had failed. Dr. White opined credibly that when that type of surgery fails, it fails catastrophically and that a patient will have significant symptoms relating to the hip joint including muscle spasm and poor function. Claimant has displayed these symptoms and is credible in reporting his current pain and limitations.

Dr. White's opinion that the only option to cure and relieve Claimant's intra-articular right hip pain is a right total hip arthroplasty is found persuasive. Although Claimant has only moderate osteoarthritis and not severe osteoarthritis, Claimant has undergone significant conservative treatment measures and has undergone a significant arthroscopic surgery to his right hip joint that ultimately failed. To treat his right hip intra-articular pain, a further right hip arthroscopy would not be appropriate given the amount of damage in his hip joint and the significant prior surgery that was not successful. A total hip replacement, as opined by both Dr. White and Dr. Zuehlsdorff is both reasonable and necessary to treat Claimant's injury. Dr. White credibly opined to the hip joint symptoms that Claimant displayed upon physical examination. Similarly, Dr. Zuehlsdorff opined that the tests for intra-articular sources of pain including the supine flex, flex knee, and external and internal rotation showed support that Claimant's primary source of pain is intra-articular. The ALJ finds persuasive the opinions of both Dr. White and Dr. Zuehlsdorff that Claimant's primary source of pain is intra-articular and defers to their medical opinion that a total hip arthroplasty is necessary at this point to cure and relieve the intra-articular issues.

The opinion of Dr. Lindberg is not found as credible or persuasive. As found above, the July, 2014 MRI was suspicious for labral tear. Both Dr. White and Dr. Zuehlsdorff opined that Claimant's clinical examination and presentation was consistent with intra-articular sources of pain. The overall opinion of Dr. Lindberg that Claimant's only had subjective complaints of pain with no evidence of a hip joint issue is not persuasive. The MRI as well as the clinical examinations point to the hip joint and intra-articular pathology as the source of Claimant's continued pain. Dr. Ellman noted Claimant's high degree of muscle spasm occurring in and about the hip as well as some intra-articular pathology, and opined that Claimant likely had elements of both intra-articular and extra-articular pathology. Dr. Erickson recommended denying the total hip replacement due to the lack of advanced arthritis of the hip joint and opined that even if Claimant had intra-articular abnormalities causing his pain, it might not be appropriate to perform a total hip replacement. However, Dr. Erickson does not offer an alternative solution to cure and relieve Claimant's intra-articular sources of pain and notes that this is a complex case. Further, Dr. Erickson defers to the opinion via IME of an individual with expertise in the hip joint. Dr. White is an expert in the hip joint and the ALJ defers

to his credible and persuasive opinion that the reasonable and necessary solution for Claimant is a total hip replacement. Even if Claimant has both intra-articular and extra-articular sources of pain, Claimant has shown that a right total hip replacement is reasonable and necessary to cure and relieve the current existing intra-articular pain

Claimant reported somewhat inconsistently surrounding the December 2014 intra-articular injection. Claimant advised Dr. Morgan that immediately at injection he received a 20% reduction in pain. Claimant then called PA Karns two days later and reported that for the first several hours after the injection, he got about 70-75 percent relief of his symptoms before the pain gradually returned. Claimant reported similarly four days after the injection to Dr. Zuehlsdorff that he received 75% pain relief for a couple of hours following the injection before the pain returned. At the IME with Dr. Lindberg, Claimant reported he called Dr. White's office and advised them that he received no pain relief from the injection and that his pain was the same. Claimant also reported to Dr. Lindberg that the third injection didn't do anything for his pain. However, earlier in the conversation with Dr. Lindberg, Claimant reported that the three injections lasted for an hour, felt good after the shots, but then the pain came right back. Claimant's reports to Dr. Lindberg appear to be confused as Claimant initially reported some pain relief following all three injections for an hour, but then later reported no pain relief from the third injection. The ALJ finds Claimant's contemporaneous reports made to Dr. Morgan, PA Karns, and Dr. Zuehlsdorff within four days of the injection to be more reliable and persuasive. Thus, the ALJ also agrees with the conclusion of Dr. White and Dr. Zuehlsdorff that the intra-articular right hip injection was diagnostic and in addition to the clinical examination findings, provided additional support for the need for a total hip replacement.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that a right total hip arthroplasty is reasonable, necessary, and related to his August 1, 2013 work injury. Claimant's request for a right total hip arthroplasty is granted.

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: August 28, 2015 /s/ Michelle E. Jones

_____

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

STIPULATIONS

1. The Claimant's average weekly wage (AWW) is $490.00.

2. The Claimant withdrew her claim for penalties against Respondents for alleged late filing of either a Notice of Contest or a General Admission of Liability

ISSUES

In light of the above stipulations, the issues remaining for determination are:

1. Whether the Claimant has proven, by a preponderance of the evidence, that she suffered an occupational disease related to her low back claim with a claim date of November 30, 2013.

2. If the Claimant's low back claim is compensable, whether the Claimant has proven, by a preponderance of the evidence, that she is entitled to medical treatment to cure and relieve her from the effects of the November 30, 2013 occupational disease.

3. If the Claimant's low back claim is compensable, whether Claimant proved, by a preponderance of the evidence, that she is entitled to temporary total disability benefits from December 4, 2013 ongoing.

FINDINGS OF FACT

1. The Claimant's date of birth is September 16, 1985 and she is 29 years old. She began working for Employer on April 12, 2013 and was employed there until January 17, 2014.

2. The Claimant was employed as a server and her job duties included waiting tables and clearing and bussing tables. The Claimant testified that she would carry food and drink items to the tables up and down the stairs. The food was carried on large, round oval shaped trays that would fit 5 – 6 entrees. She estimated the loaded trays would weigh between 20 and 50 pounds. The drink trays were about 1 foot in diameter. She testified that there was not much assistance bringing food and drinks to her tables and she did most of the carrying work during her shift.

3. The Claimant testified that the week of Thanksgiving 2013, work was very busy and she worked 6 shifts, including a 12 hour shift on Thanksgiving and the Friday and Saturday shifts after Thanksgiving. The section of the restaurant she was working

required her to go up and down the stairs repeatedly with heavy food and beverage trays. The Claimant started to experience soreness in her back while working over this week.

4. By Monday, December 2, 2013, the Claimant had difficulty getting out of bed due to the pain in her back. She went in to work on Monday but her supervisor allowed her to go home to rest because the restaurant was not busy. On Tuesday, December 3, 2013, the Claimant reported her injury to her supervisor, Jason Aragon. She advised her supervisor that she was going to Denver Health Medical Center for treatment on December 3, 2013 and testified that at that time she reported a Workers' Compensation claim.

5. According to the testimony of the Respondent's witness, Chad Ashley, managers were trained to complete a First Report of Injury and provide employees with a list of designated physicians. The Claimant was not provided with a list of designated physicians and a First Report of Injury was not filed by Respondents around the time the Claimant first reported a low back claim. Mr. Ashley also testified that he was not aware of the Claimant's injury until weeks afterward. However, even then, his testimony and the Claimant's testimony indicates that the appropriate steps for initiating a workers' compensation claim and obtaining medical care through workers' compensation were not followed.

6. On December 3, 2013, Claimant was seen by the attending physician at Denver Health Medical Center Adult Urgent Care. She reported low back pain for three to four days after increased work over the past week. She was diagnosed with a low back strain, given medications and referred to find a primary care physician for further care.

7. The Claimant testified credibly that she provided her supervisor Katrina with a release from the doctor taking her off work for 3-4 days. Sometime during the second week of December, the Claimant returned to work for one shift in which her supervisor gave her light duty telling her to have someone else carry everything for her. The Claimant testified that this did not work well and she was not scheduled for either regular or light duty after this time. She did contact co-workers and her supervisor about covering other shifts for which she was scheduled. The Claimant testified that she also contacted her supervisors on several occasions between December 2013 and January 2014 to check the status of her workers' compensation claim, to find out what she needed to do for the claim, and to find out how to get medical treatment, but she was not provided with any information. The Claimant's testimony regarding her contact with her supervisors and attempts to report a workers' compensation claim and obtain medical treatment was credible and is found as fact.

8. The Claimant testified that she didn't see any doctors in December 2013 after the 3rd because she didn't have insurance.

9. The Claimant returned to Denver Health Medical Center on January 16,

2014 with the continued complaint of low back pain over the past two months. The medical provider noted that the Claimant reported an onset when she worked 6 days in a row as a waitress. The provider recommended that the Claimant get Medicaid and follow up with a PCP.

10. In January of 2014, the Claimant testified that she had a call from her Employer to meet with Jason from HR. It was the Claimant's understanding that she was to go in to fill out paperwork for her workers' compensation claim. On January 17, 2014, the Claimant met with Jason in HR and was asked to sign a resignation letter which stated that she had not accepted another position but no longer wished to be employed. The Claimant testified that it was her understanding she was required to sign the letter in order to have her workers' compensation claim move forward. The Employer completed a First Report of Injury with its carrier dated January 17, 2014. The Claimant testified the form was completed online and/or on the telephone while she was in the Employer's office at the same meeting where she signed the resignation paperwork.

11. The First Report of Injury filed by the Employer on January 17, 2014, indicates the Employer was notified on December 18, 2013. It alleges the Claimant's last date worked was November 30, 2013, and that she returned to work for the one shift on December 12, 2013. The First Report of Injury filed by the Employer on January 17, 2014, acknowledges that Claimant received treatment at Denver Health Medical Center. At this time, the Claimant again was not provided with a list of designated providers, nor sent to a physician, nor was she provided with a Notice of Contest or General Admission of Liability following the First Report of Injury filed on January 17, 2014. A Notice of Contest was later filed on June 2, 2014.

12. The Claimant testified that after she was set up with Medicare, she obtained conservative back care at Aurora South and was prescribed with muscle relaxants.

13. The Claimant began treating with Michael Holder, M.D. in April 2014. On April 8, 2014, the Claimant reported a four month history of low back pain and Dr. Holder noted there was no specific injury or history of major trauma, which was consistent with the Claimant's testimony and prior reports. Dr. Holder noted "lower thoracic and lumbar spasms intermittent and RT hip and upper thigh pain perhaps 1-2 times per week. Works as a waitress. Went to Urgent Care in Dec. No help." He diagnosed the Claimant with low back pain and recommended the Claimant start physical therapy and get x-rays.

14. The Claimant underwent an MRI at Lutheran Medical Center on June 24, 2014 with findings of chronic lumbar spondylosis at L4-5 and L5-S1 with a moderate central broad-based disc protrusion at L5-S1, causing mild mass effect upon both right and left subarticular recesses and the associated S1 nerve roots and mild bilateral facet arthrosis at L5-S1.

15. Dr. Holder referred Claimant to Dr. Brian Fuller at Mountain Spine & Pain Physicians following the MRI. On August 11, 2014, the Claimant reported to Dr. Fuller that she had increasing, right greater than left, low back pain with radiation to the bilateral buttocks and intermittently to the right calf. Dr. Fuller noted the Claimant sustained an injury while performing work duties lifting November 2013. Dr. Fuller diagnosed a disc protrusion at L5-S1 as well as facet arthropathy and scheduled right L5-1, S1-2 transforaminal epidural steroid injections. He noted that treatment options included a bilateral SI joint injection and trans-piriformis sciatic nerve block, bilateral L4-5 medial branch neurotomy and a repeat right L5-S1 transforaminal epidural steroid injection and physical therapy. Dr. Fuller noted the Claimant was pursuing a Workers' Compensation claim. The Claimant testified that she didn't have the injection recommended by Dr. Fuller at that time because she was waiting on her Worker's Compensation claim.

16. In August or September of 2014, Respondents designated Franklin Shih, MD, as the Claimant's treating provider. The Claimant was seen by Dr. Shih on September 9, 2014. Dr. Shih noted that the Claimant was referred for treatment of a work-related injury. Dr. Shih recommended physical therapy, acupuncture and possible injections and provided work restrictions of limiting her to bending and twisting on an occasional basis, frequent positional changes and a maximal lift of 10 pounds. Dr. Shih noted that he had an extensive discussion with the Claimant about her multiple potential pain generators and treatment options. There was also apparently discussion regarding work restrictions and whether or not the Claimant was capable of working. Dr. Shih noted the Claimant became quite frustrated with him and felt that his evaluation was of no benefit and he noted that the Claimant expressed that she was not comfortable with Dr. Shih as a treating provider. As Dr. Shih and the Claimant did not establish a good therapeutic relationship, Dr. Shih recommended the Claimant see a different primary provider.

17. The Claimant's care was transferred to Dr. Jade Dillon and the Claimant was initially seen by Dr. Dillon on September 22, 2014. The Claimant reported to Dr. Dillon low back pain symptoms that began in November 2013. Consistent with the Claimant's testimony and prior reports, the Claimant told Dr. Dillon that she did not recall any one specific injury but that she had worked extra shifts six days in a row over the week of Thanksgiving as a waitress. Dr. Dillon diagnosed a work-related injury of lumbar sprain and sacroiliitis and recommended physical therapy. Dr. Dillon noted that she would obtain prior medical records to determine what injections the Claimant may have had. Dr. Dillon provided work restrictions limiting lifting to 10 lbs and avoiding repetitive bending and twisting.

18. The Claimant continued to treat with Dr. Dillon, who referred the Claimant to Dr. Feldman for bilateral sacroiliac injections in December 2014.

19. On January 14, 2015, Dr. Dillon noted that the Claimant reported that her symptoms had now returned to baseline after an immediate and short term positive response to sacroiliac joint injections. Dr. Dillon noted the Claimant was referred back to

Dr. Feldman for a repeat set of sacroiliac injections and the Claimant was to continue physical therapy and her self-directed exercise program.

20. The Claimant was evaluated by Dr. Linda Mitchell on January 14, 2015 for an Independent Medical Examination (IME). Dr. Mitchell reviewed medical records and performed a physical examination, took a history from the Claimant and reviewed some surveillance video. In the surveillance video, Dr. Mitchell notes that the Claimant is seen getting in and out of her car, walking through snow and ascending and descending steps without difficulty, walking her dog, dancing and doing 100 sit ups in 4 minutes. At the hearing, the Claimant took issue with the video surveillance and testified credibly and persuasively that she does not live upstairs, she lives in the downstairs and the person seen in the video is the Claimant's mother-in-law and not the Claimant. Dr. Mitchell noted "nonspecific low back pain with straight leg raise, Faber and piriformis maneuvers bilaterally." Dr. Mitchell diagnosed lumbar spondylosis. Dr. Mitchell noted the Claimant had a "very lengthy" course of treatment, but acknowledged that it was "somewhat interrupted." She found the Claimant currently has predominantly myofascial pain with some component of radicular pain on the right in an S1 distribution. Dr. Mitchell opined that the response to the SI joint injections was a nondiagnostic response as it was not at least an 80% improvement. She did not recommend repeat injections. She recommended the physical therapy be weaned to a home exercise program and some maintenance medications and electrical stimulation for 6 months. Dr. Mitchell also opined that a right L5-S1 transforaminal epidural steroid injection could be repeated up to three times. Dr. Mitchell did not find the Claimant to be at MMI, but recommended that when the Claimant did reach MMI, she should be assessed for permanent partial impairment.

21. Dr. Feldman performed bilateral sacroiliac joint injections on February 9, 2015 with post procedure pain reportedly decreased from 7/10 to 4/10. Dr. Feldman noted the Claimant could benefit from diagnostic medial branch blocks on the L3 to L5 levels.

22. On February 16, 2015, Dr. Dillon continued to diagnose lumbar spine pain, sacroiliitis and now listed the additional diagnosis of arthropathy of spinal facet joint. She recommended the Claimant continue to follow up with Dr. Feldman and proceeding with medial branch blocks, and, if indicated by the results of the blocks, with radiofrequency ablation.

23. On April 2, 2015, Dr. Dillon noted that, eight days prior, the Claimant had nerve root blocks and did well with a good diagnostic response and considerable pain relief for one day. After that, the symptoms returned. Based on the positive diagnostic response, Dr. Dillon recommended proceeding with the radiofrequency ablation, and continuing with medications and physical therapy.

24. The Claimant has been unable to work her regular job duties since December 3, 2013. Although the Employer had the Claimant return for one shift and attempt modified work, the Claimant was unable to perform the activities required and

could not complete the shift. The Claimant did not return to regular or modified job duties for the Employer. The Employer did not provide a modified duty job offer in writing pursuant to C.R.S. § 8-42-105. The Claimant is not currently working and has only worked very transiently. The Claimant's credible testimony was that she cleaned a friend's house the previous summer for a couple of months, performing light cleaning every other week. She was initially paid $40.00 per housecleaning, then later $50.00 per house cleaning.

25. Based on the stipulation of the parties, which the ALJ accepts, the ALJ finds that the Claimant's AWW is $490.00, which results in a temporary total disability (TTD) benefit rate of $326.63 per week.

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 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 fact 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 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*, 138 P.3d 684 (Colo. App. 2008; *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability - Occupational Disease

The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the

course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

An occupational disease, as opposed to an occupational injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). 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 claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, supra.

C.R.S. § 8-40-201(14) defines "occupational disease" as:

> "A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment."

The statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test which 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). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. Id. Where the

disease for which a claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Anderson* at 824. 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 such a showing has been made, 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).

The hazardous conditions of employment need not be the sole cause of the disease. 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*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

As found, the Claimant reported low back pain to her Employer after working long shifts over a 6 day period over the week of Thanksgiving. The Claimant advised her Employer that she was requesting medical care for the work-related low back pain on December 3, 2013, but was not given a list of designated providers nor was she directed to complete the necessary Workers' Compensation claim forms at this point. The general manager, Chad Ashley testified on behalf of Employer and, while his testimony established the procedure that should have been followed, it also supported the Claimant's argument that the appropriate procedures for initiating a Workers' Compensation claim and obtaining medical care were not followed by the Employer. Even after the Claimant brought a 3-day release from work duties from Denver Health Medical Center, the Claimant's supervisors do not appear to have taken steps to direct the Claimant to medical care for a workers' compensation claim. Yet, even the early medical records from Denver Health Medical Center attribute the low back pain to the Claimant's work duties.

Subsequently, the Claimant's medical treatment was sporadic and interrupted due to the lack of insurance and the lack of initial treatment under the Workers' Compensation system. Eventually, the Claimant was referred for treatment under Medicaid and then finally under the Workers' Compensation treatment.

Over the course of the medical care that the Claimant received, there are notes that there was no specific major trauma or injury, but rather, the onset of low back pain over a period of time around Thanksgiving of 2013. Prior to this, the Claimant has no history of low back pain, and, after this, the Claimant's low back pain was relatively constant. The type of work that the Claimant performed is consistent with the low back condition documented in the medical records. The Claimant's reporting of the onset of her condition has been consistent and was not questioned by any of her treating

physicians. Even the Respondents' IME physician, Dr. Mitchell, did not raise any serious questions about causation. There was no persuasive evidence presented that the Claimant was exposed to a hazard outside of employment that could have been a proximate cause of her low back condition. To the extent that the medical records of Dr. Mitchell reference video surveillance of physical activities which would be inconsistent with the Claimant's low back condition, the Claimant's credible testimony that the person in the video surveillance was her mother-in-law, and not her, refutes any other inferences from said video surveillance. Dr. Mitchell's reliance on the video surveillance is misplaced. In any event, Dr. Mitchell nevertheless, did not opine that the Claimant did not suffer a work-related occupational disease, but rather opined that the Claimant was at, or nearing, maximum medical improvement.

Overall, the medical opinions of Dr. Holder, Dr. Fuller, Dr. Shih and Dr. Dillon, which did not question causation, in combination with the Claimant's MRI findings, support the conclusion that the Claimant's injury arose out of her work duties during the last week of November of 2013.

Based on the Claimant's job activity descriptions and complaints of pain and other symptoms, along with the opinions of Dr. Holder, Dr. Fuller, Dr. Shih and Dr. Dillon, it is found that the Claimant's job activities likely caused the Claimant's back and radicular symptoms and were causally related to the Claimant's need for medical treatment for her low back condition. The nature and type of heavy lifting of trays laden with food and beverages, which had to be carried up and down stairs was more prevalent in her position with Employer than in her everyday life and, overall, the weight of the evidence, based on the Claimant's testimony, the evidence submitted at the hearing, combined with the physical symptoms documented in the medical records, supports the finding that the Claimant's back was more likely than not caused by her work duties. Because the Claimant met her evidentiary burden, it shifts to Respondents to establish that the Claimant's condition was caused by an outside non-industrial event. Respondents failed to establish the existence of an outside, non-industry cause of the Claimant's condition and need for medical care for her low back. The testimony of the supervisor Chad Ashley that he did not know that the Claimant was attributing her low back pain to work duties is not sufficient, by itself, to establish a hazard outside of employment.

Based on the foregoing, the Claimant has established by a preponderance of the evidence that she suffered a compensable occupational disease causing, aggravating, combining with, or accelerating the symptoms related to her back condition.

Medical Benefits –Authorized, Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101 C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the

course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v, Industrial. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence musty 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*, 717 P.2d 1000 (Colo. App. 1986).

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). 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. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Per C.R.S. § 8-43-404 (9)(a), health care services shall be deemed authorized if the claim is found to be compensable when:

- Compensability of a claim is initially denied
- The services of the physician selected by the employer are not tendered at the time of the injury; and
- The injured worker is treated….at a public health facility in the state (or within 150 miles of the residence of the injured worker).

If the treatment provided to a claimant is found to be reasonably necessary and related to the injury, the claimant shall not be liable for treatment by the provider where the conditions of C.R.S. § 8-43-404 (9) are met.

Authorized providers also 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).

Here, the Claimant testified credibly, and it was found, that she attempted to file Workers' Compensation claim to obtain medical care for her work-related condition. However, initially, the Employer did not follow the appropriate procedures for initiating a claim and directing an employee to appropriate medical care. What followed was sporadic and interrupted care for the Claimant's low back condition, first through two urgent care visits to Denver Health Medical Center due to lack of insurance. Then, once the Claimant was set up with Medicaid, she was able to treat with Drs. Holden and Fuller. However, she did not obtain all of the recommended care due to financial concerns. Ultimately, Respondents referred her to Dr. Shih, within the Workers' Compensation system. As Dr. Shih was unable to establish a good therapeutic relationship with the Claimant, he recommended referral to another doctor. The Claimant was then referred to Dr. Dillon, who assumed the role of the Claimant's medical treatment provider. While the Claimant's path to treatment with Dr. Dillon was somewhat convoluted, in the end, Dr. Dillon is currently the Claimant's authorized treating physician. This is because either (1) Employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion; or (2) Employer failed to offer to provide a Claimant with medical treatment in the first instance, and the right of selection passed to the Claimant.

In this case, the Claimant also testified credibly that she was working her regular food server duties during the week of Thanksgiving in 2013 when experienced the onset of pain in her low back with symptoms radiating to her lower extremities, right worse than left. There was no persuasive evidence presented that the Claimant had previously been treated for symptoms related to her low back before December 3, 2013. The Claimant had not been on medical restrictions prior to December 3, 2013. The conservative medical care that the Claimant received to date from Denver Health Medical Center, from Dr. Holden, Dr. Fuller, Dr. Shih and Dr. Dillon was reasonably necessary to treat the Claimant's work-related condition.

The Claimant has established that she is entitled to further evaluation of her lower back condition to determine if she requires additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act. As of April 2014, Dr. Dillon also recommended proceeding with the radiofrequency ablation, and continuing with medications and physical therapy. This conservative treatment is found to be reasonably necessary to cure and relieve the Claimant of her November 30, 2013 occupational disease.

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. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Here, the onset of the Claimant's occupational disease was during the week of Thanksgiving 2013 and, per the claim, is given a date of November 30, 2013. The Claimant came in to work on Monday, December 2, 2013 as scheduled, but was permitted to leave as the restaurant was not busy. On Tuesday, December 3, 2013, the Claimant reported her low back condition to her supervisor and sought medical treatment. The medical provider at Denver Health Medical Center provided her with work restrictions taking her off work for 3 days. At some point during the second week of December, the Claimant reported for work and attempted to work a shift under "light duty" with someone else carrying her food and beverage trays. The Claimant could not complete the shift and was not scheduled again for regular or light duty. Then on January 17, 2014, the Claimant was advised to come in to work, ostensibly to sign paperwork to initiate her Workers' Compensation claim and get referred to medical care for her condition. The Claimant testified credibly that she was led to believe that she needed to sign a resignation form stating that she had not accepted another position but no longer wished to be employed in order to move her Workers' Compensation claim

forward. This was signed the same day that the First Report of Injury was completed and transmitted to the Insurer by the Employer, supporting the Claimant's contention.

Since then, the Claimant has treated with various physicians sporadically, as set forth in greater detail above. The Claimant's current authorized treating physician, Dr. Dillon, is presently recommending additional conservative care for the Claimant's low back condition and the Claimant is under work restrictions limiting her to lifting no greater than 20 pounds and avoiding repetitive bending and twisting. The Claimant has not returned to regular or modified employment, nor has the Employer made a written offer modified employment to the Claimant within her restrictions that the Claimant has failed to begin.

The Claimant's work-related disability has resulted in her missing more than 3 work shifts and she has missed work shifts for more than two weeks resulting in a wage loss. Therefore the Claimant is entitled to temporary total disability benefits from the day she last worked. The last day that the Claimant worked for Employer was December 2, 2013. So, the Claimant is entitled to TTD benefits from December 3, 2013 ongoing. The Claimant has not worked, other than a very short, transient time period of two months when she performed light housekeeping for a friend, and has suffered a wage loss through the present. The Respondents did not endorse offsets as an issue in the Response to Claimant's November 4, 2014 Application for Hearing, and so, there is no offset for the Claimant's payment for light housecleaning work over a brief time period. In any event, the total amount the Claimant may have received for this limited work was not sufficiently established. The parties stipulate that the Claimant's average weekly wage is $490.00, with a corresponding TTD rate of $326.67 for the purposes of calculating the Claimant's temporary total disability benefits. The Claimant has proven entitlement to benefits based on this rate from December 3, 2013 ongoing, pursuant to statute, until one of the occurrences listed in § 8-42-105(3), C.R.S.

ORDER

It is therefore ordered that:

1. The Claimant's suffered a compensable occupational disease with a claim date of November 30, 2013.

2. The Claimant is entitled to medical benefits to treat her low back and associated symptoms which are causally related to the November 30, 2013 occupational disease and the Respondents are responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

3. Dr. Jade Dillon is Claimant's authorized treating physician.

4. The Claimant is entitled to temporary total disability benefits at the

TTD rate of $326.67 per week, from the time period of December 3, 2013 ongoing until one of the occurrences listed in § 8-42-105(3), C.R.S.

5. All compensation not paid when due shall bear interest at the rate of 8% per annum.

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, 1523 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 section 8-43-301, 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: August 12, 2015

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits for the period April 6, 2014 through April 19, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period April 20, 2014 until terminated by statute.

FINDINGS OF FACT

1. Claimant works as a Bartender for Employer. Her job duties involve serving food, bussing tables, making drinks, washing dishes, cleaning tables, changing kegs, stocking alcohol and closing the bar.

2. On Saturday, March 8, 2014 Claimant was changing out an empty beer keg. Claimant noted that an empty beer keg weighs approximately 40 pounds. While in Employer's walk-in cooler Claimant had to move an empty keg in order to hook up connecting hoses to a full keg. Claimant leaned forward, lifted the empty keg, twisted and experienced a "twinge" in her lower back. She remarked that the pain felt "weird and uncomfortable." The incident occurred shortly after 5:00 p.m. Claimant's back pain continued to increase throughout the rest of her work shift. She explained that towards the end of her shift she sat down and processed credit card receipts in an effort to reduce her lower back pain.

3. On Monday, March 10, 2014 Claimant went into work to perform inventory. General Manager Christina Fahey was at the bar because she oversees inventory. Claimant reported that she thought she had hurt her ribs or "popped some ribs out of place changing the Budweiser keg on Saturday night." She commented that she was unable to continue inventory duties because she was having difficulties sitting, breathing and talking. Claimant remarked that Ms. Fahey arranged for another employee to cover the shift and provided her with a list of two designated Workers' Compensation medical providers. Claimant chose HealthOne.

4. Claimant drove to HealthOne Occupational Medicine and Rehabilitation and was evaluated by Deana Halat, FNP. FNP Halat reported that Claimant had attempted to pick up an empty keg at work on March 8, 2014 but experienced pain throughout her back. In completing a physical examination of Claimant, FNP Halat explained that there was "no palpable tenderness along the paraspinous muscles in [Claimant's] lower back." She determined that Claimant suffered from "shortness of breath, pain [and] left upper quadrant abdominal pain." FNP Halat remarked that she

contacted 9-1-1 to transport Claimant to Swedish Medical Center because Claimant required more extensive evaluation than could be provided at the clinic.

5. Claimant was admitted to Swedish Medical Center because of abdominal pain, flank pain, vomiting and nausea. Claimant reported that her symptoms began three days earlier while lifting a heavy keg at work. A chest x-ray and an abdominal CT scan did not reveal any acute findings. A subsequent CT scan of the lumbar spine was also normal. Doctors thus suspected that Claimant's pain was secondary to a musculoskeletal strain. On March 14, 2014 Claimant was discharged from Swedish Medical Center with a diagnosis of "low back pain, secondary to muscle spasm."

6. On March 17, 2014 Claimant returned to HealthOne for an examination. David Williams, M.D. noted that Claimant's symptoms were consistent with her described mechanism of injury and diagnosed a lumbar strain and muscle spasms. He also took Claimant off of work. She subsequently attended several other appointments at HealthOne during March and April 2014. She was diagnosed with a lumbar strain and possible torn paraspinous muscles in her lower back. Claimant underwent conservative treatment that included medications and physical therapy.

7. On April 4, 2014 Dr. Williams released Claimant to modified employment with lifting, carrying and pulling restrictions. On April 8, 2014 Claimant visited Dr. Williams for an evaluation. She noted that she had returned to work for Employer on the previous night or April 7, 2014. Employer's records reflect that Claimant earned wages during the two-week pay period beginning April 6, 2014.

8. Although Dr. Williams' April 8, 2014 medical record noted that Claimant had been released to modified duty employment and returned to work on the previous night, the record also reflects that Claimant's pain at work became unbearable and she only worked for approximately two hours. Dr. Williams thus took Claimant off of work from April 8, 2014 through April 11, 2014. On April 11, 2014 Dr. Williams released Claimant to modified work duty of four hours per day. Another medical record from April 18, 2014 specifies that Claimant was "taken off work schedule as of April 17, 2014."

9. Claimant worked an average of 30 hours per week for Employer. She earned $4.98 each hour plus tips. Claimant had gross earnings of $4,511.24 for the period December 28, 2013 through March 8, 2014. Dividing $4,511.24 by 12 weeks yields an AWW of $375.94. An AWW of $375.94 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

10. During the two week period from April 6, 2014 through April 19, 2014 Claimant earned total wages of $246.54. Based on her AWW of $375.94 Claimant should have earned $751.88 for the two week period. Claimant thus earned $505.34 less than her AWW for the period April 6, 2014 through April 19, 2014. Multiplying $505.34 by 66.67% yields $336.91. Accordingly, Claimant is entitled to receive TPD benefits in the amount of $336.91 for the period April 6, 2014 through April 19, 2014.

11. By April 20, 2014 Claimant was unable to return to work for Employer. Claimant credibly testified that she has not worked at all since mid-April 2014. Moreover, Claimant has not reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period April 20, 2014 until terminated by statute.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). TPD benefits are calculated based on the difference between an employee's AWW at the time of the injury and the employee's earnings during the continuance of the disability. §8-42-106(1), C.R.S. Specifically, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's AWW at the time of the injury and the AWW during the continuance of the temporary partial disability. §8-42-106(1), C.R.S. TPD benefits shall continue until either the employee reaches MMI or the attending physician gives the employee a written release to "return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." §8-42-106(2), C.R.S.

5. As found, during the two week period from April 6, 2014 through April 19, 2014 Claimant earned total wages of $246.54. Based on her AWW of $375.94 Claimant should have earned $751.88 for the two week period. Claimant thus earned $505.34 less than her AWW for the period April 6, 2014 through April 19, 2014. Multiplying $505.34 by 66.67% yields $336.91. Accordingly, Claimant is entitled to receive TPD benefits in the amount of $336.91 for the period April 6, 2014 through April 19, 2014.

6. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

7. As found, by April 20, 2014 Claimant was unable to return to work for Employer. Claimant credibly testified that she has not worked at all since mid-April 2014. Moreover, Claimant has not reached MMI. Accordingly, Claimant is entitled to receive TTD benefits for the period April 20, 2014 until terminated by statute.

ORDER

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

1. Claimant shall receive TPD benefits in the amount of $336.91 for the period April 6, 2014 through April 19, 2014.

2. Claimant shall receive TTD benefits for the period April 20, 2014 until terminated by statute.

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: August 10, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

_____

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

ISSUES

1. Whether the claimant should receive a scheduled rating or a whole person rating for his right foot injury?

2. What percentage either for a scheduled or whole person rating should be assigned for the claimant's right foot injury?

3. Whether QSART testing, psychotherapy and biofeedback are reasonable and necessary post-MMI medical benefits?

4. Whether the respondents are entitled to an Order crediting TTD payments made since MMI was reached on April 17, 2014 to be applied to awarded PPD benefits?

5. What is the proper calculation of Claimant's Average Weekly Wage?

STIPULATED FACTS

The parties agreed to the following stipulated facts prior to commencement of the hearing:

1. The claimant was employed by the respondent-employer as a Driver Merchandiser.

2. The claimant suffered an admitted injury to his right foot on May 28, 2013. While working in a warehouse for the respondent-employer, the brake on a nearby pallet jack failed, causing the pallet jack to roll backwards. As a result, the pallet jack pinned the claimant's right foot, causing a crush contusion.

3. The claimant had been working for approximately two-weeks as a Driver Merchandiser at the time of the injury.

4. The injury resulted in a sesamoid fracture in the right foot.

5. On June 14, 2013, the respondents admitted for the injury by filing a General Admission of Liability. The respondents admitted to an average weekly wage

of $668.30, based on a 52-week average (from May 25, 2012 through May 24, 2013) of a similar employee working as a Driver Merchandiser with the respondent-employer.

6. On August 23, 2013, the claimant underwent surgery to remove the sesamoid bone, along with an arthrotomy of the medial aspect of the right foot.

7. On April 17, 2014, the claimant was placed at maximum medical improvement by Albert Hattem, M.D.

8. On December 31, 2014, the claimant underwent a Division-IME by Caroline Gellrick, M.D. Dr. Gellrick opined that the claimant was properly placed at MMI on April 17, 2014.

9. The claimant has been receiving Temporary Total Disability (TTD) benefits since May 29, 2013 at a rate of $445.56 per week.

10. From May 29, 2013 through July 20, 2015 (two days prior to the date of hearing), the claimant has received TTD benefits in the amount of $50,615.09.

FINDINGS OF FACT

1. Although the claimant began working for the respondent-employer approximately two weeks before his industrial injury on May 28, 2013, he had previously worked for this respondent-employer.

2. The claimant originally began working for the respondent-employer in August of 2012 and quit this job in November of 2012.

3. The claimant was paid $1,891.97 for the time period from May 18, 2013 through May 31, 2013. This was the claimant's first and only full pay period since returning to the respondent-employer in May of 2013.

4. The claimant quit his job with the respondent-employer in November of 2012 because he was offered a local position in Pueblo, CO for more money. In March 2013, the claimant's previous supervisor from the respondent-employer contacted him about a new position with the respondent-employer for substantially more money.

5. The claimant was re-hired by the respondent-employer and the primary reason he agreed to return to the respondent-employer was due to the substantially better pay.

6. The ALJ finds that the appropriate average weekly wage for the claimant is $945.99 as this amounts to his actual wage loss.

7. The claimant underwent surgery to remove the sesamoid bone in his foot on August 23, 2013. The claimant reported to his treatment provider on August 27, 2013 that his pain had been worse since surgery.

8. The claimant continues to live with pain on a daily basis. It affects everything in his life from cooking and doing the dishes to bathing and sleeping. He has difficulty walking due to an altered gait.

9. The claimant received sympathetic blocks in his spine for treatment of his injury. This results in 100% pain relief for two to three months.

10. The claimant admittedly suffered from depression prior to May 28, 2013. In approximately 2002 he relocated to Michigan for his wife. He struggled with depression due to the move away from his home and family. The claimant moved back to Colorado in 2006 and he was doing "extraordinarily well" up until his May 28, 2013 injury.

11. The medical record demonstrates that the claimant was not started on an anti-depressant—Venlafaxine XR 150mg/day—until on or around August 4, 2013. Dr. Caughfield explained on October 15, 2013 that the claimant's neuropathic pain was being complicated by "acute on chronic anxiety, which is escalating." Dr. Caughfield recommended the claimant undergo psychosocial evaluation.

12. The claimant underwent an initial evaluation with Dr. David Hopkins, Ph.D., on October 23, 2013. Dr. Hopkins' report documents that the claimant "is extremely frustrated with his slow progress, his inability to work, and fears of a poor recovery."

13. Dr. Hopkins recommended six to eight biofeedback and relaxation sessions along with six to eight verbal psychotherapy sessions.

14. Dr. Caughfield's note from November 18, 2013 indicates that the claimant would like to follow through with treatment with Dr. Hopkins, but "there is apparently a denial of that treatment per insurance carrier…."

15. The claimant was not able to receive the six to eight biofeedback and relaxation sessions that were previously recommended by Dr. Hopkins because the treatment was denied by the respondent-insurer. The claimant would "absolutely" like to

have this treatment still because he believes it can only help his condition. The claimant similarly did not receive the six to eight verbal psychotherapy sessions that were recommended by Dr. Hopkins because they were denied by the respondent-insurer. He would also like to have this treatment.

16. The claimant's surgeon, Dr. Angelo Giarratano, began suspecting the claimant had Reflex Sympathetic Dystrophy (RSD) around November 11, 2013. He recommended evaluation for RSD. The claimant underwent his first lumbar sympathetic block on December 10, 2013. Dr. Giarratano concluded, "Due to the patient having complete relief for 3 days from the epidural blocks, [it] is very apparent that the chronic regional pain syndrome [CRPS] has been confirmed." He stated on January 16, 2014, that "If patient does not get his blocks on a regular basis, there is no chance of a cure. The delay from Workers' Comp. is unprecedented."

17. Dr. Caughfield documented on November 18, 2013, that the claimant gets swelling in his right foot. He documented that on January 13, 2014, the claimant's right foot was slightly duskier than the left. On March 6, 2014, Dr. Caughfield diagnosed the claimant with "Right foot crush injury status post surgery with complex regional pain syndrome." He further stated that the claimant had a positive response to the block and has had physical findings consistent with a sympathetic dysfunction.

18. Dr. Hattem placed the claimant at MMI on April 17, 2014. Dr. Hattem stated that a thermogram and bone scan were negative for CRPS, but that the claimant reported significant improvement from three separate sympathetic blocks. He determined that the diagnosis of CRPS was "equivocal" and chose to assign a rating for CRPS. Dr. Hattem provided a 10% whole person rating based on Table 1, page 109 of the AMA Guides, Third Edition Revised, because the injury affected the claimant's ability to stand and walk.

19. The claimant underwent a Division IME with Dr. Caroline Gellrick on December 31, 2014. Dr. Gellrick stated in her report that the claimant has a "distant past history of depression, but it has gotten worse with this injury." She also noted that, according to the claimant, when Dr. Massey performs the block in the lumbar spine, the claimant feels the sensation going down the right leg in the L5 dermatome to the greater hallux, which alleviates pain and tenderness.

20. Dr. Gellrick explained that she would recommend a QSART test as maintenance to further aid in the diagnosis of CRPS.

21. The claimant would like to undergo the QSART testing as recommended by Dr. Gellrick.

22. Dr. Gellrick recommended the claimant receive the treatment that was previously recommended by Dr. Hopkins and that this could be done as maintenance treatment.

23. The claimant testified at hearing that he would still like to receive the treatment that was previously recommended by Dr. Hopkins.

24. Dr. Gellrick provided the claimant with an 11% whole person rating based on the L5 nerve distribution of the right lower extremity. She concluded the claimant's rating should be that of a whole person since the pain is sympathetically mediated in the L5 distribution alleviated with sympathetic blocks.

25. Dr. Kathy McCranie performed an independent medical examination of the claimant on April 16, 2015 at the request of the respondent-insurer. She agreed with both Drs. Gellrick and Hattem that the claimant is at MMI; however, she disagreed with the impairment ratings provided by both of them.

26. Dr. McCranie acknowledged that the Division of Workers' Compensation does allow for impairment ratings using the spinal cord table for patients with CRPS, but it is her opinion that the claimant does not have a "clinical" diagnosis of CRPS and that his clinical examination was not consistent with CRPS. For this reason, she did not think the claimant "fit" into this impairment rating category.

27. Dr. McCranie was of the opinion that the claimant should have a 16% lower extremity rating. This is based on loss of range of motion of the toe, loss of range of motion of the ankle, and causalgic pain in the distribution of the medial plantar nerve.

28. Dr. McCranie stated that the claimant should continue to receive medication management for his anxiety for one year, but if his need for these medications lasts longer than a year, it should be transitioned back to his family physician.

29. Dr. Kathy McCranie testified at hearing that the claimant's maintenance care should continue for a period of a year, but that the sympathetic blocks should continue as long as he continues to receive benefit from the blocks.

30. Dr. McCranie testified that the QSART test recommended by Dr. Gellrick would not be maintenance care because it is a diagnostic test and not treatment and

that it would not be therapeutic to the claimant and that it would "not add anything to his medical treatment." However, she did admit that it would provide additional information as to whether the claimant has a diagnosis of CRPS.

31. Dr. McCranie testified that the claimant does not meet the "clinical" diagnosis of CRPS. She stated that he had some of the symptoms consistent with CRPS, but not enough to be "clinically" diagnosed.

32. Dr. McCranie testified that Level II doctors are taught by the Division of Workers' Compensation that if a claimant has CRPS, they can use the spinal cord rating for change in gait. Dr. McCranie testified that Level II doctors have a choice based on how to provide ratings based on where the doctor thinks the claimant's biggest problem is located.

33. Dr. McCranie testified that Dr. Gellrick gave the claimant a rating based on lumbar radiculopathy. Dr. McCranie is of the opinion that Dr. Gellrick rated the wrong body part.

34. Dr. McCranie testified that the claimant has sympathetically maintained pain. She agrees that the lumbar sympathetic blocks that the claimant receives results in decreased pain and increased function.

35. Dr. Timothy Hall performed an independent medical examination of the claimant on May 14, 2015 at the request of the claimant's counsel.

36. Dr. Hall noted that, when the claimant has not received a sympathetic block, "he can barely walk and can barely weight bear and has dramatic pain in this area of the toe and forefoot."

37. Dr. Hall explained he did not believe it was appropriate to rate the claimant for his range of motion loss. "This patient's problem is not a consequence of his range of motion loss…. His situation is far beyond that. His impairment is with standing and walking when his pain is not controlled." Dr. Hall therefore agreed with the rating for CRPS as provided by Dr. Hattem.

38. Dr. Hall explained that "sympathetically-maintained pain, which is his diagnosis, is a spinal cord issue." Dr. Hall agreed with the usage of page 109, table 1, category A to assign the impairment rating. This category allows for a rating from 5% to 20%. Dr. Hall agreed 10% was appropriate.

39. The ALJ finds that the medical analyses and opinions of Dr. Gellrick are credible and more persuasive than medical analyses and opinions to the contrary.

40. The ALJ finds that the opinions of Dr. Caughfield, Dr. Hattem, Dr. Hall, and Dr. McCranie are credible and persuasive insofar as they are in concurrence with Dr. Gellrick's analyses and opinions.

41. The ALJ finds that the claimant has established that it is more likely than not that the claimant's impairment is not on the schedule and that the claimant is to be rated for a whole person impairment.

42. The ALJ finds that the claimant has established that it is more likely than not that the claimant's average weekly wage is $945.99 per week.

43. The ALJ finds that the respondents have failed to establish by clear and convincing evidence that the DIME physician's whole person impairment rating is clearly erroneous.

44. The ALJ finds that the claimant has established that it is more likely than not that the claimant is in need of maintenance medical care as specifically delineated by Dr. Gellrick in the DIME report.

45. The ALJ finds that the respondents have established that it is more likely than not that any overpayment of indemnity benefits paid to the claimant since reaching MMI on April 17, 2014 should be applied to permanent partial disability benefits due under this order.

CONCLUSIONS OF LAW

1. 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).

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

3. 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.

4. When it comes to determining the appropriate permanent partial disability (PPD) benefits to be awarded when a Division Independent Medical Examination ("DIME") has taken place, the necessary first step will be to determine if PPD benefits are to be awarded for a scheduled rating or a whole person rating. *Egan v. Indus. Claim Appeals Office of State*, 971 P.2d 664, (Colo. App. 1998); *Janine Jones-Roberts v. Frontier Airlines and Pinnacol Assurance*, 2015 WL 546080. This necessity is derived from the fact that the burden of proof involved will depend on the type of rating that is at issue.

5. "The question of whether the claimant sustained scheduled impairment within the meaning of § 8-42-107(2)(a), or a whole person medical impairment compensable under § 8-42-107(8)(c) is one of fact for determination by the ALJ." *Jones-Roberts*, at 6, citing *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). This is, of course, subject to the claimant's burden of proof by a preponderance of the evidence to prove that he sustained functional impairment not found on the schedule. See *Elaine Olson v. Foley's*, 2000 WL 1563216, at 2. "In resolving this question, the ALJ must first determine the situs of the claimant's 'functional impairment,' and the site of the functional impairment is not necessarily the site of the injury itself." *Jones-Roberts*, at 6, citing *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

6. As found above the claimant has established by a preponderance of the evidence that he sustained an impairment beyond the situs of the injury as determined by the DIME physician Dr. Gellrick.

7. Claimant is asserting a claim for whole person benefits, based on the 11% assigned by the Division IME, Dr. Gellrick.

8. Where a DIME has taken place and the DIME physician assigns a whole person impairment rating, this rating must be overcome by clear and convincing evidence.

9. As found above, the respondents have failed to establish by clear and convincing evidence that the whole person impairment rating provided by Dr. Gellrick is incorrect.

10. An award of maintenance medical benefits is appropriate when "future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury." *Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705, 711 (Colo. 1988). It is the claimant's burden to prove by a preponderance of the evidence, which requires substantial evidence in the record, that maintenance medical benefits meeting this standard should be awarded. *Regina Van Meter v. City Market*, 2012 WL 6027192, at 3; citing *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Further, it has been held that "Grover requires the claimant to prove: 'that but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far.'" *Ronald Brock v. Jack Brach & Sons Trucking*, 1995 WL 785442, at 1; quoting *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992) Whether the need for maintenance medical benefits is causally related to an industrial injury is a question of fact for the ALJ. *Id*.

11. As found above, the ALJ concludes that the claimant has established by a preponderance of the evidence the need for maintenance medical treatment as delineated by Dr. Gellrick.

12. AWW shall be calculated upon the wages the injured worker was receiving at the time of the injury. C.R.S. §§ 8-40-201(2). The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that the claimant's AWW is $945.99. The ALJ concludes that there are no special circumstances requiring a deviation from the standard method of computation.

14. C.R.S. § 8-42-105(3)(a) states that temporary total disability benefits must continue until the employee reaches maximum medical improvement. The termination of TTD benefits under any one of the conditions enumerated in § 8-42-105(3)(a) is mandatory. *Laurel Manor Care Ctr. v. Indus. Claim Appeals Office of State of Colo.*, 964 P.2d 589, 590 (Colo. App. 1998); referencing *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App.1995).

15. Claimant was placed at MMI by Dr. Hattem on April 17, 2014. All subsequent medical opinions have concurred with this opinion and the parties have stipulated to this fact.

16. Claimant has been receiving Temporary Total Disability (TTD) benefits since May 29, 2013 at a rate of $445.56 per week. From May 29, 2013 through July 20, 2015 (two days prior to the date of hearing), Claimant has received TTD benefits in the amount of $50,615.09. Claimant continues to receive TTD benefits since July 20, 2015 at a rate of $63.65 per day ($445.56 divided by 7 days per week). The amount of TTD benefits paid since MMI was reached on April 17, 2014 until August 5, 2015 is $30,234.43.

17. Therefore, it is found that Claimant's entitlement to TTD benefits was terminated as of April 17, 2014. Respondents are entitled to a credit against any awarded PPD benefits in the amount of $30,234.43, plus $63.65 per day after August 5, 2015.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant is entitled to a whole person impairment rating of 11%.

2. The respondents request to overcome the DIME with respect to the whole person impairment rating established by the DIME physician is denied and dismissed.

3. The claimant's average weekly wage is $945.99 per week.

4. The claimant is entitled to post-MMI maintenance medical treatment as delineated by the DIME physician.

5. The respondent-insurer is entitled to a credit against PPD for indemnity benefits paid subsequent to MMI on April 17, 2014.

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

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

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

DATE: August 26, 2015

/s/ original signed by:

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

ISSUES

The issues to be determined by this decision include compensability of an alleged work related heart attack and claimant's entitlement to medical benefits. The specific questions to be answered are:

I. Whether Claimant established by a preponderance of the evidence that his heart attack of May 15, 2014, was proximately caused by an unusual exertion that arose out of, and in the course and scope of, his employment duties pursuant to § 8-41-302 (2), C.R.S.

II. If Claimant established that his May 15, 2014, heart attack is compensable, whether the medical treatment for that heart attack provided at St. Mary Corwin Hospital from May 15 through May 17, 2014, was reasonable, necessary, and causally related to that heart attack.

III. Claimant withdrew, without objection, his claim for an occupational respiratory disease arising out of and in the course and scope of his employment with employer. The ALJ approved and accepted Claimant's withdrawal of this claim.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing testimony of Dr. Volz, the ALJ enters the following findings of fact:

1. Claimant is a longtime sandblaster/painter for Employer having worked on and off for the company since 1992. On May 15, 2014, Employer assigned Claimant to work as a "pot tender" outside of a water tank that Employer had contracted to refurbish. Among other things, the contract called for the inside of the tank to be sandblasted and re-painted.

2. As noted above, Claimant was instructed to tend to the sand pot, which he would periodically fill for continuous supply of blasting agent to the workers inside the tank. On May 15, 2014, Employer had assigned two workers to blast the inside of the tank while Claimant tended to the pot. One blaster did not show for work and the job supervisor had not yet arrived on site which Claimant testified slowed the progress of work. Frustrated that the second sandblaster was a no show for work, Claimant took it upon himself, without seeking permission, to enter the tank and begin sandblasting.

3. As the job called for the blasting and removal of lead based paint, the sandblasters inside of the tank wore protective, loose fitting Tyvek suits and breathing

hoods connected to an air hose. The air hood extends down past the neck, draping over the wearer's chest, back, and over their shoulders. The air hose was connected to a machine called an "Air Pig" that filtered the air four times, removing any impurities/oil and/or gas residue before it reached the workers. The air flowing to the hood from the hose is not used as an oxygen supply for the sandblaster to breathe. Rather, the hood and air hose are designed to blow air into the mask, exerting air pressure downward away from the wearer's head and face where it ventilates out the bottom of the hood in order to prevent the particulate matter from sandblasting from entering the hood and being inhaled. Consequently, if the air supply from the hose is somehow interrupted, the blaster would not asphyxiate.

4. Claimant put on his Tyvek suit, donned his hood, and entered the tank. He got onto a scissor lift inside the tank, and began sandblasting. Accordingly to Claimant it was about 65-70 degrees outside the tank and not hot inside. Claimant testified that he was not working at any increased pace. He was not under pressure to work quickly, was not using any new or additional equipment to perform his work, and was not wearing any new or unusual clothing. To the contrary, Claimant admitted that he was performing his sandblasting work as he customarily did that morning. There was nothing unusual or unexpected about his work that morning.

5. Claimant claims that after he had been sandblasting for approximately one hour and 30 minutes, his air hose became kinked and he lost all the air to his hood. According to Claimant, this alleged kink and air loss did NOT cause him any breathing difficulty, concern, panic, or stress. He kept breathing normally. Based upon the design of the hood and air ventilation system, the ALJ finds that a kink in the hose would not have caused any unusual exertion on Claimant's cardiovascular system.

6. Claimant asserts that he got down from the scissor lift, walked over to the kink, took his hood off, after which he took a deep breath inhaling a "mouthful" of dust. Claimant did not explain the reason for removing his hood at hearing but informed Dr. Mayer, during an IME in excess of one year after the initial event, that he took it off because "he did not have enough excess hose to un-kink it." He admitted he was able to breathe normally at all times during this alleged event. Claimant said he fixed the hose's kink, put his hood back on, walked back to the scissor lift, and resumed work sandblasting. Claimant told no other employee, hearing witness, or medical provider of these alleged events on May 15, 2014 or in the days and weeks following the incident in question. Claimant presented no witness to corroborate this version of events.

7. Claimant testified that he worked for about 30 minutes more, sandblasting without any incident, problem, change in his work, unusual events, stress, heat, or symptoms. Per Claimant's testimony, the visibility in the tank was poor with lots of dust in the air. According to Claimant's report to Dr. Mayer he normally could not see 2-3 feet in front of him while sandblasting. Claimant testified that he developed chest and arm pain as he was working. He kept sandblasting as he normally did for another 30 minutes, when the lights inside the tank flashed on and off, which was the signal for the blasters to exit the tank. Claimant exited the tank, testifying that his chest and arm pain

persisted. Claimant went into the trailer that Employer had at the worksite, and laid down where he was later contacted by Lawny and Dean Norvell, the owner/operator of Employer. Claimant drank some water, although he testified that he did not feel dehydrated. He took a couple of antacids which provided no relief. He walked around and vomited on two occasions. He told Dr. Mayer that he "spit up some blood."

8. Claimant testified that he told Dean Norvell, that he "breathed in a mouthful of dust," and that he was having pain. Both Dean and Lawny Norvell dispute this assertion, testifying that Claimant repeatedly told them that he did not know why he was having the aforementioned symptoms. Lawny Norvell testified Claimant had reported to another employee that he was feeling ill on the way to the jobsite to begin his workday on May 15, 2014. Claimant disputes this. According to both Lawny and Dean Norvell, Claimant never mentioned that his air hose kinked, that he took off his hood to un-kink it or that he inhaled a "mouthful" of dust leading to acute chest and arm pain. According to both Lawny and Dean Norvell, Claimant did not mention that he had been working harder than usual or that he was under any stress when his symptoms arose.

9. Dean Norvell transported Claimant to St. Thomas Moore Hospital Emergency Room (ER) in Canon City where he remained with Claimant while Claimant discussed his symptoms and work with medical personnel. Claimant testified that he told the providers at St. Thomas Moore that, he was working a sand blasting job when he breathed in a mouthful of dust. According to Dean Norvell, Claimant never mentioned the alleged hose kinking, hood removal and dust exposure events he testified to at hearing to providers at St. Thomas Moore ER.

10. The report from Claimant's St. Thomas Moore ER visit reflects the following history of present illness: "Patient was sandblasting the pain started . . . He has a history of similar pain in the past . . . He is associated shortness of breath. He was working a suit therefore states that he was sweaty prior to the pain starting. . ." The report is devoid of any mention that Claimant's symptoms began after breathing dust after removing his protective hood and un-kinking his air hose.

11. Claimant was instructed to proceed from the ER to the Centura Centers for Occupational Medicine (CCOM) because he had reported that his symptoms arose while sandblasting. Consequently, Claimant was discharged from St. Thomas Moore and taken immediately to CCOM by Dean Norvell where he was evaluated by Dr. Richard Nanes. Dr. Nanes' report from this encounter is also devoid of any mention that Claimant's symptoms began after inhaling dust while un-kinking his air hose. Although Dr. Nanes provided a diagnosis of strained ribs, he remained concerned that Claimant's symptoms were potentially cardiologic in nature. Accordingly, he recommended further cardiac workup precipitating Claimant's return to St. Thomas Moore ER. Upon his return to the ER, Claimant was reevaluated and determined to be having a ST elevated myocardial infarction (STEMI) or simply put a heart attack. Due to the emergent nature of his condition, Claimant was transported to Pueblo by flight for life to St. Mary Corwin Hospital where he was treated for that heart attack.

12. Upon his admission to St. Mary Corwin, Claimant was evaluated by Dr. Clarice Sage. He was asked for and provided a history of his symptoms. He made no mention of the events he testified, in great detail about at hearing, during this initial evaluation. He instead gave a completely different history of how his symptoms arose. Concerning the history of present illness, Dr. Sage documented as follows: "51 year-old male with a smoking history, but otherwise does not take medications or see doctors, presenting to the emergency department at St. Thomas Moore after complaining of midsternal chest pain that started at approximately 12:30 this afternoon while at work exerting himself" . . . The patient's symptoms seemed to improve and he was transferred to our facility for further evaluation and higher level of care."

13. While in the hospital a cardiology consultation was requested. Claimant was evaluated by Dr. Adam Strunk. Dr. Strunk obtained the following history from Claimant: "This is a pleasant 51 year-old gentleman who was working this morning when he developed the acute onset of chest discomfort up in Florence. He states this was about 10:30 in the morning. He was working and started feel (sic) very hot and sweaty. He took off his work suit and then developed abrupt onset of left-sided chest discomfort which felt like heartburn." Careful inspection of the report generated following this consultation fails to reflect any mention of Claimant's symptoms beginning after removing his air hood to un-kink his air line which resulted in Claimant inhaling a large quantity of dust.

14. Claimant was discharged from St. Mary Corwin Hospital on May 17, 2015, with diagnoses of coronary artery disease, hypotension, and tobacco. The discharge note does not document any of the workplace events that Claimant testified occurred at hearing.

15. Claimant was a heavy tobacco smoker at the time of his heart attack. He testified that he smoked from the age of 16 or 17 until May 15, 2014 when he was instructed to quit. Claimant switched from packaged cigarettes to hand-rolled cigarettes years before his alleged injury, because those unfiltered, hand-rolled cigarettes delivered more of the tobacco's stimulants than pre-rolled cigarettes. Since he could smoke fewer of them to achieve the same desired effect, Claimant testified that hand-rolling his own cigarettes saved him money.

16. When Claimant returned to work for Employer after May 17, 2014, he discussed his heart attack with Dean Norvell. According to Mr. Norvell, Claimant did not mention the alleged events which he claims caused his heart attack namely unusual exertion or that his air hose became kinked, he had to remove that kink, and breathed in dust when took off his hood. The first notice that Mr. Dean Norvell received that Claimant was alleging his heart attack was work-related was when he received a letter giving notice of this claim from his attorney.

17. Dean Norvell testified, the hood and air line the company used on this job site is the best ventilation system on the market and met all OSHA's guidelines and

requirements. According to Dean Norvell, the air hose was heavy duty and designed to be kink proof. Both Dean and Lawny Norvell testified that they have never seen, or heard of the air hose used by the sandblasters on May 15, 2014 becoming kinked in their decades of work with this type of air hose. Despite purposeful attempts, Dean Norvell testified that he was unable to kink the air hose used by Claimant during his sandblasting on May 15, 2014.

18. Dean Norvell testified that an open exhaust vent was cut into the roof of the tank and another 10 foot by 10 foot opening for ingress and egress for employees and equipment was cut into its side and dust socks installed to collect particulate matter. According to Dean Norvell, the tank was ventilated with an air exhaust system that exchanged 100% of the air inside the tank every 30-45 minutes. Inside the tank were two large fans that were constantly running during sandblasting work. The tank was 75 across and 35 feet high. Dean Norvell testified that air quality testing; both inside and outside the tank, was performed by an independent industrial hygienist during the work in question on three separate occasions. Per Mr. Norvell that testing returned results of "Non-detectable" levels of respirable particulates in the air during periods of testing inside the tank. There had been no complaints about the air quality inside the tank. According to Dean Norvell, the visibility inside the tank was 20 to 30 feet, and neither Claimant nor any other employee had told him on May 15, 2014, that the visibility was reduced or less than this usual visibility. According to Dean Norvell, all workers would have been removed from the tank if the visibility inside was 5 feet as that degree of dust in the air poses a risk for creating a dust explosion.

19. Black Beauty was used as the blasting agent on the jobsite. Black beauty is an OSHA accepted, low silica, coal slag blasting agent containing iron Employer frequently uses for commercial sandblasting.

20. Claimant's detailed statements to medical personnel on the date of injury cannot be reconciled with the testimony he gave at hearing. As Claimant discussed his symptoms and their onset with multiple medical providers and with Lawny and Dean Norvell on May 15, 2014, without once mentioning or even alluding to the alleged events he testified about at hearing more than one year after his alleged injury, the ALJ is persuaded that those events likely did not happen as Claimant asserts. Accordingly, the ALJ finds the statements Claimant provided to multiple medical providers on May 15, 2014, more credible than his hearing testimony. Based upon the evidence presented as a whole, the ALJ finds that Claimant is not a trustworthy historian and his testimony regarding the events and condition of his work environment on May 15, 2014 is unreliable.

21. Claimant consulted Dr. Annyce Mayer, a Level II Accredited, Board Certified Occupational and Environmental Medicine Expert to conduct an Independent Medical Examination (IME) of Claimant. Dr. Mayer undertook that assignment and generated a report following her IME on May 15, 2015. As Claimant withdrew his claim for an occupational respiratory disease arising out of and in the course and scope of his employment, the ALJ limits his findings of fact concerning Dr. Annyce's opinions as

expressed in her IME report and subsequent hearing testimony to the issue of whether Claimant's heart attack should properly be considered "work related." Based upon a theory that Claimant was exerting himself at a level greater than or equal to 6 METS, which is the metabolic equivalent of brisk walking or light jogging, inhaled "fine" particulates and was working in a low oxygen environment, Dr. Annyce attributed Claimant's heart attack to his work duties. She reiterated these opinions during her testimony at hearing.

22. Dr. Mayer testified that based on the Claimant's description of the water tank, there would be reduced ventilation that can cause the levels of dust in the air to become much higher than they would when there is better ventilation. She testified that this most likely created a low oxygen atmosphere environment.

23. Dr. Mayer testified that there are studies that have studied the particles that are produced during sandblasting. Per Dr. Mayer studies have indicated that particulate matter from sandblasting can be small of respirable size typically less than 4 um and with an average size of 1 um which is a very highly respirable particulate. She cited, as an analogy to Claimant's work environment, other studies that have looked at PM 2.5, which is a measure of fine particulate matter 2.5 microns and less which have been associated with increased hospitalizations and emergency department visits for heart attacks. Dr. Mayer testified that a recent study found an 18% increased risk of STEMI, for each 7 ug/m3 increase in a PM 2.5 (particulates <=2.5 microns). She testified that based on Claimant's description that he didn't have visibility for more than 4 or 5 feet, the concentration of particulate in the tank would be in far excess of this level. (Claimant's Ex. 9, pp 109).

24. Dr. Mayer testified that she agreed with Dr. Svinarich, that unusual physical exertion can be a trigger that increases the probability of plaque rupture and thrombosis in a patient with asymptomatic atherosclerotic plaques. She testified that the level of physical exertion associated with myocardial infarction has varied in the literature, but was most commonly defined at greater than or equal to 6 METs, which is the metabolic equivalent of briskly walking or light jogging. (Claimant's Ex. 9, pp. 109). She testified that it is her opinion that when Claimant was sandblasting and moving around, he was exerting that level of exertion; that combined with the fine particulate he was exposed to when he took off his mask, and potentially a low oxygen environment lead to his heart attack. She testified that a heart attack is triggered when the heart is not getting enough oxygen and if the amount that you are breathing in is lower than normal that will escalate the risk of a heart attack because of hypoxia.

25. Respondents asked a cardiologist, J.T. Svinarich, M.D. at Colorado Heart & Vascular to review Claimant's medical records and consider whether Claimant's heart attack of May 15, 2015, arose out of any unusual exertion Claimant experienced or performed at work on May 15, 2014. In his report, found on pages 59 and 60 of Respondents' hearing exhibit D, Dr. Svinarich concluded there was no link between claimant heart attack and his work activities of May 15, 2014, writing:

The patient has evidence of underlying atherosclerotic heart disease, which is a chronic condition. Atherosclerotic plaque in the coronary artery exists prior to the onset of acute myocardial infarction symptoms. Extreme exertion, stress, dehydration can be the triggers that increase the probability that plaque rupture in a chronic atherosclerotic plaque will occur leading to occurrence of symptoms of an acute myocardial infarction in a patient who otherwise had asymptomatic atherosclerotic plaque. The patient's work conditions did not cause his underlying heart disease, in other words did not cause atherosclerotic plaque in his arteries.

It is true that the occurrence of extraordinary exertion or stress may increase the probability of plaque rupture, but these plaques can rupture under any circumstances include sleep and rest. It is difficult to predict whether or not the patient would have had acute myocardial infarction had he not been under this degree of stress, but it is likely that the plaque rupture may have occurred subsequently without work related stress, since other factors such smoking can contribute not only to the presence of underlying atherosclerotic disease, but also with progression and its ultimate plaque rupture and development of acute myocardial infarction.

(Id, pg. 60). As stated previously, Claimant denied extreme heat, exertion, stress, or dehydration on May 15, 2014. Given the evidence presented the ALJ finds that Claimant's heart attack would have, more probably than not, occurred whether Claimant was sandblasting on May 15, 2014, or not. The ALJ finds that Claimant's heart attack was more likely than not due to his smoking and underlying coronary artery disease.

26. Dr. Svinarich is the only cardiology expert to address causation in this claim and his opinions concerning causation are more credible and persuasive than the contrary opinions of Dr. Mayer for the following reasons: During her testimony, Dr. Mayer admitted she did not have data or information specific to the Black Beauty blasting agent Claimant was using on the job. Moreover, Dr. Mayer admitted that she was not aware of any study that linked the inhalation of Black Beauty to a heart attack's occurrence. She also admitted she was not a cardiologist, was not an expert in treating or evaluating heart attacks or cardiac conditions or diagnoses and that she had no information regarding the ventilation system and air circulation in the tank where claimant was working. Consequently, the ALJ finds Dr. Mayer's suggestion that inhalation of fine particulate matter likely caused Claimant's heart attack unpursuasive. Her testimony citing various reports indicating that air pollution is a "well established cause of cardiovascular dysfunction", while likely true is unconvincing considering the dearth of persuasive evidence establishing that Claimant actually inhaled any particulate matter on May 15, 2014. On the evidence presented, the ALJ finds that Dr. Mayer based her opinions on Claimant's statements to her during his IME appointment, not independent evidence or information sources. As found above, Claimant's testimony regarding the events of May 15, 2014 and his work environment are not reliable and are unpersuasive. Accordingly, the ALJ finds Dr. Mayer's opinions unconvincing.

27. Based upon her report and testimony the ALJ finds that Dr. Mayer misunderstood the purpose, design and function of the ventilation hood. The ALJ finds that Claimant's direct testimony indicating that he was able to breathe normally throughout his hours of work inside the tank, even with an allegedly kinked air hose

strongly contradicts Dr. Mayer's suggestion that Claimant was working in a low oxygen environment.

28. Based upon the information Claimant provided to Dr. Mayer as outlined in her IME report, the ALJ finds Dr. Mayer's suggestion that Claimant was working at a level of 6 METS or greater conjecture. Even if Claimant had proven that he was working at this level, Claimant's testimony indicates that there was nothing unusual about this level of exertion. Consequently, while Claimant may have been exerting himself on May 15, 2014, he failed to prove that that exertion was unusual as required to prove a compensable heart attack.

29. Michael Volz, M.D., a pulmonologist, examined Claimant at Respondents' request on February 26, 2015. Dr. Volz' exam and report focused on Claimant's alleged occupational respiratory disease which Claimant withdrew at hearing. However, he repeated Dr. Svinarich's conclusion that Claimant's heart attack and heart disease had no work-relatedness. During his evidentiary deposition, taken June 29, 2015, by respondents, he testified that he agreed Claimant's heart attack would not have been caused by any inhalation of dust or particulate matter as Claimant alleged at hearing. He stated: "That the heart attack was not related to work exposure or work activities on that day." (Volz depo. pg. 14: 17-18) He found nothing to indicate that Claimant's work activities were in any way more exertional than his usual average work activities on that day (Id: 21-25) Dr. Volz testified heart attacks can occur without inciting events. (Id. pg. 15: 14-21) He reviewed the medical report from Claimant's medical expert, and pointed out she has no objective, scientific data to support her theory of causation, and that she did not cite any literature to support her theory that Black Beauty would be inhaled and would cause a heart attack as claimant suffered on May 15, 2014, to occur. He testified she did not define what particulate materials she was using to reach her opinion and that her report seemed to be speculative (Volz depo. pgs. 17-21: 5-8).

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado ("Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *§ 8-43-201, C.R.S.* A Workers' Compensation case is decided on its merits. *§ 8-43-201, C.R.S.*

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ need not address every piece of evidence that might lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to

the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found here, Claimant is not a reliable historian and his testimony regarding the events which he now claims, approximately one year later precipitated his heart attack, specifically removing his ventilation hood and inhaling a “mouthful” of dust, cannot be reconciled with the medical record evidence which is devoid of any mention of said events. Accordingly, the ALJ concludes that Claimant’s testimony is unreliable.

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* Heart attacks are compensable if “over-exertion” at work causes the heart attack. Industrial Commission v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Ellerman v. Industrial Commission of Colorado, 73 Colo. 20, 213 P.120 (1923). The “unusual exertion” requirement developed as a special element of the “arising out of” element of compensability in heart attack cases. *Section 8-41-302 (2), C.R.S. (2013).* Under § 8-41-302 (2), C.R.S. a claimant must satisfy a two-prong test of compensability where the claim is based upon a heart attack. First, the claimant must show he experienced an "unusual exertion arising out of and within the course of the employment," and second,

that the heart attack was caused by the unusual exertion. *Vialpando v. Industrial Claim Appeals Office,* 757 P.2d 1152 (Colo. App. 1988); *Kinninger v. Industrial Claim Appeals Office,* 759 P.2d 766 (Colo. App. 1988). Exertion meets this statutory definition if it is unusual in kind and quality when compared to the work history of the claimant or decedent. *Vialpando v. Industrial Claim Appeals Office, supra; Townley Hardware Co. v. Industrial Commission,* 636 P.2d 1341 (Colo. App. 1981).

F. As found here, Claimant has not satisfied his burden of proof on the issue of compensability. He has presented insufficient evidence that the sandblasting work he was doing preceding his symptoms, which would later be appreciated as a heart attack, was of a different kind, quality, pace, or intensity than his usual sandblasting work. To the contrary, Claimant admitted that he preformed his sandblasting in his customary way and there was nothing unusual about his work. The temperature in the water tank was not excessive, and all air circulation systems inside the water tank, exchanging the air every 30-45 minutes were operating properly. Most importantly, Claimant made no mention of the alleged events he now claims constitute "unusual exertion" leading to his heart attack. Had claimant's air hose been kinked, his air supply been interrupted, and had he breathed in dust as he claims, he likely would have mentioned at least one of those important, memorable events to at least one person he spoke with on May 15, 2014, or at the hospital where he stayed from May 15 through 17, 2014. The ALJ finds Claimant's lengthy delay in relaying this information to anyone and then, for the first time, to his retained medical expert suspicious. Based upon the totality of the evidence presented, the ALJ finds Claimant's assertions concerning the kink in his air hose, the removal of his ventilation hood and the claim that he inhaled a "mouthful" of dust dubious.

G. Even if Claimant had proven that he had experienced an unusual exertion based upon the aforementioned events, he failed to present credible evidence that those events caused his heart attack. Crediting the report of Dr. Svinarich and the testimony of Dr. Volz, the ALJ concludes that Claimant's heart attack was, more probably than not due to his coronary artery disease caused by decades of smoking which caused a plaque to dislodge and a heart attack to occur. The balance of the persuasive evidence establishes that Claimant's heart attack was not precipitated by unusual exertion. As found, Dr. Mayer's contrary opinion is not supported by the facts of this claim. Dr. Mayer was ignorant about claimant's work environment and work activities on May 15, 2014. Consequently, her opinions are not convincing. Because Claimant failed to establish that he experienced unusual exertion while performing his sandblasting work on May 14, 2015, and because the credible and persuasive evidence fails establish that his heart attack was caused by the unusual exertion, his claim must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits is denied and dismissed.

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

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

DATED: August 18, 2015

/s/ Richard M. Lamphere

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury and provided by a physician authorized to treat claimant for the injury.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits or temporary partial disability ("TPD") benefits for the period of October 22, 2014 and continuing?

FINDINGS OF FACT

1. Claimant testified at hearing that she was employed with employer as a housekeeper. Claimant testified that on May 9, 2014 she worked at her second job at a concurrent employer from 6:30 a.m. until 3:00 p.m., then went to the store, then proceeded to her second job with employer. Claimant testified that her job duties included cleaning rooms. Claimant testified that while she was in the last room she was cleaning, she leaned over to the edge of a bathtub and kneeled down, putting the ball of her kneecap on the edge of the tub when she began to experience burning pain inside her knee. Claimant testified she then went downstairs and reported her injury to her co-worker.

2. Mr. Henrichon, the director of operations for employer, testified at hearing that he became aware of the alleged injury at around 4:00 p.m. on May 9, 2014 when one of the supervisors for the property where claimant was working called him and informed Mr. Henrichon that claimant had injured her knee.

3. Mr. Henrichon testified that a few days later, he got a call from the supervisor who indicated he may want to come in and question claimant because it had become apparent that claimant may have injured herself at her other job. Mr. Henrichon testified that this information came from a co-employee of claimant, Ms. Gonzales.

4. Ms. Gonzales testified at hearing in this matter that claimant reported to work at approximately 4:30 p.m. and reported that she had been doing some deep cleaning and carrying heavy things for her concurrent employer and that her body was

very tired. Ms. Gonzales denied that claimant reported injuring her knee at her other job. Ms. Gonzales testified that from talking with her other colleagues and friends from the job, they thought claimant's injury might have happened on the other job. Ms. Gonzales didn't explain completely why the other employees thought claimant might have injured herself at her other job, other than the fact that claimant reported to work on the day of the injury and indicated that she was very tired from her other job.

5. Issues were brought up by Mr. Henrichon and Ms. Jennings, the adjuster assigned to the claim by insurer, that claimant had denied to Mr. Henrichon and Ms. Jennings having worked at her concurrent employer on the day of her injury when she was interviewed about having an injury with her concurrent employer. Claimant denied at hearing recalling a conversation with Mr. Henrichon in which she denied having worked at her concurrent employer.

6. Claimant testified she did not recall telling Ms. Jennings or anyone from insurer that her concurrent employer was closed for the off season in an interview with insurer.

7. Claimant testified that she reported to work on October 22, 2014 and found out she was no longer on the schedule. Claimant testified she called employer and was informed she was fired. Mr. Henrichon testified employer terminated claimant from her employment on October 25, 2014. Mr. Henrichon testified employer terminated claimant because she was not being honest regarding her alleged injury.

8. Claimant testified she continues to work for her concurrent employer.

9. Employment records from claimant's concurrent employment were entered into evidence at hearing. The records indicate that claimant worked for her concurrent employer from 8:15 a.m. until 5:00 p.m. The records are contradicted by the testimony of Ms. Gonzales who testified she spoke with claimant at employer's premises at approximately 4:30 p.m. The testimony of Mr. Henrichon indicated that he learned of claimant's injury around 4:00 p.m. on May 9, 2014. The records further indicate claimant did not work for her concurrent employer during the week before May 9, 2014.

10. Claimant was referred for medical treatment at Roaring Fork Family Practice and was initially seen on May 22, 2014 by Ms. Campbell, a physician's assistant. Claimant reported she was injured when she was leaning on a bathtub on May 9 and had been experiencing ongoing anterior patellar pain since that time. The physical examination showed trace tenderness along the patellar tendon. Ms. Campbell noted her physical examination revealed a negative McMurray's test. Ms. Campbell recommended physical therapy.

11. Claimant began her physical therapy on May 29, 2014. Claimant reported to the therapist an accident history of kneeling on the edge of a tub repetitively and feeling a sharp pain over the anterior patella region which got worse over the next few days. The physical therapy records indicate claimant's condition was an anterior knee

contusion from prolonged and repetitive stress resulting in point specific and global knee swelling. Respondents argue in their position statement that the reported accident history to the physical therapist is inconsistent with her accident history of suffering an acute injury on May 9. The ALJ finds the accident history provided to the therapist consistent with claimant's testimony at hearing and provided to the other treating providers.

12. Claimant returned to Ms. Campbell on June 11, 2014 with complaints of pain for a full month on her knee following an excessive compression across her right kneecap. Claimant reported more pain with physical therapy and noted recently she began to feel swelling along with occasional swelling in the past two weeks. Ms. Campbell recommended a magnetic resonance image ("MRI") of claimant's right knee. Claimant was provided with lifting restrictions of 20 pounds and limitations that included no kneeling, crawling, squatting or climbing.

13. The MRI was performed on June 18, 2014 and demonstrated a very small collection of fluid at the anterior inferior aspect of the patella that may be related to prepatellar bursitis, a seroma or a hematoma. A small joint effusion was likewise noted. There was no evidence of a tear involving the anterior horn or posterior horn of the medical meniscus or of the lateral meniscus.

14. Claimant returned to Ms. Campbell on June 25, 2014 and discussed the results of the MRI. Ms. Campbell recommended a Fletchor patch to see if it would reduce the inflammation across the anterior knee. Ms. Campbell provided claimant with restrictions that included no kneeling, squatting or climbing.

15. Claimant again returned to Ms. Campbell on July 23, 2014 and noted her pain increased to the point where she was unable to fully flex of fully extend the knee. Ms. Campbell noted the results of the MRI and recommended claimant be referred for an orthopedic evaluation due to her continued complaints. Claimant was again given work restrictions that included no lifting over 20 pounds.

16. Claimant was evaluated by Dr. George on August 19, 2014. Dr. George noted that his physical examination revealed some sensitivity over the medial joint line with a positive McMurray's examination.

17. Claimant was evaluated on August 21, 2014 by Ms. Campbell and Dr. Spindell. Ms. Campbell noted claimant continued to have a painful click when she went up and down stairs. Claimant reported she had received a steroid injection into the knee on August 19, 2014 under the auspices of Dr. George. Ms. Campbell recommended claimant attempt returning to physical therapy.

18. Claimant was examined by Dr. George on September 9, 2014. Dr. George noted claimant had 4 months of medial sided knee pain, likely from a medial meniscus tear. Dr. George reviewed claimant's MRI and opined that there was an abnormal signal within the meniscus on her MRI which was consistent with the area in which claimant was reporting pain and symptoms. Dr. George indicated claimant's

treatment options were to live with her symptoms and modify her activity or consider arthroscopic surgery for a partial menisectomy.

19. Claimant returned to Dr. George on October 7, 2014. Dr. George noted that claimant's surgery was postponed "due to insurance coverage". Dr. George again reiterated that he believed the MRI showed a tear in the medial meniscus which was consistent with her findings on exam.

20. Respondents arranged for an independent medical examination ("IME") of claimant with Dr. Lindberg on February 17, 2015. Dr. Lindberg obtained a medical history, reviewed claimant's medical records and performed a physical examination of claimant in connection with the IME. On physical examination, Dr. Lindberg noted that claimant's McMurray test caused lateral pain on the lateral side of the patella with no noise and no medial pain at all, including no medial joint line tenderness on McMurray's testing and no instability. Dr. Lindberg opined that claimant has prepatellar bursitis, but noted that, at this point, he saw no indication for arthroscopy recommended by Dr. George.

21. Dr. Lindberg issued an addendum to his report on February 24, 2014 after reviewing the MRI films and x-rays. Dr. Lindberg indicated the x-rays were normal and the MRI showed no evidence of a meniscal tear. The ALJ notes that Dr. Lindberg opines that claimant's injury was limited to prepatellar bursitis, but does not indicate an opinion that claimant was not injured at work. Instead, the opinion of Dr. Lindberg appears limited to the condition of claimant's knee and his opinion that claimant does not suffer from a meniscal tear in her right knee.

22. The records indicate claimant reported the injury to her employer on the date of the occurrence. The ALJ finds claimant provided a consistent accident history to her medical providers and in her testimony at hearing. Respondents maintain that claimant could have been injured on her other job, but that information appears to have come from conjecture from claimant's co-workers. Such a theory does not overcome claimant's testimony that she was injured while at work for employer on May 9, 2014. Additionally, claimant's statements to Mr. Henrichon and Ms. Jennings that claimant denied working for her other employer on the date of her injury, while attacking claimant's credibility, do not establish that claimant was not injured at work with employer as she testified.

23. The ALJ credits the testimony of claimant at hearing along with the supporting medical records and determines claimant has established that it is more likely than not that she sustained a compensable injury arising out of and in the course of her employment with employer.

24. The ALJ credits the testimony of the claimant along with the medical records entered into evidence and finds that claimant has established that it is more likely than not that the medical treatment provided by Dr. George and Roaring Fork Family Medicine is reasonable and necessary to cure and relieve the claimant from the effects of her work injury. The ALJ further credits the opinions expressed by Dr. George

and finds that the proposed arthroscopic surgery recommended by Dr. George is reasonable and necessary medical treatment related to her May 9, 2014 work injury. The ALJ credits the reports from Dr. George and Roaring Fork Family Medicine as credible and persuasive with regard to the issue involving the medical treatment and notes that claimant's report of the accident history was sufficiently consistent as reported in the medical reports and testified to at hearing. The ALJ credits the reports from Dr. George and Roaring Fork Family Medicine as more credible and persuasive than the contrary opinions expressed by Dr. Lindberg in his report.

25. As testified to by Mr. Henrichon, claimant was terminated on or about October 22, 2014 because employer felt claimant was not being truthful regarding her work injury. Claimant has established that it is more probable than not that she was under work restrictions at the time she was terminated and has shown that her work injury contributed to her wage loss.

26. Claimant testified at hearing that she continued to work at her job with her concurrent employer as she was called by the employer for the new season. Claimant testified at hearing that she is currently working with this employer. Therefore, claimant is not entitled to an award for temporary total disability, as she is not "totally" disabled. However, claimant has established that her work injury resulted in the loss of her ability to earn wages with employer as evidenced by the work restrictions set forth by Ms. Campbell and claimant's loss of earnings following her termination of employment. Claimant is therefore entitled to an award of TPD benefits beginning October 25, 2014 and continuing until terminated by law or statute.

27. The ALJ notes that claimant may not have been working for her concurrent employer at the time she was terminated, but testified she returned to work for employer when they called for the new season. Therefore, this wage loss is properly considered to be TPD benefits as opposed to TTD benefits.

28. The ALJ further notes that there was conflicting testimony regarding whether claimant was terminated on October 22 or October 25, 2014, but finds that the evidence establishes that claimant was terminated as of October 25, 2014.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer when she kneeled on the tub and sustained an injury to her right knee.

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

6. As found, claimant has proven by a preponderance of the evidence that the medical treatment provided by Roaring Fork Family Medicine and Dr. George was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the injury. As found, claimant has proven by a preponderance of the evidence that the surgery proposed by Dr. George is reasonable medical treatment necessary to cure and relieve claimant from the effects of the injury. The ALJ credits the reports from Dr. George and Roaring Fork Family Medicine as credible and persuasive with regard to this issue.

7. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

8. As found, claimant has established by a preponderance of the evidence that she is entitled to an award of TPD benefits for the period beginning October 25, 2014 and continuing until terminated by law or statute.

9. In this case, claimant continued to work at her concurrent employer according to her testimony. Therefore, claimant is not entitled to an award of TTD benefits as claimant's wage loss was not "total". Instead, the wage loss is based off of claimant's loss of earnings related to her work with employer, and not the combined earnings of her employer and concurrent employer.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of her industrial injury pursuant to the Colorado Medical Fee Schedule.

2. Respondents shall pay claimant TPD benefits beginning October 25, 2014 and continuing until terminated by law or statute.

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

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

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

DATED: August 7, 2015

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

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PROCEDURAL MATTER

1. Pursuant to an Order dated October 6, 2014, WC No. 4-956-967-02 was consolidated with WC No. 4-871-341-02.

STIPULATION

1. Respondent Protective and Respondent Pinnacol stipulated to the fact that Protective was the insurer of record from October, 2011, until June 6, 2012, and that Pinnacol was the insurer of record on the date of the alleged work-related injury, July 17, 2014.

ISSUES

In light of the above stipulation and procedural matter, the following issues were raised for consideration at the hearing:

1. Whether the Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his back on July 17, 2014 in WC 4-956-967-02

2. If the Claimant's claim for the July 17, 2014 injury, which is the subject of WC 4-956-967-02, is compensable, whether the Claimant proved, by a preponderance of the evidence, that medical treatment that he received was reasonably necessary to cure and relieve the effects of that work injury and whether he is entitled to such further medical benefits as are reasonably necessary to cure and relieve the effects of his July 17, 2014 work injury.

3. If the Claimant's has not proven that his claim for the July 17, 2014 injury which is the subject of WC 4-956-967-02 is compensable, whether the Claimant proved, by a preponderance of the evidence, that he is entitled to medical benefits that are reasonably necessary to cure and relieve the effects of his prior October 29, 2011 injury, which is the subject of WC 4-871-341-02.

4. Whether the Claimant proved, by a preponderance of the evidence, that he is entitled to temporary total disability indemnity benefits beginning on July 17, 2014.

FINDINGS OF FACT

Based on the evidence presented at hearing and through deposition testimony, the ALJ finds the following facts:

1. The Claimant's date of birth is November 17, 1970 and he is currently 44 years old. He has worked for Employer, which is a contractor for FedEx ground deliveries, since October 2010 as a courier/delivery truck driver. The Claimant's job-related responsibilities included delivering packages, as well as loading and organizing packages onto a delivery truck. The Claimant testified credibly that he would start his work day at the delivery terminal. Packages for his route would be located on ground level pallets on the dock behind his truck. The Claimant and other drivers take the packages off the pallets load their own trucks and then deliver the packages. The packages range in size from as small as an envelope to large heavy boxes. The average size box is a file box/banker's box (also see Claimant's Exhibit 14, p. 64; Respondent Protective's Exhibit Q1, p. 48; Respondent Pinnacol's Exhibit M2, p. 142).

2. The Claimant sustained a previous compensable work-related injury on October 29, 2011 (Respondent Pinnacol's Exhibit F2, p. 68). The injury affected the L2-3 level of the Claimants back (Claimant's Exhibit 7; Respondent Protective's Exhibit A1; Respondent Pinnacol's Exhibit H2), and the Claimant ultimately had a microdiskectomy, performed by Dr. Michael Shen, at the L2-3 level (Respondent Pinnacol's Exhibit F2, p. 86). The Claimant was treated, and placed at MMI, with an 8% whole person impairment rating, on July 13, 2012, by Dr. John Aschberger (Respondent Protective's Exhibit E1, p. 16; Respondent Pinnacol's Exhibit E2, p. 65).

3. The Claimant requested a Division Independent Medical Examination ("DIME") for the prior 2011 injury and was evaluated by Dr. Stanley Ginsburg. Dr. Ginsburg assigned a 14% whole person impairment rating, which included a 7% loss of range of motion, and affirmed the July 13, 2013 date for MMI (Respondent Protective's Exhibit F1, p. 17; Respondent Pinnacol's Exhibit G2, p. 103). The case was closed on all issues, with the exception of maintenance, and medication to keep his condition stable.

4. The Claimant returned to work full duty, only requiring maintenance medication. The Claimant testified that he still experienced low back pain, as well as numbness in his right foot and right foot drop/drag, when he gets tired, and cramping at night, but manages his symptoms with rest, and medication. On September 30, 2014, Respondent Protective filed a Final Admission of Liability for the October 29, 2011 injury, and agreed to pay for reasonable and necessary maintenance medical benefits, which had been outlined by Dr. Aschberger and Dr. Raymond Rossi (Respondent Protective's Exhibit T1, pp 89-90).

5. The Claimant was seen for maintenance on June 16, 2014, by Dr. Evan Schwartz, and reported pain that was "identical" to the previous visit in July of 2013, and that the pain was "occasional" (Respondent Protective's Exhibit G1, p. 24).

6. The Claimant testified that there was a heavy work load in early July, 2014, and that his back had been bothering him. According to the Claimant, after completing 90 stops on the morning of July 17, 2014, the Claimant stood up from the seat in his delivery vehicle and turned in order to go to the back of the truck. As he twisted, the Claimant testified that he felt severe and immediate back pain. The Claimant testified that the pain felt like someone drove a stake right into his back. Unlike the pain from the previous injury, the Claimant testified that the pain just stayed right in his back and didn't radiate down into his leg. The Claimant testified that the back pain hit him so hard he nearly lost his balance. The pain caused the Claimant to grab the sides of the shelves on the delivery vehicle and brace himself. When he felt he could move again, the Claimant decided to finish up his route. The Claimant took a Naproxen, and finished his shift. Once home, the Claimant took his medication, and rested. Claimant testified that at first this injury felt like the 2011, but not exactly. According to the Claimant, the 2011 injury caused pain to shoot down his leg, but this injury stayed in his back. On cross-examination, the Claimant testified that when he showed his wife where it hurt on his back it was below his scar from the previous surgery. The Claimant's testimony regarding the mechanism of injury and the description of his pain symptoms on July 17, 2014 was credible and is found as fact.

7. The Claimant asserts that the morning of July 18, 2014, the day after the alleged injury, he had trouble getting up, he was not feeling better, and his supervisor had previously asked for volunteers to take the day off. The Claimant testified that normally he did not volunteer since he wanted to work, but on this day he contacted his immediate supervisor and volunteered to take the day off. His supervisor approved this and the Claimant was told to bring in his delivery vehicle and another driver would take his route. The Claimant "doubled up" on his medications before driving to the delivery terminal, taking extra Naproxen, as well as Ibuprofen, along with his Metaxalone and went to return the vehicle. Upon returning his vehicle, the Claimant was told he needed to wait for a ride home from a co-worker. The Claimant helped load the delivery vehicle with his co-worker. He claims that he was able to do so because he had taken the extra medication, in addition to being strong, and, also, he did not want to show his pain. The Claimant testified that after 2 hours of work, he went home and took a nap. When he awoke from the nap, his back seized up with pain again. The Claimant's testimony regarding the events of the morning of July 18, 2014 was credible and is found as fact.

8. A video of the Employer's warehouse loading dock (Respondent Pinnacol' Exhibit N2) was played during the hearing. In the portion of the video played at hearing, the Claimant is seen engaging in activities, such as loading a delivery truck, bending over to pick up parcels and carrying them to the truck, kicking a soccer ball and grabbing a conveyor belt with both hands and swinging his body underneath while reaching under with his left hand to pull something out Dr. Raschbacher testified at the hearing that the Claimant's ability to do such things as squat, lift, kick a soccer ball, and swing under the conveyor belt did not reflect the Claimant's assertion that he had suffered an injury the day before. In addition, Dr. Raschbacher did not believe that the extra medication would have made such movement possible for an injured individual. In

her deposition, Dr. Fall also stated that the activity in the video was inconsistent with the reported injury, and that extra medication would not extinguish all of the Claimant's symptoms (Dr. Fall Depo. Tr., pp. 45-46). However, Dr. Bisgard testified at trial that the portion of the video entered into evidence was only a portion of the video she reviewed. According to her, the entirety of the video shows the Claimant standing around a lot, as well as using proper body mechanics for squatting and lifting. Additionally, Dr. Bisgard disagreed with Dr. Raschbacher and Dr. Fall, testifying that the extra medication, as well as proper body mechanics, would have allowed the Claimant to engage in the activities displayed on the video. The ALJ finds that Dr. Bisgard is more persuasive regarding her analysis of the video.

9. Steven Sampson, who is the co-owner of S4 Holdings, testified at hearing that he was at the delivery terminal on the morning of July 18, 2014, and he did not observe the Claimant in pain. He also stated that the Claimant did not report his injury on the previous day, July 17, 2014. The ALJ find that this is not inconsistent with the Claimant's own testimony that he did not report an injury that day but, rather, volunteered for a day off. Further the Claimant had testified that he did not want to show he was in pain.

10. The Claimant stated that after he returned from loading the delivery vehicle, he went back home, and laid down to rest. However, when he woke up, he had such severe back pain that he could barely walk. It was at this point that the Claimant called the Employer to report the injury, and stated that he was going to Concentra for treatment. According to the Claimant, the Employer was against this, but the Claimant decided to go to Concentra anyway. The Claimant testified that he had back spasms, and that it took him 30 minutes to get to his vehicle, and that he had to crawl. At Concentra, the Claimant saw Corey Feldman, PA-C. Mr. Feldman's report notes pain in the right lower back which radiates to the buttocks, as well as the right thigh and calf. The Claimant described the pain as "severe" and put the pain level at 7/10 (Claimant's Exhibit 10, pp. 24-26; Respondent Protective's Exhibit H1, pp 26-28; Respondent Pinnacol's Exhibit J2, pp. 114-15).

11. Mr. Feldman referred the Claimant for an MRI, which showed similar symptoms at L2-3 to the October 2011 injury, yet showed worsened symptoms at L4-5, and new symptoms at L5-S1 (Claimant's Exhibits 7, p. 15, and 8, pp. 17-18; Respondent Protective's Exhibits A1, pp. 1-2, and I1, pp. 29-30; Respondent Pinnacol's Exhibits H2, pp. 110-11, and I2, pp 112-13).

12. The Claimant saw Dr. Evan Schwartz on July 21, 2014, who released the Claimant to modified duty, with the restrictions that there be no repetitive lifting over 10 lbs., no pushing/puling over 10 lbs. of force, and no bending. In addition, the Claimant was prohibited from squatting, and climbing stairs or ladders (Claimants Exhibit 11, p. 29; Respondent Protective's Exhibit J1, pp. 31-32; Respondent Pinnacol's Exhibit J2, pp. 116-17).

13. The Claimant returned to Dr. Schwartz on July 28, 2014 (Claimant's Exhibit 11, pp. 27-28; Respondent Protective's Exhibit K1, pp. 33-35; Respondent Pinnacol's Exhibit J2, pp. 120-22), and was referred to Dr. Fall, in addition to being referred to physical therapy (Respondent Pinnacol's Exhibit J2, pp. 118-19).

14. The Claimant testified that he contacted the Employer via the phone, as well as email, regarding his work restrictions, after seeing Dr. Schwartz, and that he could perform modified duty, yet did not receive a response from the Employer. The Claimant further testified that he did not receive a letter regarding modified duty from the Employer, and that his next interaction with the Employer was a COBRA letter informing the Claimant that he had been terminated from his employment.

15. Dr. Fall evaluated the Claimant on August 4, 2014, and noted that a lumbar spine MRI revealed disc extrusions at the L2-3 and L3-4, with possible compression of the right L3 and L4 nerve roots (Claimant's Exhibit 12, pp. 37-39; Respondent Protective's Exhibit L1, pp. 36-39; Respondent Pinnacol's Exhibit K2, pp. 131-33). Dr. Fall referred the Claimant back to Dr. Shen, noting that Dr. Shen had more experience with the Claimant's back condition.

16. The Claimant followed up with Dr. Fall on August 15, 2014. Dr. Fall noted that the results of an EMG were negative for diagnosis of lumbar radiculopathy. (Claimant's Exhibit 12, pp. 33-35; Respondent Protective's Exhibit M1, pp. 40-43; Respondent Pinnacol's Exhibit K2, pp. 135-37).

17. The Claimant visited Dr. Shen on August 20, 2014. Dr. Shen reviewed the lumbar MRI, and noted damage to the L2-3, as well as L3-4, with herniation at the L3-4 discs. Dr. Shen recommended right sided L4 transforaminal steroid injection, in addition to recommending that the Claimant continue medication and physical therapy. (Claimant's Exhibit 9, pp. 19-21; Respondent Protective's Exhibit N1, p. 44; Respondent Pinnacol's Exhibit F2, p. 99).

18. The Claimant followed up with Dr. Fall on August 25, 2014, and Dr. Fall noted her agreement with Dr. Shen's treatment plan. (Claimant's Exhibit 12, p. 32; Respondent Protective's Exhibit P1, p. 46; Respondent Pinnacol's Exhibit K2, p. 138).

19. Dr. Jeff Raschbacher performed an Independent Medical Examination ("IME") of the Claimant on November 7, 2014, on behalf of the Respondent Pinnacol. Dr. Raschbacher took a history from the Claimant, performed a physical examination and reviewed relevant medical records and video footage from the Claimant's workplace taken on July 18, 2014. Based in large part on his review of the Claimant's activities as seen in the video footage, Dr. Raschbacher concludes that there is no objective basis or physical evidence that an injury likely occurred on July 17, 2014 (Claimant's Exhibit 14, p. 70; Respondent Protective's Exhibit Q1, p. 54; Respondent Pinnacol's Exhibit M, p. 148). He stated further that there is no documented objective finding of a change of condition, and that the presumption of injury was based purely on Claimant's subjective reporting. In addition, Dr. Raschbacher noted that review of the

dock surveillance video from July 18, 2014 (Respondent Pinnacol's Exhibit N2) displayed physical activity that made it medically improbable that the Claimant suffered an injury on July 17, 2014.

20. Dr. Elizabeth Bisgard performed an IME on behalf of the Claimant on January 5, 2015, on behalf of Respondent Protective. Dr. Bisgard took a history from the Claimant regarding his prior October 29, 2011 injury as well as a history of his current injury. Prior to the IME, Dr. Bisgard reviewed relevant medical records and she discussed them with the Claimant at the IME and the record review is combined with the history in her written report. Additionally a summary chart of the record review is provided. Dr. Bisgard also reviewed a pain diagram completed by the Claimant and conducted a physical examination. In her report, Dr. Bisgard states that a comparison of the MRI scans from 2011 and 2014 show disc herniation at L2-3, as well as herniation of L3-4, which is effacing both L4 nerve roots, consistent with the assessment of Dr. Shen, as well as Dr. Fall. In addition, Dr. Bisgard concludes that this is a new injury, and not the result of the previous 2011 work-related injury. Dr. Bisgard opined that the Claimant requires additional treatment prior to being placed at MMI (Claimant's Exhibit 13, p. 46; Respondent Protective's Exhibit R1, p. 71).

21. The Claimant testified that his examinations with Dr. Fall generally lasted around 20 minutes. He further claimed that his IME with Dr. Raschbacher only lasted around 30 minutes. His IME with Dr. Bisgard lasted at least 1 hour.

22. Dr. Allison Fall testified by evidentiary deposition on January 12, 2015. Dr. Fall testified that the Claimant reported to her doing well post-surgery for his 2011 injury other than minor aches and pains The evidentiary deposition of Allison Fall, M.D. occurred on January 12, 2015 The evidentiary deposition of Allison Fall, M.D. occurred on January 12, 2015. Dr. Fall testified that the Claimant reported to her doing well post-surgery for his 2011 injury other than minor aches and pains (Dr. Fall Depo. Tr., p. 9). Dr. Fall testified that after reviewing Dr. Ginsburg's DIME report at the deposition, she found that the Claimant's complaints in that report were not consistent with what the Claimant told her about his post-MMI condition for the 2011 injury (Dr. Fall Depo. Tr., p. 11). She testified that the "entire leg numbness and pain intolerable is different" (Dr. Fall Depo. Tr., p. 26). She testified that the radicular symptoms the Claimant described post July 2014 injury were reflected in the DIME report for the 2011 injury, including right foot numbness and right leg numbness (Dr. Fall Depo. Tr., pp. 12-13). She also testified that the pain complaints he made to Dr. Ginsburg appeared more severe than what he told her over a year later (Dr. Fall Depo. Tr., p. 13). Dr. Fall further testified that the electrodiagnostic testing performed by Dr. Aschberger more likely indicated an impingement at L4-5 rather than L2-3, where Claimant had been surgically treated (Dr. Fall Depo. Tr., p. 16). She also testified that, to her, the symptoms of low back and buttocks pain, along with the nature of the radicular symptoms described in the medical records from 2012 and 2013 indicated involvement at spinal levels lower than L2-3 (Dr. Fall Depo. Tr., pp. 16-18). Dr. Fall testified that she felt the references to those symptoms and the EMG findings indicated that the Claimant had involvement of or

symptoms emanating from lumbar levels below L2-3 at that time with respect to his prior injury (Dr. Fall Depo. Tr., p. 18).

23. Dr. Fall also testified as to the differing MRI findings in 2011 and 2014. She agreed that a comparison MRI review by a radiologist of the two MRIs would have been the preferred way to prevent against different interpretations of the studies (Dr. Fall Depo. Tr., pp. 19-20). She opined that additional new conditions identified in the 2014 MRI, including ligamentum flavum thickening at L4-5 and facet joint capsulitis which was causing stenosis were degenerative conditions (Dr. Fall Depo. Tr., pp. 21-22). Dr. Fall noted that there was a three year gap with an intervening surgery between the MRIs, and it was possible that the conditions shown in the 2014 MRI were present at the time of the DIME with Dr. Ginsburg (Dr. Fall Depo. Tr., p. 25). She opined that the symptoms the Claimant reported to Dr. Ginsburg were reflective of a higher degree of spinal pathology than shown in the 2011 MRI (Dr. Fall Depo. Tr., p. 26). She also felt that it was more likely that after his 2011 MRI, the Claimant developed a progression of his degenerative conditions at the lower levels of L3-4 and L4-5 that could have shown up on an MRI had it been done at the time (Dr. Fall Depo. Tr., pp. 26-27).

24. Dr. Fall was shown portions of the July 18, 2014 FedEx video at the deposition. After reviewing the video, Dr. Fall stated that she agreed with Dr. Raschbacher that the physical activity in which the Claimant was engaged in the video made it appear unlikely there was actual significant symptomatology in his lumbar spine at that time (Dr. Fall Depo. Tr., p. 30). She also agreed the activity was inconsistent with the level of symptoms he reported to her, and she "wouldn't have expected him to be doing all of that" (Dr. Fall Depo. Tr., pp. 31). As for whether the Claimant's taking extra pain medications on the morning of July 18, 2014 would have enabled the Claimant to engage in the activities seen on the video, Dr. Fall testified that the movement patterns and fluidity of his movements, such as kicking a soccer ball, awkward positioning such as putting a leg up and leaning over, and carrying objects on his shoulder, were not consistent with actions someone would take if they suffered a back injury the prior day. (Dr. Fall Depo. Tr., pp. 31-32). She also did not believe taking pain medication would extinguish all of his symptoms, and if he had a back injury, he would still have had spasms, stiffness, and other symptoms (Dr. Fall Depo. Tr., pp. 32-33). She testified that not knowing the weight of the objects he was lifting on the video had no bearing on her opinions, because the awkward positioning and posturing was more relevant (Dr. Fall Depo. Tr., p. 40). She testified he appeared fully functional at the time of the video (Dr. Fall Depo. Tr., p. 31-33). She also testified that the video was evidence that it was not medically probable that the Claimant suffered an injury the day before that led him to not being able to work because he is seen working in the video (Dr. Fall Depo. Tr., pp. 33-34). She also opined that his post 2011 injury symptoms appeared to wax and wane and it was possible his most recent complaint of symptoms were a waxing and waning of those symptoms (Dr. Fall Depo. Tr., p. 34). Dr. Fall also testified that the nature of the work the Claimant did on a daily basis contributed to the waxing and waning of symptoms (Dr. Fall Depo. Tr., p. 35).

25. At the hearing, Dr. Bisgard testified as an expert in the field of occupational medicine. She testified that she performed an IME with the Claimant and

spent an hour with him. She testified that she has previously reviewed medical records from the October 29, 2011 injury and the July 18, 2014 injury. In regard to the 2011 injury, Dr. Bisgard testified that the Claimant had a herniated disk at L2-3 and the symptoms, MRI pathology and mechanism of injury all added up and Dr. Shen performed a microdiskectomy which was appropriate. Dr. Bisgard testified that if there was other pathology present at that time, she would have expected Dr. Shen, as the treating surgeon, to have addressed it. Her understanding was that the Claimant had a good result from the surgery performed by Dr. Shen for the 2011 injury in that the Claimant's symptoms were alleviated enough for him to go back to work full duty without work restrictions. It was also her understanding that the Claimant was able to manage his condition with medications without substantial change in his symptoms, although waxing and waning of symptoms would be typical given the Claimant's work.

26. Dr. Bisgard testified that the Claimant's last maintenance visit for the October 29, 2011 injury prior to the onset of new symptoms in July of 2014 was a June 16, 2014 visit with Dr. Schwartz. Dr. Bisgard compared the Claimant's clinical presentation on that visit with his July 18, 2014 Concentra visit. She testified that on July 18, 2014, the Claimant's description of a high level of pain that was sharp, dull, aching, burning, and stabbing were descriptions not contained in the June 16, 2014 record. She also testified the tenderness in his lower spine was a new finding compared to June 2014 in addition to loss of motion and an altered gait on July 18, 2014. Dr. Bisgard felt the two reports comparatively showed that "something happened" in the intervening period and the MRI of July 18, 2014 supported the occurrence of an event in that time period. She noted that this could possibly be related to the recent deliveries of awkward and heavy boxes for the wine of the month club that the Claimant had advised her occurred in this time frame. As to the MRIs, Dr. Bisgard noted the July 2014 MRI was different because the L3 herniation was abutting the left L3 nerve root, which was different than in 2011, and there was new pathology affecting the L4 nerve roots, as well as progression of the ligament pathology and onset of facet hypertrophy. She opined the new findings explain where the symptoms were originating from. Dr. Bisgard testified that she felt Dr. Ginsburg's determination to keep the Claimant at MMI meant that he felt the Claimant's condition remained stable.

27. Dr. Bisgard also testified as to the FedEx video that was reviewed in part at the hearing. She testified that she had viewed it in its entirety. She testified that the Claimant stood around a lot over the course of the entire video and people around him were moving at a faster pace. She testified he used good body mechanics such as squatting while lifting. She also testified the boxes were not big and were of unknown weight. She disagreed with Dr. Fall that the Claimant used awkward positioning. Dr. Bisgard also testified that the medications the Claimant took the morning of July 18, 2014 would have allowed him to perform the activities shown in the video along with using good body mechanics even if he had suffered a recent back injury. She testified that it was her opinion that the Claimant suffered a substantial aggravation of his underlying condition in July 2014 and that the video footage did not change this opinion.

28. On cross-examination, Dr. Bisgard admitted she did not take formal range of motion measurements. Her statement of limitation on his ability to forward flex was

based upon his statement that he was previously able to touch his fingers to the floor. She confirmed that Claimant had full extension and no objective signs to correlate complaints of radicular symptoms at her IME. She testified this was similar to Dr. Aschberger's physical exam at MMI for the 2011 injury. Dr. Bisgard agreed on cross-examination that Claimant's allegation of foot drag in relation to the 2011 injury was first documented by Dr. Aschberger after Dr. Shen released Claimant from care post-surgery. She agreed that Dr. Aschberger then performed an EMG which identified nerve root irritation at levels below L2-3. She also agreed foot drag could possibly correlate with a L5-S1 dermatome, which was also lower than L2-3. She also agreed that complaints of radiculopathy through the whole leg and into the toes, and low back pain into the buttocks, as documented by Dr. Ginsburg, could possibly correlate to levels below L2-3. Dr. Bisgard agreed that the entirety of that clinical presentation as seen in Dr. Aschberger's and Dr. Ginsburg's records could possibly be suggestive of possible nerve root irritation at lumbar levels below L2-3. However, she testified that there was not an MRI at that point and she opined that Dr. Ginsburg, a respected neurologist, felt that the Claimant was at MMI and didn't make a note of pathology or symptoms at other levels, which was indicative to her that he didn't make this correlation. Dr. Bisgard agreed on cross-examination that it was possible the findings on the 2014 MRI were present in 2012 and 2013, but she did not feel it was probable due to Claimant's change in clinical presentation and that she felt the 2014 MRI findings were consistent with his post-July 2014 presentation. She opined that it is possible that the new MRI pathology was pre-existing, but stated that she didn't think it likely that the findings would have been present, but asymptomatic, until 2014. She also agreed that Claimant's subjective complaints to Dr. Ginsburg represented a progression of symptoms from his treatment with Dr. Shen and Dr. Aschberger, but his objective exam did not correlate the worsening complaints, although, she again noted that an MRI was not obtained at this point as Drs. Aschberger and Ginsberg felt the Claimant at MMI.

29. At the hearing, Dr. Raschbacher testified at hearing as an expert in the field of occupational medicine. Dr. Raschbacher testified that he performed an IME of the Claimant and was aware of his prior 2011 injury and subsequent discectomy. Dr. Raschbacher testified he felt it medically improbable that Claimant suffered an injury in July 2014. He testified that in his opinion after review of the medical records, the Claimant's subjective reports appeared to be dependent upon the situation, and there was a large difference in those complaints, specifically as between Dr. Shen's, Dr. Fall's and Dr. Ginsburg's notes. Specifically, he noted the Claimant's complaint to Dr. Ginsburg of intolerable pain was in great contrast to earlier reports to Dr. Shen and Fall about a great recovery, and his range of motion was much reduced as well. Dr. Raschbacher also testified the Claimant informed him at the IME that his pain was "tolerable" after his prior surgery, which was directly contradictory to his report to Dr. Ginsburg that his pain could be "intolerable." However, this would be consistent with over all reporting that the Claimant's symptoms waxed and waned at time. Dr. Raschbacher testified that the symptoms associated with an L2-3 impingement would not manifest in symptoms below the medical knee in general. He also noted an L3 impingement would not innervate any muscles that cause foot drop or foot drag. He testified that this is more of an L5 issue. He testified that the Claimant's complaints after being released by Dr. Shen of low back / buttocks pain, foot drag and foot drop, as well

as Dr. Aschberger's EMG findings, were suggestive of pain generators originating at levels below L2-3. The EMG represents objective findings of that fact. He also noted Dr. Fall's later EMG was essentially the same, which objectively showed no worsening in terms of nerve root irritation. Dr. Raschbacher further testified that if Claimant's subjective complaints to Dr. Ginsburg were taken as true, these would represent a progression of symptoms that Dr. Aschberger stated at MMI would have warranted a new MRI, and therefore, a new MRI should been taken at that time. Dr. Aschberger stated if he had been in Dr. Ginsburg's place, and assuming he believed Claimant's subjective reports to be accurate, he would have stated Claimant was not at MMI and recommended a repeat EMG and repeat MRI. Yet, as the records demonstrate, this did not happen. Dr. Raschbacher compared Dr. Schwartz's August 25, 2014 treatment note, one month after the date of the alleged July 2014 injury, with Dr. Ginsburg's DIME. He noted Dr. Schwartz documented intermittent dull pain described as mild with improving symptoms, and he stated this characterization was much better than those described to Dr. Ginsburg. He also noted that Dr. Schwartz documented a normal range of motion whereas Dr. Ginsburg documented range of motion loss in 2013. Dr. Raschbacher further testified that he had not seen any range of motion measurements in any records after July 2014 which showed greater limits on range of motion than that recorded by Dr. Ginsburg, including Dr. Fall's documentation of range of motion. Dr. Raschbacher himself testified he recorded minor range of motion loss, but less than that recorded by Dr. Ginsburg. So, he opines that the Claimant's current condition is a natural progression of his October 29, 2011 injury. He also testified that, based on the MRIs that were reviewed, he finds it more likely that the findings on the July 2014 MRI were present before the injury, just not symptomatic. Dr. Raschbacher admitted that he had not previously compared the 2011 MRI with the one from 2014. However, after reviewing both at trial, Dr. Raschbacher stated that the 2014 MRI had new findings, but opined that different radiologists read MRI's in different ways.

30. Dr. Raschbacher also commented on portions of the FedEx video which were shown during his testimony. He noted specific activities which he would not expect the Claimant to perform if he had suffered an injury the prior day, including a portion of the video when Claimant is seen swinging under a conveyor belt at 7:18:45 a.m. He testified that the Claimant was seen in the video bending, lifting, and squatting, all of which were movements that did not reflect the Claimant suffered an injury. He testified that the video of the Claimant's repeated lifting and bending spoke for itself and periods of the video in which the Claimant was not as active did not minimize the relevance of the portions in which he is seen as physically active. Dr. Raschbacher also testified he did not believe the Claimant's explanation of taking medications justified the actions in the video, as, in his opinion, the Claimant was still able to engage in awkward positioning and move without apparent limitation. Although later in cross-examination testimony, Dr. Raschbacher did agree that people in pain can work through their pain.

31. With respect to the DIME opinion of Dr. Ginsberg that the Claimant was at MMI from the October 29, 2011 injury, Dr. Raschbacher opined that the DIME report is just one puzzle piece that you put in to get the whole picture. In the context of this case, Dr. Raschbacher opines that the subjective reports the Claimant provided, which Dr. Ginsberg relied on, were not so reliable, so the DIME report itself has flaws. Ultimately,

Dr. Raschbacher believed that the Claimant's symptoms which were not attributable to the L3 nerve root were present before July 2014, they were just not symptomatic.

29. In weighing the contradictory evidence in this case, the ALJ finds that the Claimant's testimony was credible and generally supported by the medical records. Whether the Claimant receives continuing medical treatment for his prior injury or he receives medical treatment for a new injury, does not impact the Claimant and there would be no incentive for the Claimant to prefer one over the other, as long as he receives treatment. Therefore, it is persuasive that the Claimant is adamant that the pain he felt on July 17, 2014 was markedly different from the pain that he felt from the October 29, 2011 injury. This testimony is also supported by the comparison of the MRI from November 23, 2011 and the one from July 18, 2014, as well as the credible and persuasive testimony of Dr. Bisgard. Further, having experienced some waxing and waning of symptoms from the 2011 injury and having managed these with medications over several years, it is more likely than not that the Claimant would recognize symptoms that were simply more of the same. The symptoms the Claimant currently experiences are significantly different and, per the testimony of Dr. Bisgard, they do correlate to pathology on the MRI and the mechanism of injury described by the Claimant. It is found as fact that the Claimant suffered a new injury on July 17, 2014 or that his work injury permanently aggravated, accelerated or combined with his preexisting condition.

Generally

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

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

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

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

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury or illness have its origins in an employee's work-related functions. There is no presumption than an injury or illness which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, supra.

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the

precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The Claimant in this case was employed as a delivery driver. The Claimant's job included loading his truck, handling packages, and delivering packages. On October 29, 2011, the Claimant suffered a work-related injury to the L2-3 level of his back. The Claimant was treated by Dr. Michael Shen, who eventually performed a microdiskectomy on the injured area. On July 13, 2012, Dr. John Aschberger placed the Claimant at MMI, with an 8% whole person impairment rating. The Claimant requested a Division Independent Medical Examination, and was examined by Dr. Stanley Ginsburg. Dr. Ginsburg assigned a whole person impairment rating of 14%, which included a 7% loss of range of motion, rather than the 8% previously assigned by Dr. Aschberger, and affirmed that MMI was achieved on July 13, 2012. The Claimant returned to full-duty work, despite suffering from ongoing waxing and waning of symptoms, including back pain and occasional foot drag, both of which were manageable through the use of medication, as well as rest.

During the month of July, 2014, the Claimant was experiencing increased back soreness, due to his heavy workload. On the morning of July 17, 2014, the Claimant was taking a break, after having completed approximately 90 stops. The Claimant stood up from his seat in the delivery vehicle, and twisted, and felt a sudden pain in his back. The pain was so severe that the Claimant had to brace himself on the sides of his delivery vehicle, with his arms spread out from his sides. The pain was isolated to his lower back, in contrast to the 2011 injury which caused pain to radiate down his right leg. He took some of his prescribed Naproxen, and managed to finish his shift. The following morning, the Claimant was not feeling better, and informed his supervisor that he would volunteer to take the day off. He was told to bring in his delivery vehicle, and that he would be given a ride home. Once at the loading dock, he decided to help his coworker who would be covering his deliveries load her vehicle. At this point, he had doubled up on the medications he was taking, and refrained from showing his pain, as he was still not sure how bad his back was. The Claimant was taken home after the delivery vehicle was loaded, and he proceeded to lie down and rest, in hopes that his back would feel better. However, when the Claimant tried to get up from his rest, he found that his back had gotten worse. He called his supervisor and requested that he be allowed to go to Concentra for treatment. His supervisor denied that request, yet the Claimant decided to take himself in anyway. It took him 30 minutes to make his way through his house in order to get to his car. He could barely walk, and was forced to crawl some of the way.

At Concentra, the Claimant was treated by Corey Feldman, PA-C. Mr. Feldman noted that the Claimant had pain in the right lower back, as well as pain that radiated down to the Claimant's buttocks, and down the right leg. Mr. Feldman ordered an MRI, which revealed that the Claimant still had symptoms at the L2-3, yet also had increased damage to the L4-5, as well as new damage to his L5-S1 levels. On July 21, 2014, the Claimant visited Dr. Evan Schwartz, who examined him, and released him to modified duty, restricting him from lifting anything over 10 lbs, pushing/pulling using anything over 10 lbs of force, as well as refraining from all bending, squatting, and climbing, including stairs and ladders. The Claimant followed up with Dr. Schwartz on July 28, 2014, and referred to Dr. Fall, and was also referred to physical therapy. Around this time, the Claimant contacted his employer via phone and email, regarding his modified duty, but did not hear a response. It wasn't until the Claimant later received a letter from COBRA that he learned of his termination.

Dr. Fall examined the Claimant on August 4, 2014, and noted that a lumbar spine MRI revealed disc extrusions at the L2-3 and L3-4, with possible compression of the right L3 and L4 nerve roots. The Claimant was referred to Dr. Shen, since Dr. Shen had more experience with the Claimant's back, and was seen again by Dr. Fall on August 15, 2014, wherein an EMG was used to rule out lumbar radiculopathy. Dr. Shen examined the Claimant on August 20, 2014, and found that the Claimant had damage to his L2-3 and L3-4, noting herniation of the L3-4 discs. A transforaminal steroid injection for the right side L4 was recommended by Dr. Shen. The Claimant followed up with Dr. Fall on August 25, 2015, and Dr. Fall agreed with Dr. Shen's diagnosis, as well as recommended course of treatment.

On November 7, 2014, Dr. Jeff Raschbacher performed an IME on the Claimant, on behalf of the Respondent Pinnacol. Dr. Raschbacher determined that there were no objective findings which would indicate that the Claimant had sustained a back injury on July 17, 2014. Dr. Raschbacher had at that point, only reviewed the MRI from July 18, 2014. At trial, Dr. Raschbacher conceded that when comparing the two MRIs, the July 18, 2014 did indeed have new findings. However, he opined that discrepancies between the two MRIs could be due to reporting styles of different radiologists.

On January 15, 2015, Dr. Elizabeth Bisgard performed an IME on the Claimant, on behalf of the Respondent Protective. Dr. Bisgard compared the MRI related to the 2011 injury with the one taken on July 18, 2014, and found, as Dr. Shen, and Dr. Fall had, that the Claimant continued to have some damage to the L2-3 level of his spine, as well as new disc herniation to the L3-4 level, with additional damage to both sides of the L4 root. Dr. Bisgard concluded that this new injury was likely the result of the July 17, 2014 injury.

The Claimant offered credible testimony. His account of the morning of July 17, 2014, as well his increased pain in the days following, establishes that it is more likely than not that he did in fact sustain a new injury. Further, the Claimant established that this new injury arose out of, and within the scope of, his work-related duties for employer.

The expert testimony of Dr. Bisgard was found to be more persuasive than that of Dr. Raschbacher. Specifically persuasive was Dr. Bisgard's opinion that the Claimant had new injuries that were most likely attributable to the twisting injury reported by the Claimant and were consistent with the Claimant's medical records. Dr. Raschbacher's testimony regarding the video surveillance was not enough to overcome the generally consistent findings illustrated in the Claimant's medical records.

As found, the ALJ determines that the Claimant has proven, by a preponderance of the evidence, that his work activities on July 17, 2014 caused or permanently aggravated, accelerated or combined with his preexisting condition. Thus, the Claimant suffered a compensable injury on July 17, 2014.

Medical Benefits
Authorized, Reasonable, Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). It is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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).

The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As set forth above, the Claimant's new back injury is found to be causally related to the Claimant's work activities and is compensable. The Claimant received conservative treatment after his July 14, 2014 injury and it was reasonably necessary in order to treat this new injury. In addition, Dr. Bisgard persuasively testified that the Claimant's condition related to the July 14, 2014 injury is not stable and that he requires further evaluation and medical treatment before he can be placed at MMI.

With respect to the post-MMI treatment that the Claimant was receiving for his October 29, 2011 per the Final Admission of Liability dated September 20, 2013, nothing in this order would disturb that, to the extent that his symptoms attributed to the prior injury continue to require treatment, and the Claimant continues to be entitled to Grover medical benefits as outlined in the Final Admission of Liability for that injury, in addition to treatment he receives for the July 14, 2014 injury.

Per the stipulation of the parties that Respondent Protective was the insurer of record from October, 2011, until June 6, 2012, and that Respondent Pinnacol was the insurer of record on the date of the alleged work-related injury, July 17, 2014, Respondent Protective remains responsible for Grover medical benefits only for the October 29, 2011 injury which, at the present time, has been limited to medication management. Respondent Pinnacol is responsible for all other medical treatment provided since July 18, 2014 and ongoing (except for medication management that the Claimant receives for the October 29, 2011 injury) that is reasonably necessary to cure and relieve the Claimant of the effects of his July 17, 2014 work injury.

Temporary Disability Benefits

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

Through testimony and the exhibits, it was established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. The Claimant voluntarily took a day off on July 18, 2014 due to the pain he felt after the incident on July 17, 2014. He went to the terminal to return his truck and helped another driver load the truck over a period of two hours. After he returned from loading the delivery vehicle, the Claimant went back home and rested. When he woke up, he had such severe back pain that he could barely walk. The Claimant then called the Employer to report the injury, and stated that he was going to Concentra for treatment. According to the Claimant, the Employer was against this, but the Claimant decided to go to Concentra anyway. At Concentra, the Claimant saw Corey Feldman, PA-C. Mr. Feldman's report notes pain in the right lower back which radiates to the buttocks, as well as the right thigh and calf. The Claimant described the pain as "severe" and put the pain level at 7/10. Mr. Feldman referred the Claimant for an MRI. The Claimant saw Dr. Evan Schwartz on July 21, 2014, who released the Claimant to modified duty, with the restrictions that there be no repetitive lifting over 10 lbs., no pushing/puling over 10 lbs. of force, and no bending. In addition, the Claimant was prohibited from squatting, and climbing stairs or ladders. The Claimant's testimony that he contacted the Employer via the phone, as well as email, regarding his work restrictions, after seeing Dr. Schwartz,

and that he could perform modified duty, yet did not receive a response from the Employer was not challenged or disputed. The Claimant further testified that he did not receive a letter regarding modified duty from the Employer, and that his next interaction with the Employer was a COBRA letter informing the Claimant that he had been terminated from his employment.

The claim for the July 17, 2014 injury was found compensable. Through testimony and the exhibits, it was also established that the Claimant suffered a disability lasting more than three work-shifts due to his injury. There is no evidence that the Claimant was released to regular duty work or that Employer provided an offer of modified work at any time after July 17, 2014. The Claimant suffered a wage loss as a result of his July 17, 2014 work injury. Therefore, the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 18, 2012 ongoing until the occurrence of one of the events set forth in C.R.S. 8-42-105 (d).

ORDER

Based upon the foregoing, it is ordered that:

(1) The Claimant established that he suffered a compensable injury on July 17, 2014 by a preponderance of the evidence; and

(3) Respondent Pinnacol shall be liable for all authorized, reasonably necessary and related treatment related to the July 17, 2014 injury which is the subject of WC no. 4-956-967-02, and shall pay for this medical treatment in accordance with the Official Medical Fee Schedule of the Division of Workers' Compensation; and

(4) The Claimant is entitled to receive temporary total disability indemnity benefits beginning on July 18, 2014. The Claimant's TTD benefits shall be calculated and paid in accordance with C.R.S. § 8-42-105. Respondent Pinnacol is liable for the payment of TTD benefits; and

(5) Nothing in this order affects the Claimant's entitlement to post-MMI medical benefits per a Final Admission of Liability, and in accordance with the Act, related to an October 29, 2011 work injury that is the subject of WC no. 4-871-341-02. Respondent Protective remains liable for the payment for post-MMI medical benefits related to the October 29, 2011 work injury; and

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

(7) All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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: July 30, 2015

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer on July 31, 2014;

2. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve Claimant from the effects of the work injury;

3. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that the back surgery recommended by Dr. James Gebhard is reasonable and necessary medical treatment to cure and relieve Claimant from the effects of the industrial injury; and

4. If the claim is compensable, whether Claimant proved by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") beginning August 1, 2014 and continuing until terminated by law?

STIPULATIONS

The parties stipulate and agree that, if the claim is compensable, Claimant's average weekly wage (AWW) is $870.00.

FINDINGS OF FACT

1. Claimant is a 59-year-old male who was hired by Employer in March 1975. Claimant had no other employers between 1975 and 2014. Claimant worked at Employer's in production, on the loading dock, as a service technician, and as an equipment deliverer and installer. He worked as a service technician and in equipment delivery and installation for 35 years.

2. The physical demands of working as an equipment installer required that Claimant typically work with vending machines, coolers, and fountain equipment for soft drinks. Claimant's job involved delivering and installing equipment for Employer's customers. Claimant used assistive equipment like hand trucks to move the equipment, yet, the work still involved pushing, pulling, lifting, bending, stooping, and squatting. Claimant's job also required moving other equipment or furniture out of the way before installing new equipment. Claimant had to maneuver the equipment around various obstacles, through tight doorways, over curbs, up and down slopes, and up and down

stairs. The vending machines weighed an estimated 500-800 pounds, and the fountains could weigh between 200-700 pounds. Claimant lifted some of the coolers himself but some larger coolers weighed between 400-600 pounds. Claimant performed his work on a full-time basis for 35 years as of 2014.

3. Claimant's work involved making deliveries in Western Colorado and Eastern Utah. His work involved significant driving between customers' locations, especially if he was making deliveries to remote areas. Even on days when Claimant had long drives in order to make deliveries, he still performed physical activities on a daily basis.

4. Claimant had assistance from co-workers on some deliveries. However, typically, Claimant spent more than half of his time delivering and installing equipment by himself. Even when Claimant had assistance with the deliveries and the work still involved substantial physical activity.

5. Since 1975, Claimant engaged in some physical activities outside of work. This included some home repairs and playing one season of recreational softball. Claimant also hunted approximately four times in the past 15 years. Claimant occasionally had back pain, which he described as muscle spasms or "a knot in the back," but the occasional symptoms never caused Claimant to miss work. Claimant had pain in the muscles right above the buttocks area. Claimant never had radiating pain to his legs. He occasionally took ibuprofen and Flexeril to treat his symptoms, but he did not take medications on a daily basis.

6. On Thursday, July 31, 2014, Claimant was performing deliveries and installations in the Vail area. Over the course of the day, Claimant moved approximately 16 vending machines. He did not notice a sudden onset of low back or leg symptoms over the course of his workday.

7. Claimant began to have symptoms when he had lunch with a Vail Associates employee with whom he was working that day. He began having pain in his hip and his back. He continued to bend and lift over the course of the day while his symptoms increased. As the day went on, he began having radiating pain into his left leg. Although there was an incident before lunch when a vending machine broke a pallet, Claimant did not feel anything strange involving his low back or legs in connection with that incident.

8. On the afternoon of July 31, 2014, Claimant made a phone call to James Townsend, lead tech. Mr. Townsend requested that Claimant come in the following day to move more equipment. Claimant told Mr. Townsend that he was in a lot of pain. He told Mr. Townsend that he had already worked 48 hours that week, and wanted to rest over the weekend and feel better. Claimant did not report a work injury to Mr. Townsend at that time. Claimant hoped he could use ibuprofen, ice, heat and feel better after taking some time off of work.

9. Claimant did not work on August 1 or August 2, 2014. Claimant sought medical care at Primary Care Partners on Sunday, August 3, 2014, because his regular doctor's office was not open that day, and his pain had become so severe that he needed medication.

10. Dr. John Bratteli at Primary Care Partners noted on August 3, 2014, that Claimant had "pain in the left lower back that extends down to his buttock and down to the back of his leg, all the way to the back of his left ankle." Dr. Bratelli noted that Claimant had no history of significant back issues. Dr. Bratelli noted that Claimant had had "about a week of low back pain without any obvious cause. Claimant told the doctor that there was no "specific obvious cause" to his symptoms because he did not want to report a work injury at that time. He still hoped he could get over his symptoms and return to work.

11. Dr. Bratteli referred Claimant to Dr. Dale Utt for follow-up and opined that Claimant should not work on August 4 and 5, 2014.

12. Claimant spoke by phone with Robert Josey, marketing equipment supervisor for Employer, on August 3, 2014, after his appointment with Dr. Bratteli. Claimant asked Mr. Josey if he could take some time off from work using Claimant's sick and vacation time in order to get time away from moving heavy equipment.

13. Claimant saw Dr. Dale Utt at Foresight Family Physicians on August 5, 2014. Dr. Utt is Claimant's family doctor. Claimant presented to Dr. Utt with primarily left-sided low back pain and left leg pain. Dr. Utt noted that Claimant's symptoms began a week earlier with no specific event. Dr. Utt also noted that Claimant did not think he hurt himself at work although his job is physical.

14. Claimant was asked by various providers to identify a specific event in which he injured himself, but he could not give them a specific time or point where an injury had occurred. Claimant's symptoms came on during the course of the day on July 31, and progressively got worse.

15. Dr. Utt recommended a MRI and, potentially, epidural steroid injections.

16. On August 9, 2014, Respondents referred Claimant to Dr. Reicks. Claimant saw Dr. Reicks with Foresight Family Physicians on August 9, 2014. Dr. Reicks prepared and signed a WC-164 form dated August 9, 2014, noting that Claimant had increased lower back pain and leg pain that started at work with no definite event. Dr. Reicks imposed work restrictions on Claimant involving lifting and carrying limits of 10 pounds.

17. Claimant decided to report the injury as a workers' compensation injury prior to his meeting Dr. Reicks on August 9, 2015, because Claimant's pain was getting more severe, and he decided that he needed to take care of the injury.

18. Employer filed its First Report of Injury on August 11, 2014. The First Report noted an injury date of July 31, 2014. The First Report noted: "[Claimant] states that while performing repetitive occupational duties, he began to experience discomfort (strain) to his lower back area. He was diagnosed with a pinched nerve to his back area." The First Report noted that August 1, 2014, was the "date disability began," and that Robert Josey was notified of the injury on August 11, 2014. Respondents filed a Notice of Contest on August 15, 2014.

19. Claimant returned to see Dr. Reicks on August 15, 2014. Dr. Reicks notes that Claimant did not report a specific event but does note that his back started hurting at work around July 31 and he started getting radicular symptoms into his left buttock and left leg. Dr. Reicks noted that Claimant's work involved significant stooping, bending, and heavy lifting and Claimant had done the work for more than 30 years. Although Dr. Reicks noted that low back pain and radiculopathy can be part of the degenerative process, he noted that Claimant's current radicular pain could be work related.

20. Claimant decided to report his injury as work-related when he realized that his pain was worsening and he needed significant medical care in order to improve and return to work.

21. On August 20, 2014, Dr. Reicks noted that Claimant had a long history of working a heavy-duty job and that on July 31, 2014, he had to move 16 pop vending machines. Dr. Reicks reports that, on July 31, 2014, Claimant had a fairly hard day, working without a helper, in Vail and another location working at odd angles and working around the loading dock. Claimant reported to Dr. Reicks that he had some back pain on July 31, 2014, after his work activities.

22. Claimant saw Dr. Jeffrey Bowman on August 26, 2014, who noted that Claimant had ongoing back and leg pain that was not improving. Dr. Bowman recommended an MRI. Claimant underwent an MRI on August 28, 2014. The MRI scan showed a broad-based disc bulge, posterior osteophytes, prominent facet hypertrophy, and circumferential spinal stenosis at the L4-L5 level. The MRI also showed posterior spurring and facet hypertrophy with neural foraminal narrowing to the left side due to spurs at the L5-S1 level.

23. On September 9, 2014, in a follow-up appointment with Dr. Bowman, the doctor noted that the MRI results explained Claimant's low back pain and left leg symptoms. Dr. Bowman referred Claimant to Dr. Robert Frazho for consideration of spinal injections.

24. Dr. Frazho saw Claimant on September 16, 2014, at which time the doctor recommended left L4-L5 and L5-S1 transforaminal epidural injections. Claimant underwent three sets of injections between September 22, 2014, and December 1, 2014. Claimant's pain continued after the injections. Dr. Frazho recommended surgical referral to Dr. James Gebhard.

25. Claimant returned to Primary Care Partners for a core stabilization program recommended by Dr. Frazho.

26. Claimant saw Dr. James Gebhard on December 11, 2014. Dr. Gebhard noted:

> [Claimant's] history actually goes back to July 31, 2014, when he was moving heavy vending machines and had onset of symptoms after this extensive lifting and transport of the machines. Before that, [Claimant] really had nothing similar in complaints related to back or leg pain. He has been doing this type of work for a long time and probably had some accumulated degeneration, but this one day, in my opinion, is what pushed him over the edge and brought on his symptoms and has made them persist.

Claimant's Exhibit 3, p. 49.

27. Dr. Gebhard noted that Claimant had improvement with epidural injections, but still had pain, especially with activity. Dr. Gebhard noted that surgical options included decompression surgery alone or a combination of decompression and fusion surgery. Dr. Gebhard noted that Claimant would continue with physical therapy, and if there was not much improvement after four weeks, then surgery would be considered.

28. Claimant returned to see Dr. Gebhard on January 15, 2015, with symptoms that had not improved since his last visit. Dr. Gebhard noted that Claimant would have one more month of therapy, and if there was no improvement, then surgery would be indicated.

29. Claimant saw PA Daniel Meyer with Work Partners on February 3, 2015. PA Meyer noted an injury date of July 31, 2014, and noted Claimant's chief complaint was low back pain caused by moving around vending machines all day. PA Meyer also provided work restrictions and opined that Claimant's injury was work related.

30. PA Meyer noted:

> [Claimant] reports three incidents on July 31. The first was loading off a truck onto a dock and his back tightened up. Then later he was loading a machine onto a pallet and it broke, causing him to brace his back and brought on the radicular symptoms. Then he continued with his day going to another store in the Vail area where he loaded double digit number of machines. From there he reports he couldn't move with pain down his [left] leg and went to Docs on Call that Sunday.

Claimant's Exhibit 2, p. 31.

31. Claimant returned to see PA Jason Bell in Dr. Gebhard's office on February 17, 2015. PA Bell described Claimant as motivated to get well and return to

work. The PA recommended proceeding with surgery, pending ruling on whether Claimant's claim was a compensable workers' compensation injury.

32. On March 31, 2015, Dr. Gebhard noted that Claimant was a candidate for surgical correction and addressed the urgency of Claimant's need to undergo surgical correction of a nerve compression problem. Respondents denied authorization for the surgery and the surgery nonetheless occurred on June 22, 2015, under Claimant's private medical insurance provider. Claimant explained that he was in extreme pain and was hopeful that the surgery would allow him to return to work for Employer and work for Employer until he retired.

33. Claimant testified that he had not worked for Employer or any other employer since July 31, 2014. He testified that he has been receiving short-term and long-term disability benefits and Social Security Disability Insurance (SSDI) benefits.

34. Mr. Josey testified that Claimant told him about his back and leg problems after July 31, 2014. Mr. Josey recalled that Claimant told him he didn't know where he injured himself, but did not state clearly that the injury occurred outside his employment. Mr. Josey instructed Claimant to speak with Suzette Bellario to file for short-term disability benefits. It was with Mr. Josey's instruction to apply for short term disability benefits that Mr. Josey recalled that Claimant reported the injury as work-related.

35. Mr. Josey stated that he was aware that Claimant had been moving vending machines on July 31, 2014, and Claimant's workload on that date constituted a big day, work wise, in his opinion. Mr. Josey observed Claimant at the end of his work day on July 31, the date of Claimant's injury, and Mr. Josey observed that Claimant appeared injured and was noticeably limping. Mr. Josey stated that Claimant never missed time from work for back symptoms prior to July 31, 2014.

36. Respondents obtained an independent medical examination (IME) with Dr. Tashof Bernton on December 10, 2014. Dr. Bernton was recognized at hearing as an expert in the fields of internal medicine and occupational medicine. Dr. Bernton opined in his report that Claimant's low back condition was not work-related and that surgery was reasonable and necessary. He based his opinion that Claimant's condition was not work-related at least in part on his opinion that Claimant's condition was degenerative.

37. Dr. Bernton opined that Claimant's leg pain was caused by a bone spur compressing the nerve root at L5-S1. He testified that lifting on July 31, 2014, could not have caused the bone spurs. However, Dr. Bernton testified the condition could become acutely symptomatic when the bone spurs put pressure on the nerve root. Dr. Bernton testified the symptoms could appear in connection with trauma. Dr. Bernton testified that in patients he has treated, lumbar bone spurs can be present without any symptomatology, but can become symptomatic in connection with specific trauma.

38. Dr. Bernton offered conflicting opinions that medical science has not established that bone spurs can be caused by 30 years of lifting activities. However, Dr. Bernton also opined that prolonged stress on the spine can cause bone spurs to form.

39. Dr. Bernton opined that Claimant's symptoms came on over the course of one day, and with leg pain being experienced on July 31, 2014. Dr. Bernton opined that Claimant's preexisting clinical history with low back pain was different from the symptoms after July 31, 2014. Dr. Bernton described Claimant as having unremitting leg pain and back soreness and stiffness, which was different than the occasional back symptoms he had prior to July 31, 2014. Dr. Bernton acknowledged that Claimant never reported leg pain prior to July 31, 2014.

40. Dr. Bernton testified that although decompression surgery was appropriate for Claimant, he would advise Claimant to get a second opinion as to whether fusion surgery should be performed.

41. The ALJ credits the testimony of Claimant regarding the onset of his low back and leg symptoms on July 31, 2014. The ALJ credits Claimant's testimony that he noticed back and leg pain over the course of the workday as he moved 16 large soda vending machines in the Vail area. The ALJ finds it is more likely than not that the physical activity Claimant engaged in while working for Employer on July 31, 2014 caused Claimant's back and leg symptoms.

42. The ALJ also credits the opinions of Dr. Gebhard and PA Meyer over the contrary opinions of Dr. Bernton regarding the work-relatedness of Claimant's low back condition. The ALJ finds that it is more likely than not that Claimant's work activity on July 31, 2014 caused Claimant to have low back and lower extremity symptoms, and that the employment aggravated, accelerated, or combined with a preexisting condition to cause disability and a need for treatment.

43. The ALJ finds that Claimant has demonstrated that it is more likely true than not that he sustained a work injury involving his low back in the course and scope of his employment with Employer with on July 31, 2014. The ALJ finds that Claimant has demonstrated it is more likely true than not he is entitled to medical benefits and treatment that may reasonably be needed to cure and relieve the effects of the July 31, 2014, injuries involving his low back.

44. The ALJ credits the opinions expressed by Dr. Gebhard and Dr. Frazho as credible and persuasive and determines that Claimant has established that it is more likely true than not that the proposed surgery recommended by Dr. Gebhard is related, reasonable and necessary to cure and relieve Claimant from the effects of his July 31, 2014, work injury. The ALJ finds that Respondents are responsible for the cost of the proposed medical treatment recommended by Dr. Gebhard pursuant to the Colorado Medical Fee schedule.

45. The ALJ finds that Claimant was taken off of work completely by Dr. Bratteli effective August 3, 2014. Claimant established that he was disabled from his usual employment commencing August 1, 2014, and is entitled to temporary total disability benefits (TTD) benefits commencing August 1, 2014, and continuing until terminated by law or statute.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. Claimant proved that moving heavy vending machines and other heavy equipment on July 31, 2014 caused an injury that aggravated, accelerated or combined with Claimant's preexisting condition to produce the disability and need for treatment.

5. The ALJ credits the testimony of Claimant along with the supporting medical opinions of PA Meyer and Dr. Gebhard over the contrary medical opinions of Dr. Bernton.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S.

7. Claimant proved by a preponderance of the evidence that the treatment provided by providers at Foresight Family Physicians, Work Partners, and by Dr. James Gebhard was reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

8. Claimant proved that the surgical treatment recommended by Dr. Gebhard is reasonable and necessary to cure and relieve Claimant from the effects of the work injury. The ALJ credits the medical opinions of PA Meyer, Dr. Frazho, and of Dr. Gebhard over the contrary opinions expressed by Dr. Bernton.

9. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. Claimant proved by a preponderance of the evidence that he sustained an injury that led to a medical incapacity in his ability to work. Claimant established that he did not work following July 31, 2014, injury because of back and leg symptoms that disabled him from performing his normal job. Claimant established that he is entitled to TTD benefits beginning August 1, 2014, and continuing until terminated by law or statute.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided by authorized medical providers to cure and relieve Claimant from

the effects of his July 31, 2014, industrial injury pursuant to the Colorado Medical Fee Schedule, including the surgery recommended by Dr. Gebhard.

2. Respondents shall pay Claimant TTD benefits commencing August 1, 2014, and continuing until terminated by law or statute.

3. Claimant's AWW is $870.00.

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: __8/24/2015_____

DIGITAL SIGNATURE:

Margot W. Jones

Margot W. Jones, Administrative Law Judge
Office of Administrative Courts

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ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for prior authorization of L5-S1 anterior/posterior fusion surgery by Roger Sung, M.D. is reasonable, necessary and causally related to her May 30, 2014 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Deli Associate. On May 30, 2014 Claimant suffered an admitted industrial injury to her lower back during the course and scope of her employment with Employer. While moving a case of meat and starting to rotate, Claimant experienced a pulling sensation in her lower back area and pain in her right leg.

2. On June 5, 2014 Claimant visited Autumn Dean, M.D. for an examination. Dr. Dean diagnosed Claimant with a lumbar strain/spasm. She referred Claimant for physical therapy, ordered x-rays, assigned work restrictions and prescribed medications.

3. On July 3, 2014 Claimant underwent an MRI of her lumbar spine. The MRI revealed the following: (1) a grade 1 anterolisthesis of L5 over S1 measuring one centimeter secondary to bilateral spondylolisthesis; (2) mild degenerative changes from the L1-2 to L4-5 disc space with minimal grade 1 retrolisthesis of L2 over L3 measuring 0.4 centimeters; and (3) mild segmental neural canal and mild foraminal narrowing of the levels without evidence of nerve root impingement.

4. On July 31, 2014 Claimant visited Stephen Scheper, D.O. for an evaluation. He noted that Claimant was working full-time modified duty for Employer. Dr. Scheper explained that Claimant had suffered lower back pain in 2011 without any mechanism of injury. He remarked that she had been told she had arthritis in the spine and her symptoms resolved without treatment. After reviewing Claimant's July 3, 2014 MRI, Dr. Scheper commented that "[f]lexion and extension images refute instability of her spondylolisthesis; no surgical management is appropriate at this time." Dr. Scheper planned nerve conduction studies, a needle EMG of the bilateral lower extremities and consideration of right L2-3 and bilateral L5-S1 transforaminal epidural steroid injections.

5. On July 31, 2014 Dr. Scheper also conducted an EMG/NCS evaluation of Claimant's bilateral lower extremities. The testing revealed the following: (1) a mild, right L2-3 radiculopathy of recent chronicity; (2) a moderate, right greater than left L5 chronic, latent radiculopathy; (3) a moderate left L5 radiculitis; and (4) bilateral distal

sensory slowing that was likely related to peripheral polyneoropathy but not related to radicular pathology or consistent with the mechanism of injury.

6. On August 7, 2014 Claimant underwent a psychological evaluation with James H. Evans, Ph.D. He determined that Claimant was experiencing reactive depression secondary to her inability to engage in usual activities because of pain in her lower back, groin and legs from her industrial injury. In an Addendum to his report Dr. Evans remarked that on Symptom Checklist 90 Claimant endorsed 83 symptoms. The number of symptoms demonstrated a fairly high degree of emotional reactivity and the possibility of a hysterical, exaggerated response. Dr. Evans summarized that Claimant had a significant psychological overlay to her symptoms.

7. On September 3, 2014 Claimant returned to Dr. Scheper for an examination. Dr. Scheper determined that Claimant suffered from chronic lower back pain with lower extremity radicular symptoms, a right L2-3 subacute radiculopathy and bilateral L5 chronic radiculopathy that was minimally responsive to epidural steroid injections. He also remarked that imaging studies revealed L5-S1 degenerative spondylolisthesis.

8. On September 26, 2014 Claimant visited Roger Sung, M.D. for an evaluation. Dr. Sung obtained x-rays that showed a grade II spondylolisthesis at L5-S1 with quite significant degeneration of the disc. He noted that an MRI reflected significant L5 neural foraminal stenosis and a small disc bulge at the L2-3 level. Dr. Sung remarked that Claimant's situation was very complicated "in that a lot of her dysfunction is in her right anterior thigh and I really am not seeing a whole lot on this scan that would account for this."

9. On November 20, 2014 Claimant again visited Dr. Sung for an examination. She told Dr. Sung that her right thigh pain had resolved and really noticed how much the remainder of her symptoms were bothering her. She had completed physical therapy and received additional injections at L5-S1 but they had not resolved her posterior buttock and leg issues or her lower back pain. Dr. Sung discussed surgical intervention at the L5-S1 level. He set up an appointment in one month and planned to proceed with an L5-S1 anterior/posterior fusion if Claimant successfully quit smoking.

10. On January 20, 2015 Dr. Sung requested prior authorization for an L5-S1 anterior/posterior fusion. He diagnosed Claimant with spondylolisthesis and lumbar degenerative disc disease.

11. On April 20, 2015 Claimant underwent an independent medical examination with Wallace K. Larson, M.D. Dr. Larson concluded that the need for the recommended spinal surgery was not related to Claimant's industrial injuries because her ongoing symptoms were caused by the pre-existing conditions of spondylolisthesis and nerve root compression. He detailed that Claimant likely suffered a muscular strain to her lower back on May 30, 2014. Because the muscular strain would have resolved, Claimant's continuing symptoms constitute the natural progression of her pre-existing

L5-S1 spondylolisthesis. Dr. Larson noted that there was no objective evidence that the spondylolisthesis was caused by her work-related activities. He also commented that Claimant mentioned a large number of somatic symptoms and complaints, which combined with her history of cigarette smoking, placed her at a significant increased risk of surgical failure. Accordingly, surgical intervention was not reasonable or related to Claimant's May 30, 2014 industrial injury.

12. Claimant was previously treated for severe lower back pain and diagnosed with spondylolisthesis in 2011. On November 24, 2011 she was transported by ambulance to the St. Francis Medical Center Emergency Department. The ambulance report noted that Claimant was reporting pain at level 10 out of 10 in her lower back after she attempted to get out of bed. The ambulance drivers administered intravenous narcotic pain medications A subsequent CT of the abdomen and pelvis revealed spondylotic changes of the lumbar spine.

13. On December 18, 2011 Claimant presented to the Emergency Department of Memorial Hospital with lower back pain that had been present since Thanksgiving. The Emergency Department physician obtained another CT of the abdomen and pelvis with contrast. The CT revealed lumbar disease at L5 with a pars defect, degenerative changes and spondylolisthesis.

14. On June 7, 2015 Dr. Scheper wrote a rebuttal to Dr. Larson's independent medical examination of Claimant. He specifically responded to Dr. Larson's determination that Claimant's symptoms constituted the "natural progression" of her spondylolisthesis. Dr. Scheper explained that it was unlikely that Claimant would have been free of symptoms from November 2011 until the onset of her severe pain on May 30, 2014 if she was experiencing the natural progression of a pre-existing condition. Instead, he maintained that Claimant's May 30, 2014 symptoms constituted a "work-related aggravation of an admitted pre-existing condition" and that surgery was her best option.

15. Dr. Scheper also testified at the hearing in this matter. He maintained that Claimant did not experience the natural progression of her pre-existing condition but suffered a sudden change in symptoms on May 30, 2014. Dr. Scheper determined that Claimant's L5-S1 condition was affected by the May 30, 2014 incident because she went from fully functional with no pain complaints to the rapid onset of debilitating pain. Her symptoms suggested a "sudden change in anatomy" rather than the slow deterioration of her condition over time. Dr. Scheper explained that Claimant's rapid change of symptoms on May 30, 2014 necessitated surgical intervention because she had not responded to conservative treatment.

16. Dr. Larson testified at the hearing in this matter. He concluded that the fusion surgery recommended by Dr. Sung is not causally related to Claimant's May 30, 2014 industrial injury. Dr. Larson explained that spondylolisthesis is the primary diagnosis triggering the surgery recommendation. Spondylolisthesis is a developmental weakness in part of the vertebral body called pars interarticularis that allows a very slow slippage of one vertebral body over the next. The process typically occurs over many

years. As the vertebra slips over time people can develop pain in the lower back and sometimes into the legs. Dr. Larson reasoned that Claimant's spondylolisthesis almost certainly had existed for decades before the December 18, 2011 CT scan.

17. Dr. Larson explained that Claimant's current symptoms are the same as the spondylolisthesis diagnosed in 2011. Spondylolisthesis can commonly become symptomatic without a traumatic event. People often develop symptoms because of the gradual progression of the slippage. The natural expected course of spondylolisthesis is that symptoms will wax and wane.

18. Dr. Larson disagreed with Dr. Scheper's opinion that the May 30, 2014 incident directly impacted Claimant's L5 level. He noted that Dr. Scheper's determination was speculative because it was based on Claimant's subjective symptoms. There was a lack of objective evidence in the chart reflecting an injury to the L5 level or any acute damage. Furthermore, there was nothing on the MRI that revealed any fractures at the L5 level. There was also nothing on the MRI that showed an increased slip, a fracture or any other change in an identifiable structure. Based on Claimant's description, Dr. Larson remarked that she probably suffered a muscular strain caused by her work injury. Dr. Larson summarized that Claimant's ongoing medical treatment has addressed the L5-S1 spondylolisthesis and spondylolysis and not the lower back strain that she sustained at work. He concluded that, if the May 30, 2014 industrial accident had never occurred, Claimant's lower back pathology and need for fusion surgery would be the same as they are today. Accordingly, Claimant's symptoms constitute the natural progression of her pre-existing condition.

19. Dr. Larson testified that the EMG by Dr. Scheper showed Claimant had chronic changes in the L5 distributions suggesting long-term pressure on the nerves. The larger amplitude at the L5-S1 level was an indication that Claimant was having some progression of her spondylolisthesis. In contrast, there was nothing on the EMG that clearly supported recent trauma from Claimant's industrial accident. The slippage of spondylolisthesis is gradual because the disc provides internal stability. It stretches out the tissue over time.

20. Claimant has failed to demonstrate that it is more probably true than not that the request for prior authorization of L5-S1 anterior/posterior fusion surgery by Dr. Sung is reasonable, necessary and causally related to her May 30, 2014 admitted industrial injury. On May 30, 2014 Claimant suffered an admitted industrial injury to her lower back while working for Employer. After conservative treatment failed, Dr. Sung requested fusion surgery. However, the request for the L5-S1 anterior/posterior fusion is primarily an attempt to stabilize Claimant's long-standing spondylothesis. Dr. Larson persuasively explained that Claimant's continuing symptoms constitute the natural progression of her pre-existing L5-S1 spondylolisthesis. He noted that there was no objective evidence that the spondylolisthesis was the result of her work-related incident.

21. Dr. Larson detailed that spondylolisthesis is a developmental weakness in part of the vertebral body called pars interarticularis that allows a very slow slippage of one vertebral body over the next. The process typically occurs over many years. As the vertebra slips over time people can develop pain in the lower back and sometimes into the legs. Dr. Larson reasoned that Claimant's spondylolisthesis almost certainly had existed for decades before the December 18, 2011 CT scan. Furthermore, Dr. Larson testified that the EMG by Dr. Scheper showed Claimant had chronic changes in the L5 distributions suggesting long-term pressure on the nerves. The larger amplitude at the L5-S1 level suggested that Claimant was having some progression of her spondylolisthesis. In contrast, there was nothing on the EMG reflecting that Claimant suffered from recent trauma attributable to her industrial accident. Finally, Dr. Larson commented that Claimant mentioned a large number of somatic symptoms and complaints, which combined with her history of cigarette smoking, placed her at a significant increased risk of surgical failure.

22. In contrast, Dr. Scheper maintained that Claimant did not experience the natural progression of her pre-existing condition but instead suffered a sudden change in symptoms on May 30, 2014. Dr. Scheper determined that Claimant's L5-S1 condition was affected by the May 30, 2014 incident because she went from fully functional with no pain complaints to the rapid onset of debilitating pain. Claimant's rapid change of symptoms on May 30, 2014 necessitated surgical intervention because she has not responded to conservative treatment. However, the testimony of Dr. Scheper is not persuasive because it was based on Claimant's subjective symptoms. Dr. Larson explained that there was a lack of objective evidence reflecting an injury to the L5 level or any acute damage on May 30, 2014. Moreover, there was nothing on the MRI scan that showed an increased slip, a fracture or any other change in an identifiable structure. Based on the persuasive reports and testimony of Dr. Larson as well as the medical records, Dr. Sung's request for L5-S1 anterior/posterior fusion surgery is not reasonable, necessary or causally related to Claimant's May 30, 2014 industrial injury. Claimant's request for surgery is based on the natural progression of her pre-existing spondylolisthesis at the L5-S1 levels.

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 failed to demonstrate by a preponderance of the evidence that the request for prior authorization of L5-S1 anterior/posterior fusion surgery by Dr. Sung is reasonable, necessary and causally related to her May 30, 2014 admitted industrial injury. On May 30, 2014 Claimant suffered an admitted industrial injury to her lower back while working for Employer. After conservative treatment failed, Dr. Sung requested fusion surgery. However, the request for the L5-S1 anterior/posterior fusion is primarily an attempt to stabilize Claimant's long-standing spondylothesis. Dr. Larson persuasively explained that Claimant's continuing symptoms constitute the natural progression of her pre-existing L5-S1 spondylolisthesis. He noted that there was no objective evidence that the spondylolisthesis was the result of her work-related incident.

6. As found, Dr. Larson detailed that spondylolisthesis is a developmental weakness in part of the vertebral body called pars interarticularis that allows a very slow slippage of one vertebral body over the next. The process typically occurs over many years. As the vertebra slips over time people can develop pain in the lower back and sometimes into the legs. Dr. Larson reasoned that Claimant's spondylolisthesis almost certainly had existed for decades before the December 18, 2011 CT scan. Furthermore, Dr. Larson testified that the EMG by Dr. Scheper showed Claimant had chronic changes in the L5 distributions suggesting long-term pressure on the nerves. The larger amplitude at the L5-S1 level suggested that Claimant was having some progression of her spondylolisthesis. In contrast, there was nothing on the EMG reflecting that Claimant suffered from recent trauma attributable to her industrial

accident. Finally, Dr. Larson commented that Claimant mentioned a large number of somatic symptoms and complaints, which combined with her history of cigarette smoking, placed her at a significant increased risk of surgical failure.

7. As found, in contrast, Dr. Scheper maintained that Claimant did not experience the natural progression of her pre-existing condition but instead suffered a sudden change in symptoms on May 30, 2014. Dr. Scheper determined that Claimant's L5-S1 condition was affected by the May 30, 2014 incident because she went from fully functional with no pain complaints to the rapid onset of debilitating pain. Claimant's rapid change of symptoms on May 30, 2014 necessitated surgical intervention because she has not responded to conservative treatment. However, the testimony of Dr. Scheper is not persuasive because it was based on Claimant's subjective symptoms. Dr. Larson explained that there was a lack of objective evidence reflecting an injury to the L5 level or any acute damage on May 30, 2014. Moreover, there was nothing on the MRI scan that showed an increased slip, a fracture or any other change in an identifiable structure. Based on the persuasive reports and testimony of Dr. Larson as well as the medical records, Dr. Sung's request for L5-S1 anterior/posterior fusion surgery is not reasonable, necessary or causally related to Claimant's May 30, 2014 industrial injury. Claimant's request for surgery is based on the natural progression of her pre-existing spondylolisthesis at the L5-S1 levels.

ORDER

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

Dr. Sung's request for prior authorization of L5-S1 anterior/posterior fusion surgery is denied and dismissed.

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

DATED: July 30, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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overruled. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, a deadline of 30 days for the filing of the evidentiary depositions of Danny Lopez , Rebecca Hohnstein, and the Claimant's rebuttal deposition was established. Thereafter, a responsive briefing schedule was established. Written transcripts of all three evidentiary depositions were filed on July 2, 2015. Instead of filing an opening brief, the Claimant filed a document labeled proposed order ('Findings of fact, Conclusions of Law and Order") on July 17, 2015, indicating that he had not reviewed the Respondents' brief. Despite the labeling of the document, the ALJ construes it as the Claimant's opening brief. On July 15, 2015, the Respondents' filed what was labeled as "Respondents Position Statement," which the ALJ construes as Respondents' answer brief. On July 20, 2015, the Respondents filed an unopposed "Motion to File Response to Claimant's" Proposed Findings of Fact, Conclusions of Law and Order," which was granted on July 27, 2015. On July 28, 2015, the Respondents filed what is labeled as "Respondents' Answer Brief," which the ALJ construes as the Respondents' reply brief. Based on the actions of the parties in taking and filing post-hearing depositions of all witnesses listed on the Respondents' case information Sheet (CIS), and the rebuttal evidentiary deposition of the Claimant, plus the fact that **no** continuation hearing has been set, the ALJ determines that the Respondents completed their case-in-chief by evidentiary depositions, and the Claimant completed his case in rebuttal by his evidentiary deposition. Consequently, as of the filing of the Respondents' reply brief on July 28, 2015, the ALJ deems the matter submitted for decision as of that date.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits, average weekly wage (AWW); and, a reservation of the issue of temporary total disability (TTD) benefits. The respondents raised the affirmative defense of 'responsibility for termination," and the issue of unemployment insurance (UI) offset.

Despite the fact that the Respondents initiated the hearing on all issues (which accounts for the mislabeling of the briefs), the Claimant bears the burden of proof, by a preponderance of the evidence, with the exception of the issues of "responsibility for termination,' and UI offset, in which case the Respondents bear the burden of proof, by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds if compensable, to an AWW of $1,315.32.

2. The Claimant was born on January 7, 1953, and he was 62 years of age at the date of the hearing. The Claimant is right hand dominant.

3. Claimant was hired by Employer on or about July 22, 2014 as a delivery truck driver. The job required Claimant to make multiple local deliveries of petroleum in each shift. Deliveries required Claimant to drive and handle truck hoses to deliver product to customers.

Procedural History

4. The Claimant testified that he prepared a memorandum reporting his injury (Exhibit 6), which he hand delivered to the base office on a date uncertain, but before October 3.

5. On September 30, 2014, the Claimant called Rebecca Hohnstein (hereinafter "Hohnstein"), co owner of the Employer. Hohnstein advised the Claimant to bring in his access card, radio, and uniforms. She advised him that he was fired.

6. On October 3, 2014, the Claimant turned in his access card, radio and uniforms at the base office.

7. The Respondents filed a "First Report of Injury or Illness" on October 6, 2014.

8. The Respondents filed a Notice of Contest on October 14, 2014.

Prelude to the Injury Incident

9. It is undisputed from the testimony of the Claimant and Danny Lopez, the Employer's Dispatch and Operations Manager, that on September 22, 2014, the Claimant noticed a leak in one of the hoses attached to his delivery truck. He called Lopez and informed him of the leak. Lopez told him to return to the Employer's base of operations at 725 S. Main Street in Brighton ("Base"). The Claimant alleges he suffered a right shoulder injury from attempting to twist off the hose after returning to Base. The Employer denies that the Claimant engaged in that activity and suffered an injury. The ALJ finds that the Claimant did **not** suffer a right shoulder injury at this time, or at any time in the course and scope of his employment for the Employer herein.

10. The Claimant's counsel called Lopez as an adverse witness in his case-in chief, and Lopez also testified by post-hearing deposition in the Respondents' case-in-chief. According to Lopez, his responsibilities include monitoring the warehouse, ensuring employees complete their assigned tasks, and dispatching drivers to deliveries. At his deposition, Lopez testified that the Claimant was aware he was the Claimant's supervisor because new employees are informed of this during the interview process and employees know that Lopez is their supervisor simply from the course of their work. Rebecca Hohnstein corroborates Lopez, and she testified, in her evidentiary deposition, that she told the Claimant that Lopez was his supervisor. The Claimant denies that Lopez was his supervisor. The ALJ finds no plausible reason for Lopez and Hohnstein to say that Lopez was the Claimant's supervisor, if he was not. The Claimant's denial of this fact impairs his credibility. The ALJ finds that the Claimant knew, at all relevant times, that Danny Lopez was his supervisor.

The Injury Incident

11. According to Lopez, on September 22, 2014, the Claimant returned to Base around 4:00 PM. The leak was at a 3" hose connection where the fuel is sucked out from the storage container on the truck. Lopez testified the hose fits into a mount on the body of the truck, and the hose fits into the mount with a male/female coupling. The attachment is secured by flipping two ears prongs. Lopez testified to remove the hose, the ears would be unhooked, and then the hose pulled out. To put the hose back into the mount, it would be inserted, and the two ears would be secured. This contradicts the Claimant's version that the hose had to be twisted round to unhook it. The ALJ finds that Lopez's testimony concerning the removal of the hose is accurate and the Claimant's testimony in this regard is **not** accurate.

12. It is undisputed that the Claimant notified Lopez of the leak and then returned to Base for Lopez to examine the leak. Lopez testified he had removed a hose

of this type on occasions in the past, including when he himself had worked as a delivery driver. It is entirely logical that Lopez inspected the hose and removed the hose from the truck after the Claimant returned to Base for the specific purpose of having Lopez examine the hose and determine what repairs were required

13. Also, according to Lopez, when the Claimant returned to Base, another employee, Josh Peak, was in the vicinity and came over to assist. Lopez positively testified that the Claimant did not assist with removing the hose from the truck. Rather, Lopez asked Peak to grab a bucket for the leaking fuel while he removed the hose, and Lopez himself unhooked the hose and drained the remaining fuel from the hose into the bucket. At his deposition, Lopez testified that, when he removed the hose, it did not feel stuck or difficult to pull out. This squarely contradicts the Claimant's version of events. According to Lopez there was no indication that Tabares had tried to unhook the hose. Also Lopez stated that Tabares did not inform him that he had injured his shoulder, nor did he appear to be in discomfort. The ALJ finds that Lopez, and not the Claimant, removed the hose.

14. The Claimant testified that he knelt on the ground, and then tried to detach the hose from the truck mount. He testified that detaching the hose was not easy, that he had to put some force and twisting action into the detachment and that, in the process, he hurt his right shoulder. He further testified that Peak had to finish detaching the hose. He also testified that Lopez never touched the hose. This contradicts Lopez's testimony that Lopez had to unhook the hose. The Claimant further testified that he did not say anything to Lopez or Peak about his shoulder since he considered neither of these individuals to be his supervisor. In his mind, the co-owner, Becky Hohnstein ("Hohnstein"), was his only supervisor. The ALJ infers and finds that the Claimant's belief in this regard is contrary to reality. The Claimant's testimony contradicts Hohnstein's and Lopez's testimony. The ALJ finds that Lopez, and not the Claimant, removed the hose.

15. Lopez positively testified that it was unnecessary for the Claimant to have tried to twist the hose to remove it. Lopez stated there was no twisting involved with unhooking the latches or pulling the hose out. Rather, it required a forward and backward movement to insert or remove the hose. Lopez clarified in his post-hearing deposition that the hose was a suction hose, which only required lifting the ears and pulling out the hose. He also testified that the male/female interlocking parts did not even allow the hose to be moved from one side or the other once inserted. Lopez testified at hearing that the Claimant's description in his written statement that he tried to "unhook and twist off the hose" did not make sense with how the hose would be removed. The ALJ accepts Lopez's version of the "hose removal," and rejects the Claimant's version because Lopez has no direct interest in the outcome of this claim,

there has been no showing of animosity for the Claimant as a motive, and Lopez version makes sense and the Claimant's version makes **no** sense.

16. According to the Claimant, he injured his right shoulder at approximately 4:00 PM, on September 22, 2014 at Base. The Claimant testified that when he returned with the truck to Base, Lopez instructed him to take the hose off the mount. The Claimant testified that he knelt down to remove the hose. He further testified that after the ears were pulled back it was difficult disconnecting the male/female connection. He testified he could not pull out the hose. He testified while trying to twist the hose off he hurt his right shoulder, he immediately stood up, backed away from the truck, and put his left hand on his right shoulder. The Claimant testified that he felt something ripping in his right shoulder. He testified his pain at that time was 10/10, where 10/10 was so severe one would want to commit suicide. He testified he did not tell Lopez he was hurt, because Lopez was just a dispatcher and not his boss. The Claimant's testimony is contradicted by Lopez, who has no direct interest in the outcome of this claim. The ALJ finds the Claimant's version of the alleged hose removal incident as lacking in credibility. Moreover, the ALJ finds Lopez's version more credible than the Claimant's version of the incident and, as found, the Claimant did **not** remove the hose.

17. The Claimant acknowledged that the hose had a male/female part where the male part on the hose fit into grooves of the female mount, which would require the hose to be inserted and pulled out in backwards and forwards motions. Despite this, he stated that twisting the hose helped with removing it, and the twisting caused his right shoulder injury. Based on the Claimant's concession concerning the male/female mounts and the pulling backwards and forwards to remove the hose, as also testified to by Lopez and Peak, the Claimant's "twisting" version makes no sense, and it undermines his version of the mechanics of his right shoulder injury.

18. According to the Claimant, after he moved away from the vehicle in pain, Josh Peak wound up disconnecting the hose. The Claimant testified that Peak put a bucket under the hose to allow it to drain, and the Claimant testified that Peak lifted the center part of his hose with his left hand to finish draining the fuel. The ALJ infers and finds the Claimant's version of Peak finishing the disconnection of the hose disingenuous insofar as it attempts to be consistent with Peak's role in the removal of the hose. Lopez, however, testified that he removed the hose, and the Claimant had no role in the removal of the hose.

<u>Aftermath of the Incident</u>

19. After the hose was removed, according to Lopez, he told the Claimant to use the other mounts on his truck to finish his scheduled deliveries for that day, and that the Claimant was to take the truck to have the leaking hose repaired the next morning.

At that point, according to Lopez, the Claimant requested the set-up of the mounting location be changed as well to be moved higher and closer to the front of the truck. Lopez told the Claimant that he would not approve that change, because it would be costly (there is an indication that it would cost between $15 and $20 thousand dollars), it would take the truck out of service, it was not necessary to fix the leak, and the company has never had issues related to the location of the mounting and hose. According to Lopez, the Claimant appeared frustrated at this denial, shook his head, and then left Base for the day. The ALJ finds Lopez's testimony in this regard accurate.

20. Lopez prepares a dispatch sheet every evening assigning deliveries for his drivers the following day. He would post this dispatch sheet in the office for his drivers to see the next morning, and he placed tickets for the individual jobs in a basket that was next to the dispatch sheet. He also stated he would fax the sheet to his other warehouse in Commerce City, so that the warehouse would know what product to pull for the drivers. According to Lopez, drivers became aware of their assigned deliveries by checking the dispatch sheet and grabbing their tickets when they arrived in the morning. Lopez never assigns work by walking up to drivers and delivering tickets, contrary to what the Claimant testified he expected the next morning. The Claimant's written statement, which noted that the Claimant waited outside for deliveries to be assigned, is contrary to Lopez's, the dispatcher, testimony (*See* Respondents' Exhibit). E. The only way deliveries would be assigned would be by the dispatch sheet. In this regard, the ALJ finds Lopez's testimony credible and the Claimant's testimony lacking in credibility.

21. According to Lopez, the dispatch sheet (Respondents' Exhibit D, p. 12), is the sheet he prepared the night of September 22, 2014, for September 23, 2014. Lopez testified that the copy of the dispatch sheet used at hearing was the same as the one he prepared on the evening of September 22, and it had not been altered since that time. At his deposition, he stated that the time stamp on the bottom of the page which states "Received Time Sep. 22 2014 6:13PM No. 7737," is a fax confirmation showing receipt of the sheet to the Commerce City warehouse on that date.

22. The Claimant is identified as "TJ" on the dispatch sheet. Lopez testified that on September 23, 2014, the Claimant was required to complete his deliveries from the day before that were held up due to the discovery of the leak, taking the truck in for the repair, and then completing those deliveries listed under his name on the September 23, 2014 dispatch sheet. Lopez understood that the Claimant may not have been able to finish all of his assigned September 23 deliveries, but Lopez testified that he expected the Claimant to begin those jobs after the quick repair was completed.

<u>The Hose Leak Repair</u>

23. According to Lopez, the next day, on September 23, he received a call from an employee of the repair vendor, Polar, advising that the Claimant was requesting the location of the hose mounting of the truck be moved, as the Claimant had proposed to Lopez the day before. Lopez responded that the change was not authorized, only the repair of the leaking hose. At this time, Lopez was still not aware that the Claimant was alleging he had suffered a right shoulder injury the day before.

24. Lopez saw the Claimant return from Polar with the repaired vehicle at approximately 12:00 PM, and then he saw the Claimant leave Base in his personal vehicle. Lopez tried calling the Claimant on his cell phone when he saw him leaving, but the Claimant did not answer or call him back that day. Lopez assumed that the Claimant simply went off-site for lunch at the time he saw him leave. Lopez discovered, however, two or three hours later, that the Claimant's tickets for his jobs assigned for that day were still in the basket next to the dispatch sheet and had not been picked up or completed by the Claimant. Lopez assumed that the Claimant had quit due to the Claimant's leaving work without completing his deliveries. Lopez was still not aware that the Claimant was alleging a work-related right shoulder injury.

September 24, 2014/Claimant's Termination

25. Lopez prepared a dispatch sheet for September 24, 2014 on the evening of September 23, 2014 (Respondents' Exhibit D, p. 13). He did not assign any jobs to the Claimant based upon his assumption that the Claimant had quit. He specifically disputed the Claimant's written statement that he had covered up the Claimant's name with white tape on the dispatch sheet at the time it was posted. In this regard, the ALJ finds Lopez credible and the Claimant's testimony lacking in credibility.

26. On September 24, 2015, Lopez arrived at work around 7:00 AM. He stated that the Claimant came into the office and asked if there was any work for him, and Lopez told him "no." It was Lopez's decision to not assign the Claimant work due to the events of the prior day, and Lopez had not yet consulted with Rebecca Hohnstein regarding the Claimant's employment status. As a result, Lopez had nothing more to inform the Claimant at that time. On September 24, 2014, Lopez informed Hochstein of the events from the previous day involving the Claimant. Lopez stated that Hochstein informed him (Lopez) at that time that the Claimant was fired.

27. Lopez's drivers prepared logs documenting their deliveries. The log marked as Respondents' Exhibit D, p. 10, was the Claimant's log for his work on September 22 and 23, 2014. According to Lopez, the deliveries applicable for September 22, 2014 run through the Valley Crest entry. *Id.* According to Lopez, the Sinclaire entry thereafter documented the Claimant's arrival at the Employer's terminal

at 5:40 AM on the following day, followed by two off-site deliveries. *Id.* Lopez further testified that the sheet shows the Claimant's time at Polar for the repairs and return to Base at 12:20 PM. *Id.* The jobs listed on the September 23, 2014 dispatch sheet are not listed on the Claimant's September 23, 2014 daily log, showing that he did not complete those jobs. *See Id.* at pp. 10 & 12.

<u>The Hose Repair and Subsequent Deliveries According to the Claimant</u>

28. According to the Claimant, after the hose had been removed, Lopez instructed him to use the other mounts to complete his deliveries and have the truck repaired the next day. The Claimant testified that he then suggested to Lopez that they change the location of the mount. According to the Claimant, Lopez did not acknowledge his request.

<u>The Claimant's Testimony Concerning the Hose Repair</u>

29. According to the Claimant, the next day he completed two deliveries and then was instructed by Lopez to take the truck to Polar for the repairs. The Claimant stated that he called Rebecca Hohnstein, the owner, from Polar after being told that Lopez had not authorized his suggestion. The Claimant testified that he requested from Hohnstein that the mount be moved on the truck, and that he told her about the alleged injury at that time. He testified that she "didn't say anything" about the injury and did not approve the redesign. Hohnstein denies that the Claimant informed her of a work-related injury at the time, however, she admits that she would not approve the Claimant's suggested repair of re-doing the mounts.

30. According to the Claimant, when he came back to Base, he went inside to look for more work on the dispatch sheet. The Claimant testified the September 23, 2014 dispatch sheet had his name whited out and there were no work assignments under his name. He testified the dispatch sheet entered into evidence as *Respondents' Exhibit D*, p. 12, was not the same sheet as what was posted. He also suggested that the dispatch sheet was therefore modified after the fact to make it seem like he had jobs on that day. The Claimant stated he cleaned his truck, waited outside to see if someone would bring him more work, and clocked out and left. The ALJ infers that the Claimant's actions of looking for work are inconsistent with his allegedly "severe" right shoulder injury. As found herein above, the ALJ does not find the Claimant's version of the "whited out" dispatch sheet credible. It is contradicted by Lopez's testimony, and it makes no sense for Lopez to have "whited" out the Claimant's name for September 24, 2014. Lopez testimony has indicia of regularity in keeping dispatch sheets. The Claimant's version suggests a "grand conspiracy theory," without any other supporting evidence than the Claimant's bald statement.

31. According to the Claimant, he clocked in when he arrived in the morning. He did not see any assignments on the dispatch sheet for him so he left. He testified he did not see or talk to Lopez on that day. He testified he assumed that the Employer did not want to assign him any jobs because he suffered an injury, and he did not show up to work on subsequent days because he was not assigned work on September 24, 2014. The Claimant testified he talked with Hohnstein over the phone on September 30, 2014, and he alleged she told him to turn in his equipment. He testified that he interpreted that as him being fired. The ALJ infers and finds that the Claimant's testimony, regarding his informing Hohnstein of his injury is contradicted by Hohnstein. It makes no sense for Hohnstein to ask the Claimant to turn in his equipment and fire him after he reported an injury to Hohnstein.

Rebecca Hohnstein

32. Rebecca Hohnstein testified by post-hearing deposition. She positively testified that Lopez was the Claimant's supervisor, which included determining the Claimant's work schedule, coordinating repairs of the vehicles, managing deliveries, and "anything that has to do with the trucks, and the drivers, and deliveries to customers" (Hohnstein Depo, p. 4, ll. 2-18), and the ALJ so finds. She testified that she told the Claimant that Lopez was his supervisor, and the ALJ so finds.

33. According to Hohnstein, the first time she was aware of the leaking hose was on September 23, 2014, when the Claimant called her from Polar requesting authorization for the redesign changes to the truck. She testified that the Claimant told her that Lopez had denied the changes, and she agreed with the denial. She also testified that the Claimant sounded aggravated with her denial based upon the tone of his voice. Hohnstein positively testified that the Claimant did not inform her that he had suffered an injury, and the ALJ so finds.

34. The next time Hohnstein heard of any issues involving the Claimant was the next day when Lopez informed her that the Claimant had left the job site the prior day without completing his deliveries.

35. According to Hohnstein, she figured that the Claimant had quit because he was mad that his requested changes were not approved. She also testified the Claimant's leaving the job site without completing his tasks were grounds for termination. In Hohnstein's opinion, the Claimant's return to work on the morning of September 24, 2014 did not cure his abandonment the prior day. Hohnstein did not call the Claimant on that day because she expected him to be calling her in the next couple days anyway to pick up his final check. She stated that he did call her four or five days later to arrange for dropping off his equipment and picking up his check, and she confirmed with him at that time that his employment was terminated. Hohnstein

positively testified that the Claimant had not informed her of an injury as of that date, and the ALJ so finds.

36. There is an undertone in the Claimant's argument that Lopez and Hohnstein conspired against the Claimant in creating an argument that he did not complete deliveries to which he was assigned on September 23, 2014 and that the Claimant could have completed his remaining September 22 assignments, have the truck repaired, and completed additional assigned deliveries on September 23. The Claimant cites a portion of Lopez's deposition for the proposition that Lopez did not know how long the repairs were to take. Lopez shortly thereafter, in his deposition, went on to clarify that he did not believe the repairs would take long or prevent the Claimant from completing his additional deliveries, as follows:

> Q: And we established you didn't know how long would take. Correct?
>
> A: It was just a hose. I didn't think it was going to take that long.
>
> Q: Okay. So what you are saying is you expected him to do the two jobs he hadn't done, get the hose repaired, and complete five deliveries?
>
> A: Correct. Yeah, correct.

The complete picture of Lopez's testimony paints a different picture than that portrayed by the Claimant. The actual timing of the events proved Lopez's testimony to be true. The Driver's Daily Log for September 23, 2015 shows that Claimant completed his two carryover repairs from the prior day early on the 23rd [Brannan Mix and 5280 Waste]. Respondents' Ex. D, p. 10. The Claimant then took the truck in for repairs, which were completed by noon. Lopez's testimony that he assigned the Claimant additional assignments for September 23, 2015, because he felt the Claimant could complete his remaining repairs from the prior day and have the hose fixed in a short amount of time was proven true. The Claimant had the entire afternoon to complete a new set of assigned deliveries. The Claimant's position that it is not credible that Lopez would have assigned the Claimant additional jobs for September 23, 2014 is itself lacking in credibility when the Claimant himself admitted he had completed with his work and the repairs by noon on that date, and that he was looking for additional work.

Medical

37. On October 9, 2014, the Claimant saw Paul Raford, M.D. who noted a chief complaint of "right shoulder pain" and noted a history, given by the Claimant, as follows: "He tried to bend down and find the valve between the bumper and another valve and twisted, facing toward the left and kneeling. He then had acute onset of right shoulder pain and felt a 'grating'." (Exhibit C, Bate p.7). The ALJ finds that the history

the Claimant gave Dr. Raford is **not** accurate because the Claimant did not unhook the valve (hose). Lopez unhooked it.

38. Dr. Raford assessed "right biceps tendon, shoulder sprain, and moderate suspicion for internal derangement." He recommended occupational therapy, naproxen and topical creams. Dr. Raford returned the Claimant to "full duty modified duty with a 5-pound weight limit with the right upper extremity, no over-stomach-level motion, and no climbing of ladders" (Exhibit C, Bate pp. 8-9). Because the Claimant has failed to prove an injury arising out of the course and scope of his employment for the Employer herein, Dr. Raford's evaluations and treatments are **not** work-related.

39. Claimant has not received any further treatment because, according to him, he does not have personal health insurance.

Ultimate Findings

40. The ALJ finds the Claimant's testimony lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, the ALJ finds Lopez's and Peak's version of events credible.

41. The ALJ makes a rational choice, between conflicting testimonies, to accept the credibility of testimonies of Danny Lopez and Rebecca Hohnstein and to reject the credibility of the Claimant's testimony.

42. This case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. The Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein, and it is not credible. This lack of credibility undermines the Claimant's theory of an injury occurring within the course and scope of his employment, and arising out of his employment. Therefore, the ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014, arising out of the course and scope of his employment.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony is lacking in credibility because his version of the mechanics of the alleged injury make no sense and is contradicted by the testimony of Danny Lopez. Lopez has no interest in the outcome of this claim and no plausible reason for him to lie has been offered. Consequently, Lopez's and Peak's version of events is credible, and the Claimant's version is **not** credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App.

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

Compensability

c. "Course of employment" deals with the time, place and circumstances of an employee's injury. *See General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994). As found, the Claimant failed to prove, by preponderant evidence that he sustained the right shoulder injury in the course and scope of his employment for the Employer herein. "Arising out of employment" deals with the proximate causal connection between the employment and the injury. *See L.E.L Construction v. Goode,* 849 P.2d 876 (Colo. App. 1992), *rev'd on other grounds, L.E.L. Construction v. Goode,* 867 P.2d 875 (Colo. 1994). The Claimant failed to prove a proximate causal connection between his right shoulder condition and his work for the Employer.

d. An "unexplained injury satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the injury would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he was injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** As found herein above, the Claimant failed to prove that his right shoulder condition even happened while he was at work.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, this case turns on the credibility of the alleged mechanics of injury and subsequent events concerning the Claimant's departure from the Employer. As found, the Claimant's version of the alleged mechanics of injury is not credible. Also, his version concerning his departure from employment is contradicted by Lopez and Hohnstein and the Claimant's version is not credible. This lack of credibility undermines the Claimant's theory of compensability. Therefore, as found, the Claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on September 22, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of August 2015.

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_____
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*.

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ISSUE

A determination of Claimant's correct Employer on April 15, 2014.

FINDINGS OF FACT

1. Claimant testified that he worked for Employer at a Popeye's restaurant in Northglenn, Colorado. On April 15, 2014 he was opening a freezer door during his employment in order to serve customers. The partially broken door came off the freezer and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead.

2. Claimant explained that, at the recommendation of Employer's Store Manager, he visited a hospital for emergency treatment. The record reveals that Claimant obtained treatment at HealthOne North Suburban Medical Center on the date of the injury and was discharged on the same day. A medical bill from HealthOne reflects total charges of $2,114.26 and an estimated balance of $317.14.

3. Respondent did not appear at the hearing in this matter. However, representative of Employer Nick Amirian submitted documents on Employer's behalf reflecting that it ceased doing business in Colorado on September 9, 2013 because the business was sold. In fact, the documents reveal that all Popeye's stores operated by Employer were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013. Moreover, the Division of Workers' Compensation website for insurance coverage verification (https;//www.colorado.gov/pacific/cdle/node/20371) reflects that HZ Foods, LLC had Workers' Compensation insurance coverage in place for various Popeye's locations on the date of Claimant's injuries.

4. Claimant credibly explained that he sustained head injuries on April 15, 2014 during the course and scope of his employment. Claimant's credible testimony reflects that on April 15, 2014 he was opening a partially broken freezer door that came off and struck him in the head. The impact caused him to suffer various bumps and bruises on his cheek and forehead. Claimant obtained treatment at HealthOne North Suburban Medical Center for his injuries and incurred total charges of $2,114.26 with an estimated balance of $317.14.

5. Although Claimant suffered head injuries on April 15, 2014, the record reveals that Employer was not liable for the injuries. The persuasive evidence reflects that Employer ceased doing business in Colorado on September 9, 2013 because the company was sold. All Popeye's stores operated by Employer were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013. Moreover, the Division of Workers' Compensation website for insurance coverage verification reflects

that HZ Foods, LLC had Workers' Compensation insurance coverage in place for various Popeye's locations on the date of Claimant's injuries. HZ Foods, LLC was thus Claimant's employer on April 15, 2014. Accordingly, Claimant's claim against Respondent 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. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The identity of the liable employer in a Workers' Compensation case is a question of fact for the ALJ. The determination of the liable employer is based on the totality of the circumstances. *See MeInick v. Industrial Commission,* 656 P.2d 1318 (Colo. App. 1982).

6. As found, although Claimant suffered head injuries on April 15, 2014, the record reveals that Employer was not liable for the injuries. The persuasive evidence reflects that Employer ceased doing business in Colorado on September 9, 2013 because the company was sold. All Popeye's stores operated by Employer were part of a sale/transfer agreement to HZ Foods, LLC on September 9, 2013. Moreover, the Division of Workers' Compensation website for insurance coverage verification reflects that HZ Foods, LLC had Workers' Compensation insurance coverage in place for various Popeye's locations on the date of Claimant's injuries. HZ Foods, LLC was thus Claimant's employer on April 15, 2014. Accordingly, Claimant's claim against Respondent is denied and dismissed.

ORDER

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

HZ Foods, LLC was Claimant's Employer on April 15, 2014. Claimant's claim against Respondent is denied and dismissed.

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

DATED: August 20, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained an occupational disease proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits commencing January 5, 2015 and continuing?

- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and authorized medical benefits?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 11 were admitted into evidence. Respondents' Exhibits A through F were admitted into evidence.

2. Claimant testified as follows. In 2014 she worked for the Employer as a receiving and repack worker. In this job she lifted boxes from a pallet and put them on a wheeled cart. It took 5 to 6 minutes to load the cart with boxes. The boxes contained various food products and soap and weighed between 10 and 50 pounds. When the cart was fully loaded with boxes she pushed it to a shelving area. She would then cut open the boxes with a "knife-like tool" (box cutter) and place the opened boxes on the shelves. The claimant would cut open about 50 and 100 boxes per day. She typically worked 90 hours over two weeks.

3. Claimant further testified as follows. In March 2014 she began to experience pain in her thumb that moved up her forearm to the outside of the elbow. The pain was especially noticeable when she was cutting open boxes. Claimant explained that she gripped the box cutter with her thumb holding one side and the four opposing fingers grasping the other side. Despite these difficulties she continued performing her job. By May she was still experiencing a lot of pain that ran from her right thumb up to her elbow. As a result she decided to go to her primary care physician Joseph Soler, M.D.

4. Claimant testified that prior to commencing work for Employer in 2003 she had no wrist or elbow pain and she never saw a physician for these symptoms.

5. On May 16, 2014 Dr. Soler examined Claimant. Dr. Soler recorded that Claimant was seen for follow-up of her "Right elbow Pain, Hypothyroidism, Polyarthralgias, [and] Myalgias." Dr. Soler noted the complaints of "joint pain" in the right elbow were better. He recommended Claimant continue with "former meds" for the elbow pain and continue with the treatment plan established for the other conditions. Dr. Soler's May 16 notation contains no explicit mention of right hand, thumb, wrist or forearm pain.

6. Claimant testified that after she saw Dr. Soler on May 16, 2014 she continued performing her regular job duties. She continued feeling the same pain from her wrist to the elbow and decided to return to Dr. Soler.

7. Claimant returned to Dr. Soler on July 26, 2014. On July 26 Dr. Soler noted a complaint of "hand pain" and stated Claimant was present for follow-up of her "Hypothyroidism, Right Wrist pain, Myalgia, [and] Polyarthralgia." Dr. Soler noted Claimant was "still having problems with her R-wrist pain." Dr. Soler recommended x-rays of the right wrist. He prescribed medication for Claimant's other diagnoses.

8. Claimant testified that her pain never stopped and at some point in time she decided to see a chiropractor. The chiropractor recommended that she see a hand specialist. As a result Claimant made an appointment to see Kavi Sachar, M.D., of Hand Surgery Associates, PC.

9. Dr. Sachar examined Claimant on July 28, 2015. Claimant gave a history of right wrist pain that had been present for about 3 months and "started after she started a new job." On examination Dr. Sachar noted swelling over the "1st DC," tenderness over the "1st DC," a positive Finkelstein's maneuver and limited ulnar deviation with pain. Three-view right wrist x-rays were negative. Dr. Sachar assessed right de Quervain's. He injected Claimant's first dorsal compartment with xylocaine and corticosteroid.

10. On August 18, 2014 Dr. Sachar noted Claimant was "doing very well" after the right first dorsal compartment injection. Dr. Sachar further stated that Claimant's symptoms were "resolved" but she had "not yet get gone back to work." Dr. Sachar recorded that Claimant had a full range of motion and a negative Finkelstein's test. He wrote that Claimant was "offered two weeks."

11. Claimant testified as follows. After the injection she was on vacation for approximately two weeks. She stated that when she returned to Dr. Sachar she advised him she experienced a "little less pain" after the injection. She returned to work after the vacation and again experienced pain extending from her hand to her elbow. As a result she made another appointment with Dr. Sachar.

12. On September 24, 2014 Dr. Sachar again examined Claimant. She was seen for follow-up of "right de Quervain's." Dr. Sachar noted the injection he performed "did not help." Dr. Sachar's examination demonstrated the presence of a ganglion cyst over the right first dorsal compartment and a markedly positive Finkelstein's test. Dr.

Sachar recommended Claimant undergo surgery described as a "right first dorsal compartment release and ganglion cyst excision." Claimant was limited to lifting no more than 5 pounds with the right upper extremity.

13. On September 25, 2014 Claimant reported her alleged injury to the Employer. She completed a written report in which she stated that she injured her right hand and a "tendon" by lifting and opening boxes every day. Employer referred Claimant to Occupational Medicine (Occ Med) for treatment.

14. On September 25, 2014 Claimant reported to Occ Med where she was evaluated by PA Jim Keller. Claimant gave a history that she had worked for the employer for 11 years but changed duties when she was assigned "from inventory to receiving in March of this year." Claimant reported the new job required her to lift heavy boxes and stock them. She started to experience pain in her "right wrist and elbow that progressively got worse." She was seen by Dr. Sachar who "determined this was a work-related injury." On examination of the right hand PA Keller noted a ganglion cyst and "extreme discomfort subjectively" with provocative motion of the thumb. The right elbow was "exquisitely tender with palpation of the lateral epicondyle and less so at the medial epicondyle." The elbow exhibited no crepitus or instability. PA Keller assessed right de Quervain's tenosynovitis, a ganglion cyst and right lateral and medial epicondylitis. Keller opined Claimant would not need to be seen at Occ Med again until after the "first postoperative visit with Dr. Sachar."

15. On September 25, 2014 PA Keller completed a Physician's Report of Workers' Compensation Injury (WC 164). He marked a box indicating that his "objective findings" were "consistent with history and/or work related mechanism of injury/illness." He listed his work-related diagnoses as right de Quervain's tenosynovitis, ganglion cyst and right lateral and medial epicondylitis. PA Keller imposed right upper extremity restrictions of no lifting or carrying greater than 5 pounds, no pinching or gripping. Claimant was also instructed to wear a splint and an arm band.

16. On October 23, 2014 Jonathan Bloch, D.O., examined Claimant at Occ Med. Claimant's chief complaints were right wrist and elbow pain. Dr. Bloch noted Claimant's work history of "handling packaging, shipping, and receiving at a company for 11 years." Dr. Bloch opined that "based on the Colorado Work Comp. Guidelines and the nature of her packing, receiving, scalpel use, and working with the orders and supplies that this would be reasonably compensable underneath those Guidelines." Dr. Bloch stated that he had not received Dr. Sachar's notes and was not "exactly sure what the diagnosis is here." Dr. Bloch recommended "an MRA of the right wrist and an MRI of the right elbow, as well as EMG of the right upper extremity."

17. On October 23, 2012 Dr. Bloch completed a WC 164. He marked a box indicating that his "objective findings" were "consistent with history and/or work related mechanism of injury/illness." Dr. Bloch also noted Claimant was working and that she was able to return to work at modified duty with a restriction of no use of the right arm.

18. On November 7, 2014 either PA Keller or Greg Smith, D.O., examined Claimant at Occ Med. Claimant complained of right wrist and elbow pain. The examiner noted Claimant was "tolerating work well." He commented that the surgery recommended by Dr. Sachar and the diagnostic procedures recommended by Dr. Bloch had not been completed because the claim was "under investigation." On PE there was no gross deformity of the right upper extremity except for a ganglion cyst "just inferior to the radial styloid." Any motion caused pain and Claimant was "extremely tender to palpation along the lateral and medical epicondyles." The examiner assessed "elbow enthesopathy." He recommended the continuation of "modified work restrictions" and that Claimant wear splints.

19. On November 21, 2014 Dr. Smith examined Claimant. Dr. Smith assessed a right-sided ganglion cyst and stated "whether this is work related could be challenged." He also assessed a "positive Finkelstein's with de Quervain's," and stated that he felt this was work-related. Dr. Smith also assessed "mild epicondylitis."

20. On December 8, 2014 Ms. Gail Pickett (Ms. Pickett), vocational consultant, performed a "Job Analysis" of the tasks Claimant performed at work. Pickett noted Claimant generally worked 8 hour shifts 5 days per week, but hours varied with the season. Pickett noted that prior to May 2014 Claimant worked in a cold area (34 degrees) receiving groceries. In this position she lifted up to 50 pounds at the "low end of occasional" (1% - 33% of workday) and 30 pounds occasionally. In May 2014 Claimant was removed from the cold area because, according to the Employer, the temperature "was aggravating the arthritis in her feet." Pickett described the pre-May 2014 duties as "medium work." After May 2014 Claimant worked in an area that was 54 degrees and she was not required to lift more than 10 pounds. She lifted up to 10 pounds frequently (34% - 66% of workday). Pickett observed that Claimant constantly used her hands during the workday but did "not do the same task repetitively." Claimant used her hands to perform multiple tasks that included manipulating pieces of paper, writing, lifting boxes and scanning. Pickett described the post-May 2014 duties as "light work."

21. On December 10, 2014 Allison Fall M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Fall is board certified in physical medicine and rehabilitation and is Level II accredited. In connection with the IME Dr. Fall took a history from Claimant, reviewed medical records, reviewed the job analysis and performed a physical examination (PE). At the time of the IME Claimant reported symptoms in her right wrist, forearm, elbow, shoulder as well as her neck and back. On PE Dr. Fall found no right upper extremity swelling or erythema. There were positive Tinel's signs over "areas not corresponding to a nerve." A Finkelstein's maneuver could not be completed because Claimant "indicated she could not flex her fingers." There "was not focal tenderness over the epicondyles" but rather diffuse complaints of pain.

22. In the IME report Dr. Fall assessed right "distal upper extremity complaints, nonlocalizing without specific diagnosis or physiologic explanation." She also assessed "[P]rior diagnosis of dorsal compartment tenosynovitis (de Quervain's

tenosynovitis) and dorsal ganglion cyst, resolved." Dr. Fall opined that currently there was "no diagnosis based on lack of objective findings correlating with symptoms." With regard to Dr. Sachar's prior diagnosis of de Quervain's tenosynovitis Dr. Fall considered Claimant's history and the job analysis. Dr. Fall then applied the Cumulative Trauma Conditions Medical Treatment Guidelines (MTG) (WCRP 17 Exhibit 5) matrix/algorithm for the determination of causation. Dr. Fall opined that Claimant was exposed to only one "secondary risk factor" of working in a cold temperature prior to May 14, 2014. However, Dr. Fall noted cold temperature is not associated with a diagnosis of de Quervain's disease under the "diagnosis based risk factors" portion of the algorithm. Instead, the only specific risk for de Quervain's disease is a combination of force, repetition and posture which is not present in this case. Dr. Fall explained that the only "force" required by Claimant's job was lifting boxes and that was done "intermittently" and not "continuously."

23. Dr. Smith examined Claimant on December 12, 2014. Dr. Smith reported Claimant had significant pain to palpation in her right arm and minimal grip. He noted she had a positive de Quervain's test. Dr. Smith assessed de Quervain's tenosynovitis, a minimal ganglion cyst and "right medial and right lateral epicondylitis that is part of the entire pain threshold today and not just its own entity." Dr. Smith prescribed Voltaren, recommended referral to "Dr. Hawkins" for depression and recommended that Claimant undergo an EMG.

24. Claimant testified as follows. On January 5, 2015 her supervisor requested that she apply for short term disability (STD) benefits. Claimant applied but the request for STD was denied because this workers' compensation case was pending. When the STD benefits were denied she was still under the restriction of no use of the right hand. She needs both hands to perform her job duties and the Employer told her she cannot return to work until she has 100% use of both hands. The Employer has not offered her any job since she left work on January 5, 2015.

25. Claimant testified that her symptoms did not improve while she was working light duty between September 25, 2014 and January 4, 2015. She further testified her symptoms have not improved since she stopped working in January 2015.

26. On January 29, 2015 Larisa Ravdel, M.D., performed an "annual physical" examination of Claimant. Dr. Ravdel stated the claimant was "not able to continue to work with one hand due to R. hand pain." Dr. Ravdel noted Claimant denied "other specific complaints." Dr. Ravdel assessed "tendinitis" of the right forearm, acquired hypothyroidism and "overweight."

27. On March 2, 2015 John S. Hughes, M.D., performed an IME at Claimant's request. Dr. Hughes took a history from Claimant, reviewed medical records, reviewed the job analysis and performed a PE. Claimant reported that she had worsening "radial arm and hand pain." Dr. Hughes noted he did not have Dr. Sachar's notes. Dr. Hughes assessed the following: (1) Hypothyroidism; (2) Right de Quervain's tenosynovitis with recrudescence of symptomatology; (3) Right lateral epicondylitis; (4) Probable bilateral shoulder rotator cuff tendinopathy. Dr. Hughes stated that like Dr. Bloch and Dr. Fall he

found “it difficult to establish a definite diagnosis of [Claimant’s] right upper extremity conditions” although it seemed “fairly clear she has sustained onset of de Quervain’s tenosynovitis as well as right lateral epicondylitis.” Dr. Hughes stated the he, like Dr. Fall, did not “see that there has been a substantial injurious activity factor present in [Claimant’s] job.” However, he opined that Claimant has “underlying inflammatory pathology that makes her more prone to development of these soft tissue injuries in the absence of a substantial injurious physical exposure factor.” Dr. Hughes recommended claimant undergo the diagnostic testing recommended by Dr. Smith prior to a “final determination of work-relatedness.”

28. On March 12, 2015 Dr. Ravdel signed a note stating Claimant should be excused from work from March 25, 2015 to July 6, 2015 because of right hand tendonitis and pain radiating to the right shoulder.

29. On March 18, 2015 Claimant underwent an MRI of the right hand and fingers. The radiologist noted the tendons of the hand were normal in “caliber and signal” and there was no evidence of “tendinosis, tear, or tenosynovitis present.” The radiologist’s findings included “subchondral cyst formation within the lunate triquetrum” with an otherwise negative examination.

30. On March 18, 2015 Claimant underwent an MRI without contrast of the right forearm. The radiologist noted the tendons of the forearm appeared normal. However there was “mild edema” of the supinator muscle at the radial head. The radiologist assessed a mild strain of the supinator muscle and an otherwise negative exam.

31. On March 20, 2015 the Claimant underwent electrodiagnostic studies of the right upper extremity. The neurologist reported a “minimally abnormal study” with electrodiagnostic “evidence of a right median mononeuropathy at the wrist (carpal tunnel syndrome) that is electrically mild.”

32. On March 23, 2015 Dr. Hughes issued a second report after reviewing Dr. Sachar’s notes and the results of the diagnostic tests performed after his IME. Dr. Hughes noted that on March 2, 2015 Claimant reported that her symptoms of shoulder, neck and back pain improved after she stopped work on January 5, 2015, but the symptoms of right radial arm and hand pain worsened after January 5. Dr. Hughes assessed the following: (1) Hypothyroidism; (2) Right de Quervain’s tenosynovitis with recrudescence of symptomatology; (3) Occult right carpal tunnel syndrome, secondary to right wrist regional tendonitis; (4) Right forearm supinator muscle strain; (5) Probable bilateral shoulder rotator cuff tendinopathy.

33. On March 23, 2015 Dr. Hughes again opined that it seems “fairly clear that [Claimant] has sustained onset of de Quervain’s tenosynovitis.” He also noted Claimant did not “manifest clinical findings of right carpal tunnel syndrome.” Dr. Hughes noted that Claimant gave a history that “repetitive activity using her right upper extremity has made her symptomatic.” Dr. Hughes wrote that it seemed probable that Claimant has “underlying inflammatory pathology that makes her more prone to development of these

soft tissue injuries in the relative absence of a substantial injurious physical exposure." Dr. Hughes further opined that Claimant's right wrist and elbow conditions were "measurably accelerated by her work activities through January 5, 2015."

34. Dr. Fall testified at the hearing. Dr. Fall explained the de Quervain's tenosynovitis is a condition involving inflammation of 3 tendons that lie within a "sleeve" or sheath in the first dorsal compartment at the base of the thumb. The function of these tendons is to extend the thumb. She stated that the exact cause of de Quervain's tenosynovitis is not known. However, she explained that de Quervain's tenosynovitis is covered by the cumulative trauma MTG. Dr. Fall stated that under the MTG the only work-related risk factor for development of de Quervain's tenosynovitis is a combination of force, repetition and awkward posture at least two-thirds of the day. Dr. Fall testified that application of the MTG algorithm to Claimant's job duties does not warrant a finding that the diagnosis of de Quervain's tenosynovitis is causally related to Claimant's employment.

35. Dr. Fall testified that there is no indication that Dr. Hughes applied the MTG algorithm insofar as he opined that the diagnosis of de Quervain's tenosynovitis is causally related to the conditions of Claimant's employment. Dr. Fall noted that Dr. Hughes in fact stated that he did not see any work-related risk factor for the development of de Quervain's tenosynovitis.

36. Dr. Fall testified that Dr. Sachar's reports do not show that he offered any opinion concerning the cause of the de Quervain's tenosynovitis. Dr. Fall specifically opined there is no evidence that Dr. Sachar conducted a causation analysis or applied the MTG matrix/algorithm to the issue of whether the diagnosis of de Quervain's tenosynovitis is causally related to Claimant's employment.

37. Dr. Fall opined it would be inconsistent with a diagnosis of work-related de Quervain's tenosynovitis if Claimant's symptoms worsened after she was placed on light duty and after she stopped work altogether. Dr. Fall explained that pain from de Quervain's tenosynovitis results from movement of the thumb and she would anticipate the pain would improve or resolve when Claimant stopped moving her thumb at work.

38. Dr. Fall reviewed Dr. Hughes's March 2, 2015 IME report. Dr. Fall opined that based on Claimant's description of her duties and the job analysis none of Dr. Hughes's diagnoses, including de Quervain's tenosynovitis and right lateral epicondylitis, is work-related under the MTG. Dr. Fall opined that Dr. Hughes made the argument that none of the proposed diagnoses is work-related when he stated he could not find any work-related physical exposure.

39. Dr. Fall also reviewed Dr. Hughes's March 23, 2015 report. Dr. Fall stated that Dr. Hughes's March 23 diagnosis of right regional wrist tendinitis is a distinct diagnosis from the diagnosis of right de Quervain's tenosynovitis with recrudescence of symptomatology. She further opined that a diagnosis of right regional wrist tendinitis is not supported by the wrist MRI which showed no inflammation of tendons. Dr. Fall noted there was no indication that Dr. Hughes applied the MTG matrix/algorithm in

reaching the conclusion that the duties of Claimant's employment accelerated one or more of her various diagnoses.

40. Dr. Fall testified that a ganglion cyst is a fluid filled cyst that can arise from a tendon sheath or a nerve. She further stated that ganglion cysts only cause problems when they are in an area where they can be traumatized, cause pain or get in the "way of a mechanical movement." Dr. Fall explained that there is no known cause for ganglion cysts and the MTG don't discuss ganglion cysts as a work-related cumulative trauma condition.

41. Dr. Fall testified she considered Claimant's testimony and the job evaluation in determining the duties of Claimant's employment. She then applied the cumulative trauma MTG matrix/algorithm and concluded there is no work-related cause for any of the multiple diagnoses suggested by the Claimant's medical providers. Dr. Fall explained Claimant was subjected to the "secondary risk" factor of cold temperature prior to May 2014. However, Dr. Fall explained that cold temperature is not a risk factor for the development of any of the conditions for which Claimant seeks compensation.

42. Claimant failed to prove it is more probably true than not that she sustained any occupational disease proximately caused by the performance of service arising out of and in the course of her employment.

43. The ALJ assigns great weight to WCRP 17 Exhibit 5 (cumulative trauma MTG) principles for assessment of causation of cumulative trauma conditions. *See* WCRP 17, Exhibit 5 (D)(3). As noted in WCRP 17, Exhibit 5 (D)(3)(a) the cumulative trauma MTG are based on "a thorough review of the epidemiologic literature" available at the time the MTG were issued. The ALJ finds that this evidence based method for determining causation presents a credible and persuasive method for determining whether a particular condition is related to an on-the-job activity.

44. Dr. Fall credibly and persuasively opined that based upon consideration of Claimant's testimony and Ms. Pickett's job analysis, and based on consideration of the cumulative trauma MTG, none of Claimant's diagnoses is causally-related to her employment. Dr. Fall persuasively opined that under the MTG Claimant's employment exposed her to only one cumulative trauma risk factor, which is cold temperature. However, that risk factor is not associated with any of the diagnoses Claimant alleges are causally-related to her employment. Dr. Fall credibly opined that under the cumulative trauma MTG the duties of Claimant's employment did not subject her to sufficient force, repetition and awkward posture sufficient to be considered the cause of de Quervain's tenosynovitis, epicondylitis or any of the other diagnoses mentioned by Claimant's medical providers and Dr. Hughes.

45. Dr. Fall also persuasively argued that there is a questionable temporal relationship between the Claimant's work duties and the progression of her symptoms. Dr. Fall credibly opined that if Claimant's symptoms were work-related she would have expected them to diminish after Claimant was placed on light duty in September 2015. Dr. Fall would also have expected symptoms to diminish or end after Claimant stopped

working in January 2015. However, by Claimant's testimony and Dr. Hughes's report most of Claimant's symptoms continued to worsen after she was placed on light duty and after she ceased work.

46. Dr. Fall credibly opined there is no known cause for a ganglion cyst and that it is not considered to be a cumulative trauma condition under the MTG. Dr. Fall's testimony is corroborated by Dr. Smith's statement that the work-relatedness of the ganglion cyst "could be challenged."

47. Claimant's argument notwithstanding, Dr. Fall's testimony concerning causation is not rendered incredible because she failed to diagnose de Quervain's tenosynovitis. Dr. Fall did not testify that the other physicians incorrectly diagnosed Claimant with de Quervain's tenosynovitis. Indeed, Dr. Fall's IME report expressly acknowledges a "prior diagnosis" of de Quervain's tenosynovitis. Dr. Fall credibly testified that she did not disagree with the diagnosis of de Quervain's made by other physicians prior to the December 10, 2014 IME. Rather, Dr. Fall stated that on December 10, 2014 she was unable to diagnose de Quervain's tenosynovitis because the Claimant said pain prevented performance of the tests necessary to make the diagnosis. Further, even if Dr. Fall did not correctly diagnose de Quervain's tenosynovitis that does not detract from her testimony that if Claimant has or had de Quervain's the disease was not caused by her employment.

48. The opinions expressed by Dr. Hughes are not as persuasive as those of Dr. Fall. Dr. Hughes's opinion that Claimant was more "prone" to the development of de Quervain's tenosynovitis, epicondylitis, and perhaps some of the other conditions, because she had "underlying inflammatory pathology" is not persuasive. The ALJ finds that Dr. Hughes agrees with Dr. Fall that application of the cumulative trauma MTG to Claimant's job duties does not identify any risk factor for the development of any cumulative trauma condition including de Quervain's tenosynovitis. The ALJ therefore infers that Dr. Hughes is of the opinion that the cumulative trauma MTG do not or should not apply in a causation analysis where the duties of employment are found to have the "aggravated" or "accelerated" a pre-existing condition. However, Dr. Hughes's opinion that the MTG causation matrix/algorithm does not apply to aggravation or acceleration of a pre-existing condition is refuted by the credible testimony of Dr. Fall that the MTG do apply in this case.

49. Dr. Hughes's implicit opinion that the MTG causation matrix/algorithm does not apply to the alleged aggravation or acceleration of a pre-existing condition is also refuted by reference to the cumulative trauma MTG. WCRP 17, Exhibit 5 (D)(3) notes that a "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." This provision also states that a work-related condition is "covered" when, among other things, the "work exposure causes the activation of a previously asymptomatic or latent medical condition" or "the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition." Finally, this section of the cumulative trauma MTG establishes a six-step process that "should be used to evaluate causality in CTC cases." The six steps are as follows; (1) Identification of a

"specific and identifiable diagnosis," (2) Determination of whether the specific "disorder is known to be or is plausibly associated with work," which is "largely based on comparison of risk factors" (under the cumulative trauma Matrix) with the patient's work tasks; (3) Determination of whether risk factors are present in sufficient degree and duration to cause or aggravate the condition; (4) Matching the risk factors identified on the Risk Factor Table and the established diagnosis; 5) Determination of whether a temporal association exists between the workplace risk factors and the onset or aggravation of symptoms; (6) Identification of non-occupational diagnoses.

50. Dr. Hughes did not present any persuasive argument as to why deviation from the cumulative trauma MTG is appropriate in this case. Dr. Hughes did not cite any credible and persuasive medical literature or scientific evidence to support his argument that Claimant's "underlying inflammatory pathology" rendered her "prone" to develop cumulative trauma conditions from exposure to hazards at levels below those cited in the MTG.

51. Dr. Fall correctly testified that Dr. Sachar diagnosed de Quervain's tenosynovitis, but did not state in any of his reports that he considered this condition to be work-related. In any event, Dr. Fall correctly points out that there is no indication that Dr. Sachar applied the cumulative trauma MTG to assess the cause of the de Quervain's tenosynovitis. Thus, to the extent that Dr. Sachar proffered any opinion concerning causation his opinion is assigned very little weight.

52. Dr. Bloch's opinion that Claimant's symptoms of right wrist and elbow pain are work related under the MTG is not persuasive. Although Dr. Bloch claims to have applied the MTG in his causation analysis, his October 23, 2014 states he was uncertain of the Claimant's diagnosis and that he recommended additional testing to reach a diagnosis. The ALJ infers that if Dr. Bloch had actually applied the cumulative trauma MTG he would have recognized that the first step in assessing causation is to arrive at a "specific and identifiable diagnosis." Without such a diagnosis it is not possible to proceed through the cumulative trauma matrix/algorithm to determine causation. (*See* Finding of Fact 49). Moreover, Dr. Bloch's October 23 report was based solely on Claimant's reported history and was not informed by Ms. Pickett's job analysis performed in December 2014.

53. To the extent PA Keller diagnosed work-related de Quervain's tenosynovitis , epicondylitis and ganglion cyst his causation opinion is not persuasive. There is no credible or persuasive evidence that PA Keller is level II accredited. Neither is there any credible and persuasive indication that PA Keller considered and applied the cumulative trauma MTG in arriving at his opinion concerning causation.

54. To the extent Dr. Smith diagnosed work-related de Quervain's tenosynovitis his opinion is not persuasive. There is no credible or persuasive evidence that Dr. Smith considered or applied the cumulative trauma MTG in arriving at his opinion concerning causation.

55. 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 ALLEGED OCCUPATIONAL DISEASES

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a

hazard to which the worker would have been equally exposed outside of the employment.

This section 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). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). If the claimant makes the requisite showing of causation the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the MTG upon consideration of 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).

The ALJ concludes Claimant is attempting to prove that she sustained the compensable occupational diseases of right de Quervain's tenosynovitis, right wrist ganglion cyst, right lateral and medial epicondylitis, and possibly other conditions. In this regard, the ALJ finds that Claimant has not alleged or proven that any of these conditions is attributable to a specific time, place and cause. Rather, Claimant argues that the repetitive performance of various activities (lifting boxes and cutting boxes) over

time caused the alleged diseases or aggravated or combined with pre-existing conditions so as to cause disability and/or the need for treatment.

As determined in Finding of Fact 42, Claimant failed to prove it is more probably true than not that any of her alleged occupational diseases (including de Quervain's tenosynovitis, lateral epicondylitis and ganglion cyst) was proximately caused, aggravated or accelertaed by the performance of service arising out of an in the course of her employment. As found, the ALJ places great weight on the cumulative trauma MTG causation analysis set forth in WCRP 17, Exhibit 5 (D)(3). As determined in Findings of Fact 44 through 46, Dr. Fall credibly and persuasively opined that application of the cumulative trauma MTG matrix/algorithm to Claimant's job duties establishes that none of the alleged disease processes is causally related to Claimant's employment. Dr. Fall credibly opined that there is no known cause for a ganglion cyst and that a ganglion cyst is not even recognized as a cumulative trauma condition under the MTG.

To the extent Dr. Hughes opined Claimant's employment aggravated or accelerated underlying inflammatory conditions so as to cause a compensable disease process, the ALJ is not persuaded for the reasons stated in Findings of Fact 48 though 50. To the extent other providers opined that Claimant developed a work-related disease process or processes their opinions are not persuasive for the reasons stated in Findings of Fact 51 through 54.

Because Claimant failed to prove she sustained a compensable occupational disease the claim must be dismissed.

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 4-963-828 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: August 4, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing October 22, 2014?

- If Claimant otherwise proved he is entitled to temporary total disability benefits, did Respondents prove by a preponderance of the evidence that Claimant is disqualified because he was responsible for his termination from employment?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 and 2 were received in evidence. Respondents' Exhibits A through F were received in evidence.

2. Claimant contends he is entitled to an award of temporary total disability (TTD) benefits commencing October 22, 2014 and continuing. Respondents contend that if Claimant can prove he was disabled on October 22, he is not entitled to TTD benefits because he was responsible for his termination from employment on October 21, 2014.

3. In February 2008 Claimant was hired by Employer to perform the job of "lead maintenance worker." In this position Claimant performed numerous activities including cement work, yard work, paint work, and facility maintenance. The "job description" for Claimant's position states the worker must be able to lift up to 50 pounds and stand, stoop, bend, kneel, climb and work in uncomfortable positions.

4. When Claimant applied for employment in February 2008 he signed a U.S. Department of Justice Employment Eligibility Verification form I-9. On the form I-9 Claimant represented that he was a "lawful permanent resident" of the United States and an "alien authorized to work." Respondents' Exhibit F p. 21 contains copies of a driver's license issued in Claimant's name and a Social Security card number 564-87-689 issued in Claimant's name. Claimant admits that Respondents' Exhibit F p. 21 contains copies of documents he submitted to Employer. The form I-9 also reflects that in February 2008 Claimant submitted to Employer a driver's license and Social Security Card number 564-87-689.

5. On September 17, 2014 Claimant suffered work-related injuries to his right upper extremity and back. On September 18, 2014 NP Monica Garbiso examined Claimant at Concentra Medical Centers (Concentra). NP Garbiso assessed "shoulder pain" and "shoulder/upper arm strain." NP Garbiso imposed restrictions of no climbing

stairs or ladders, no lifting over 20 pounds, no pushing or pulling with over 30 pounds of force and no reaching above shoulders.

6. On September 25, 2014 Scott Richardson, M.D., examined Claimant at Concentra. Dr. Richardson assessed shoulder pain, shoulder/upper arm strain and a lumbar strain. Dr. Richardson imposed restrictions of no lifting over 3 pounds, no pushing or pulling with over 3 pounds of force, no reaching above shoulder, and no squatting and/or kneeling.

7. Claimant credibly testified that after the accident the Employer initially permitted him to continue working. The ALJ infers that Claimant was permitted to continue working within the restrictions imposed by NP Garbiso and Dr. Richardson.

8. On October 7, 2014 Claimant received a notice from the Employer. According to Claimant the notice advised that his "social security number did not match with the information" he had given to the Employer and he "needed to fix the situation." The employer gave Claimant until October 21, 2014 to resolve the situation. However, Claimant testified that "in spite of the deadline" he could not fix the situation "because I don't have that." The ALJ infers from Claimant's testimony that he admits he does not have a valid social security number matching the one he provided to the Employer in February 2008.

9. Respondents' Exhibit F p. 16 is a copy of the notice provided to Claimant by the Employer. The notice is dated October 7, 2014. The notice contains a handwritten "Employer Statement" indicating that Claimant's social security number "does not match with his information provided." The notice further states Claimant has until October 21, 2014 "to provide documentation from the SS office that the SS# he provided is his." Claimant was warned that if he did not provide the information by October 21 he would be terminated. Claimant testified he was "familiar" with the warning notice and that he signed it. Claimant's signature is dated October 8, 2014.

10. Ms. Shannon Janson (Janson) credibly testified as follows. She is Employer's Risk Manager. Employer is required by federal law to verify that an employee presented the necessary work authorization documents as defined by the form I-9. Janson explained that if an employer knows that an employee does not possess the requisite I-9 documentation the employer could be held "liable" by the Federal government.

11. Janson credibly testified as follows. When Claimant applied for work with the Employer in 2008 he provided I-9 documentation in the form of a driver's license and social security card. These items constituted sufficient documentation to satisfy the requirements of the I-9 form.

12. Janson credibly testified as follows. In the fall of 2014 Employer conducted open enrollment for its 401(k) program. Janson encouraged Claimant to enroll in the 401(K) program and Claimant submitted an application. Janson went online to submit the applications for the new 401(K) enrollees including Claimant. However, she was unable to

enter Claimant's application. Janson contacted Great West, Employer's 401(k) third party administrator, about the problem. A representative of Great West advised Janson that Great West has a system for checking social security numbers. According to the Great West representative the system showed thirteen other individuals had the same social security number that Claimant provided to Employer. When Janson had another employee (Melanie) speak to Claimant about fixing the social security problem he replied that "he couldn't do that" and his "real identity was not good."

13. Janson credibly testified the employer terminated Claimant's employment on October 21, 2014 because he failed to correct the problem with the Social Security number.

14. On December 9, 2014 Dr. Richardson assessed a shoulder strain, supraspinatus tendinitis, a labral tear of the shoulder, shoulder pain and a lumbar strain. At that time Dr. Richardson imposed restrictions of lifting up to 10 pounds, pushing and pulling up to 20 pounds, occasional bending and no reaching above shoulder with the affected extremity.

15. On November 24, 2014 the Insurer filed a General Admission of Liability (GAL) for medical benefits only.

16. Respondents proved Claimant is not entitled to receive TTD benefits. Specifically, Respondents proved it is more probably true than not that Claimant was responsible for his termination from employment on October 21, 2014.

17. Respondents proved that when Claimant applied for employment he submitted a false Social Security card as documentation of his immigration status. As found, Claimant admitted the Social Security card that he provided to Employer was not valid. The ALJ infers from this evidence that Claimant deliberately submitted the false Social Security in order to procure employment with the Employer.

18. The Respondents proved it is more probably true than not Claimant acted "volitionally" when he supplied the false Social Security card to the Employer. The ALJ infers from Claimant's action in submitting the false Social Security card that he knew production of a valid card was important to the employer's decision to hire him and that failure to supply a valid card might result in his termination. Indeed, Claimant was expressly warned of this fact when he received the October 7, 2014 "notice" from the Employer. However, Claimant admitted he did not provide a valid Social Security number because he could not. The ALJ finds that by supplying the false Social Security card Claimant exercised some degree of control over the circumstances that ultimately led to his termination on October 21, 2014.

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.

RESPONSIBILITY FOR TERMINATION

Claimant contends he is entitled to an award of temporary total disability (TTD) benefits commencing October 22, 2014, the day after he was terminated by Employer. Claimant argues the evidence establishes that on October 22 he was temporarily disabled within the meaning of the Act. Respondents contend that if Claimant proved he was temporarily disabled commencing October 22, a preponderance of the evidence establishes he is disqualified from receiving TTD benefits because he was "responsible" for his termination from employment. The ALJ agrees with Respondents that Claimant is disqualified from receiving TTD benefits because he was responsible for his termination from employment.

The ALJ assumes for purposes of this order that Claimant proved it is more probably true than not that on October 22, 2014 he was temporarily disabled within the meaning of the Act.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., (termination statutes) provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because the termination statutes provide a defense to an otherwise valid claim for TTD benefits, respondents shoulder the burden of proof by a preponderance of the evidence

to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (ICAO July 18, 2003).

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). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of a degree of control over the circumstances leading to the termination. *Apex Transportation, Inc. v. Industrial Claim Appeals Office,* 321 P.3d 630 (Colo. App. 2014); *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.* The ICAO has held on numerous occasions that where an employee consciously provides a false social security number in order to procure employment the employee's conduct may be found "volitional" for purposes of the termination statutes. *E.g. Gutierrez-Delgado v. North Star Foods*, WC 4-857-384-03 (ICAO December 19, 2012); *Olaes v. Elkhorn Construction Co.,* WC 4-782-977 (ICAO April 12, 2011); *Gutierrez v. Exempla Healthcare, Inc.,* WC 4-495-227 (ICAO June 24, 2002).

As determined in Findings of Fact 16 though 18 Respondents proved it is more probably true than not the Claimant acted volitionally in causing his termination from employment on October 21, 2014. Claimant deliberately supplied a false social security card as documentation of his eligibility to work in the United States. The ALJ infers Claimant supplied the false documentation with knowledge that Employer might not hire him if he did not supply a valid social security number and might terminate him upon learning that he could not supply a valid social security number. The ALJ concludes Claimant was "responsible" for his termination within the meaning of the termination statutes.

Notwithstanding, Claimant argues that he is entitled to an award of TTD benefits because this case is controlled by the holding in *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). In *Champion* the court held that a "Mexican national who did not possess legal work status in the United States" was entitled to TTD and later temporary partial disability (TPD) benefits. The respondents argued that the claimant was not entitled to TTD and TPD benefits because his immigration status caused a "legal disability" that precluded him from proving that any of his wage loss was caused by the effects of the industrial injury. However, the court held that the claimant's immigration status did not create a "legal disability" that prohibited him from entering into an employment contract. Rather, under federal immigration law the claimant's unauthorized work status merely prohibited employers from hiring or continuing to employ claimant with knowledge of his unauthorized status. Further, applying the principles set forth in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995), the *Champion* court held that the claimant's unauthorized work status did not

prohibit him from establishing that "to some degree" his wage loss was caused by the industrial injury.

The ALJ concludes that Claimant's reliance on *Champion Auto Body v. Industrial Claim Appeals Office, supra*, is misplaced. In *Gutierrez v. Exempla Healthcare, Inc., supra*, the ICAO upheld an ALJ's ruling that under the termination statutes the claimant was disqualified from receiving TTD benefits because she "acted volitionally when she used a social security number that was not assigned to her for purposes of getting hired." The claimant argued that the *Champion* decision dictated a different result. However, in *Gutierrez* the ICAO pointed out that *Champion* was decided under the law as it existed prior to enactment of the termination statutes. The ICAO held that the termination statutes were adopted to "overturn *PDM Molding, Inc. v. Stanberg, supra*" and prevent an otherwise temporarily disabled worker "from recovering temporary disability benefits where the worker is at fault for the loss of post-injury employment, regardless of whether the industrial injury remains a proximate cause of the subsequent wage loss." The ICAO explained that the termination statutes preclude an ALJ from "finding that a claimant's post-separation wage loss is 'to some degree' the result of the industrial injury where the the claimant is 'responsible' for the termination." *See also, Enriquez v. Oglebay Norton Co.,* WC 4-603-526 (ICAO January 21, 2005).

The ALJ concludes that the reasoning in *Gutierrez* is persuasive. Claimant has not distinguished *Gutierrez* and cites no authority that disapproves or overrules *Gutierrez*.

Moreover, the reasoning in *Gutierrez* is consistent with the supreme court's subsequent interpretation of the termination statutes in *Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323, 328 (Colo. 2004). In *Anderson* the supreme court acknowledged that "the legislative history to section 8-42-105(4) demonstrates" that *PDM Molding* "caused concern among employers, their insurers, and members of the General Assembly that [the court] had created a 'loophole' promoting illegitimate claims." As one example of the "loophole" the *Anderson* court noted legislative history showed that *PDM Molding* had been applied to award TTD benefits to a claimant who "was not authorized to work in this country" and had "falsified his work documents at his hiring." 102 P.3d at 329. Ultimately, the *Anderson* court stated that the "General Assembly intended section 8-42-105(4) to weed out wage loss claims subsequent to voluntary or for-cause termination of modified employment that do not involve a worsened condition."

Claimant was responsible for his termination from employment within the meaning of the termination statutes. Therefore, the claim for TTD benefits commencing October 22, 2014 and continuing must be denied.

ORDER

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

1. The claim for temporary total disability benefits commencing October 22, 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: August 12, 2015

DIGITAL SIGNATURE:

David P. Cain

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

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ISSUES

- Did Claimant prove by a preponderance of the evidence that on September 25, 2014 he sustained a compensable 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 on or about October 1, 2014 he sustained a compensable 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 or reasonable, necessary and authorized medical benefits as a result of the alleged injuries?

- Did Claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits commencing October 16, 2014 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 through 6 were admitted into evidence. Claimant's Exhibit 8 pages 63 through 65 were admitted into evidence. Respondents' Exhibits A through E were admitted into evidence.

2. Claimant alleges he injured his left knee at work on September 25, 2014 and/or October 1, 2014.

3. On June 2, 2014 the Employer hired Claimant as an auto body technician. Claimant has more than twenty-years of experience in this field.

4. Claimant testified as follows concerning the events of September 25, 2014. He was pushing a tool cart through the Employer's shop. The cart caught on uneven pavement and he "flipped forward over the cart." He injured his right knee, hip, low back and forehead. He experienced immediate and "excessive" knee pain. Claimant described the pain as a 9 on a scale of 10 (9/10). Claimant reported this event to his supervisor Nate Stephenson (Stephenson) and requested medical treatment on September 25. However, Claimant stated that Stephenson declined to send Claimant for medical treatment.

5. Claimant testified as follows concerning the events after September 25, 2014. On several occasions Claimant requested the Employer to provide medical treatment but the Employer ignored his requests. Between September 25, 2014 and October 1, 2014 it was "very visible" to Claimant's co-employees that he was experiencing 9/10 pain while working. Despite this pain Claimant did not seek out medical treatment on his own but continued to work and perform his duties as an auto body technician.

6. Claimant testified as follows concerning events on October 1, 2014. While at work Claimant "stubbed" his leg on a "piece of metal sticking out of the ground in the shop." He experienced a worsening of his pain. Stephenson was not present but Claimant reported the incident to the office manager and a "writer." Claimant was told that Stephenson would come to see him when he returned. Stephenson did not come to see Claimant. Claimant initially testified on cross-examination that after the October 1 incident his pain skyrocketed to 20/10. However, Claimant did not seek any medical treatment after October 1 and continued to perform his duties as an auto body technician.

7. Stephenson testified as follows. On September 25, 2014 he was at the employer's shop. He did not see Claimant trip or fall but he heard the "clutter" of Claimant falling over his "tool box." Stephenson went to the scene of the incident and observed Claimant "kind of limping around, stumbling around." Stephenson asked Claimant if was "okay" and Claimant responded that he was "fine." Claimant did not request medical treatment for his knee or any other body parts in the "couple of days" immediately following September 25. After the incident Claimant returned to work. Stephenson did not notice Claimant limping at any time from immediately after the September 25 accident until October 16, 2014. Stephenson was unaware of the alleged October 1, 2014 incident and does not recall Claimant requesting any medical treatment as a result of that incident.

8. Danny Graffenberger (Graffenberger), one of Claimant's co-workers, testified that he did not witness the September 25, 2014 incident but he did discuss it with Claimant. Graffenberger testified that Claimant stated he had been pushing his "roll cart" across the concrete when he hit a crack and fell over the cart. Graffenberger recalled Claimant stated "they wanted him to go to the doctor to get checked out." However, Claimant advised Graffenberger he was "fine" and did not want medical treatment "because it was involving drug tests and all this other stuff."

9. Stephenson testified as follows concerning events on October 15, 2014. On October 15 Claimant was aware a Mercedes needed to be repaired and returned to an insurance company's facility during the morning hours. Claimant had promised Stephenson the work would be completed and the Mercedes returned to the insurance company on time. However, on the morning of October 15 Claimant was running late to work which prompted Stephenson send a text message to Claimant asking where he was and reminding Claimant that the Mercedes needed to be completed. Stephenson testified the Mercedes was later returned to the insurance company but "there were issues with the workmanship." Consequently, Claimant "went down to fix the issues" at

the insurer's facility. During a lunch meeting Stephenson received a text from Claimant stating that he was "coming to get his box and he was done." Stephenson then called Claimant who told Stephenson he was not "feeling well" and told Stephenson to give away all of Claimant's work. Stephenson testified that during this telephone call Claimant never stated he was leaving work because he had been hurt on the job and needed medical treatment.

10. Claimant testified as follows concerning the events of October 15, 2014. On October 15 he had a "discussion" with Stephenson. Claimant stated that he began the discussion by requesting medical treatment for his leg. However, Stephenson wanted Claimant to finish the Mercedes job before he took Claimant to the doctor. Claimant was "dropped off" several miles from the Employer's facility (presumably at the insurer's facility). Claimant testified that his leg was hurting and he couldn't do the work on the Mercedes. He also testified that he wanted to go home because his leg was hurting. (Transcript pp. 40-41).

11. Several October 15, 2014 text messages between Claimant and Stephenson were introduced into evidence. At 7:43 a.m. Stephenson texted Claimant requesting his "eta." At 7:45 a.m. Claimant texted Stephenson: "15 min." At 7:49 a.m. Stephenson texted Claimant: "The merc [sic] has got to go!" At 8:06 a.m. Claimant texted Stephenson stating: "I know boss first thing I'll do is get it done, would have been do [sic] yesterday if I wasn't getting pulled off it ever [sic] 30 mins to deal with other BS in the shop…" At 11:50 a.m. Claimant sent a text to Stephenson. Some of this text is not decipherable because holes were punched through the top of the exhibit. (*See* Exhibit 8 p. 64). As best the ALJ can determine the text states: "Really (illegible) you left me hear [sic] (illegible) dude won't do this agin [sic]." At 11:52 a.m. Stephenson texted Claimant stating: "You ready? I am on my way if you are." At 11:53 Claimant texted: "Been ready boss it was simple fix I'm not hourly sir." At 12:02 p.m. Claimant texted himself stating, "This is some real BS!" At 12:03 p.m. Stephenson sent a text to Claimant stating, "Dusty said you were on the way back." At 12:04 p.m. Claimant texted Stephenson stating, "I'm coming back loading my tools and I'm done." At 12:08 p.m. Stephenson texted Claimant stating: "At a lunch meeting, I will talk to you afterward." At 12:48 p.m. Claimant texted Stephenson: "I'm going home for the day I'm not feeling well need to get my head together cam [sic] we talk tomarrow [sic]."

12. Because of the events of October 15, 2014 Stephenson prepared a disciplinary "write up" for delivery to Claimant on the morning of October 16, 2014. The "write up" stated Claimant had not timely and properly completed the Mercedes job and that he had told Stephenson to give away his work and then "hung up." The "write up" also noted a "decrease in the quality" of Claimant's work and an "increase in erratic behavior" by Claimant. Claimant was warned that failure to improve would result in further discipline up to and including dismissal.

13. Claimant testified as follows concerning the events of October 16, 2014. He received the write up from Stephenson at approximately 8:30 a.m. He told Stephenson that his production had dropped because he "got hurt three weeks prior" and had been complaining about his leg and other injuries. On October 16 Claimant

"insisted" on seeing a doctor because his leg was excessively swollen and bruised. Claimant stated that he worked until approximately 2:30 p.m. Sometime after 2:30 p.m. Stephenson took Claimant to Concentra Medical Centers (Concentra) for treatment.

14. Stephenson testified as follows concerning the events of October 16, 2014. At approximately 8:30 a.m. Claimant came into Stephenson's office and was given a copy of the "write up." At this time Stephenson did not notice the Claimant limping. Claimant signed the "write up," stated he would "do better" and went to work. Claimant did not give a reason why his productivity had declined and did not advise Stephenson his knee was hurting. At 11:00 a.m. Claimant reported to the office manager that he was hurt and needed medical attention. Stephenson went to see Claimant and ask what was going on. At this time Stephenson observed Claimant was limping. Claimant told Stephenson that his leg hurt and he needed to "get checked out."

15. Graffenberger testified to a conversation he had with Claimant. Graffenberger could not be certain of the exact date of the conversation but he believed it was about a month after the September 25, 2014 "roll cart incident" and "about two days" before October 16, 2014. Graffenberger observed Claimant was limping and asked him if everything was okay. Claimant told Graffenberger that early in the morning he went outside his house to smoke a cigarette and accidentally locked himself out. Claimant also told Graffenberger that he then got on a chair to climb in a window but fell and "blew his knee out."

16. Claimant denied that he injured his knee at home while trying to crawl through a window. Claimant denied that he ever told Graffenberger he fell from a chair trying to get into the house. Claimant testified that his house has a keypad security system and he would not have needed to crawl through a window if he had been locked out. Claimant opined Graffenberger was "lying" about the alleged conversation.

17. On October 16, 2014 Julie Parsons, M.D., examined Claimant at Concentra. Claimant reported symptoms of right proximal and right anterior knee pain. He rated the pain as 6/10. Claimant gave a history that he suffered a direct blow to the knee at work and experienced the onset of symptoms immediately after the injury. Dr. Parsons listed the date of injury (DOI) as October 15, 2014. On physical examination (PE) Dr. Parsons noted an "antalgic gait." She also recorded the right knee exhibited "effusion grade 2 and swelling." There was diffuse anterior knee tenderness and tenderness in the quadriceps tendon and medial tibial plateau. Range of motion was restricted in flexion. Dr. Parsons assessed "right knee injury." Dr. Parsons referred Claimant for an MRI. Dr. Parsons returned Claimant to "modified duty" with restrictions of seated duty, no driving of the "company vehicle," "non-weight bearing" and use of an "assistive device." The October 16 report contains no mention that Claimant reported a hip or back injury. The October 16 report contains no mention that there were two work-related incidents that caused knee pain.

18. Claimant testified that he took the restrictions to Stephenson but was not offered any job within the restrictions. Claimant testified he has been unemployed since October 16, 2014.

19. On October 20, 2014 Carol Ramsey, D.O., examined Claimant at Concentra. Claimant reported constant right knee pain rated at 10/10 and Dr. Ramsey wrote that the pain increased to "20/10 at times." Claimant also complained of "ankle pain." He advised Dr. Ramsey that he "stepped in a hole and also flipped over a cart injuring his back." The history does not mention any report that Claimant tripped over a piece of metal on or about October 1, 2014. The back pain was rated as 5/10. Claimant also reported that his pain was not controlled by a current prescription for Percocet. Dr. Ramsey wrote that Claimant had been "getting unauthorized medications from a neighbor." Dr. Ramsey listed the DOI as "9/28/2014." Dr. Ramsey assessed right knee injury, internal derangement right knee, back pain and right knee pain. She prescribed Celebrex and Oxycodone and directed Claimant to stop using "all other narcotics." She placed Claimant on a "no work" status.

20. During cross-examination Claimant testified that Dr. Ramsey's reference to "20 out of 10" pain did not come from him and he didn't know where that reference came from. Claimant also testified that he didn't understand the reference "20 out of 10" pain because the scale only "went from one to ten." Claimant's testimony that Dr. Ramsey's reference to "20 out of 10" did not come from him is contradicted by Claimant's earlier testimony that his pain "skyrocketed" to 20/10 after the alleged incident of October 1, 2014.

21. On October 20, 2014 Claimant underwent an MRI of the right knee. The radiologist assessed a complex tear through the posterior horn of the medial meniscus, a Baker's cyst and moderate-size joint effusion.

22. On October 22, 2014 Dr. Parsons noted Claimant had suffered a "complex MMT." The ALJ understands this reference is to the MRI results showing a tear of the medial meniscus. Dr. Parsons referred Claimant for an orthopedic evaluation of the right knee. On October 28, 2014 Dr. Parsons referred Claimant to a pain specialist. On October 28 Dr. Parsons imposed restrictions of no driving the company vehicle, no squatting, no kneeling, no walking on uneven terrain and no climbing of stairs.

23. On November 6, 2014 orthopedic surgeon Mark Failinger, M.D., examined Claimant. Dr. Failinger recorded a history that on "9/26/2014" Claimant sustained injuries when he was "pushing a cart through a shop with his supervisor" and the "wheels caught." Claimant reported that he experienced right knee pain, hip pain and back pain as a result of this incident. The history does not mention any report that Claimant tripped over a piece of metal on or about October 1, 2014. Dr. Failinger's impressions included a complex tear of the right medial meniscus and "back and hip pain." Dr. Failinger recommended that Claimant undergo a surgical "scope to clean up the meniscus."

24. On November 7, 2014 physiatrist Kathie McCranie, M.D., examined Claimant. Claimant gave a history that on "09/26/14 he was walking on uneven pavement and fell over a tool cart in the body shop." Claimant stated that as a result of this incident he had "immediate pain in the right knee, right hip, and right side of his low back." The history does not mention any report that Claimant tripped over a piece of metal on or about October 1, 2014. Dr. McCranie reviewed the MRI results, medical records from October 16, 2014 through November 6, 2014 and performed a PE. Dr. McCranie's impressions include right knee pain with tear of the posterior horn of the medical meniscus, effusion and Baker cyst on MRI. Dr. McCranie also noted right-sided low back pain "myofascial versus facet mediated and right anterior hip pain status post contusion/strain." Dr. McCranie recommended x-rays of the right hip and lumbar spine, chiropractic care and acupuncture. Dr, McCranie noted that opioid medications were discussed and that Claimant was to proceed with a urine drug screen.

25. Claimant returned to Dr. McCranie on November 21, 2014. Dr. McCranie noted the urine drug screen showed "multiple substances that were not prescribed" for Claimant. Dr. McCranie stated that Claimant "admitted he had been buying opioid medications from friends and had been given benzodiazepine from a neighbor." Dr. McCranie advised Claimant that "this combination [of drugs] is very dangerous and, in fact, can be lethal."

26. Claimant testified that he did not obtain narcotics from a neighbor. Instead, Claimant stated he took some prescription medication that was leftover from treatment of a non-industrial infection that he had months earlier.

27. Claimant failed to prove it is more probably true than not that he sustained any compensable knee injury, including a right knee injury resulting in a torn medial meniscus, on September 25, 2014. A preponderance of the credible and persuasive evidence establishes that the torn meniscus was probably the result of an off-the-job accident that Claimant sustained at home a few days prior to October 16, 2015.

28. The evidence proves that it is more probably true than not that on September 25, 2014 Claimant fell over his tool cart while pushing it at work.

29. However, Claimant's testimony that the September 25, 2014 accident resulted in a knee injury for which he promptly and repeatedly requested medical treatment is not credible and persuasive. Claimant's testimony that the alleged knee injury of September 25 immediately caused excessive pain in the range of 9/10 is contradicted by the fact Claimant returned to work after the incident and continued performing his duties until October 16, 2015. Claimant's testimony is also contradicted by the credible testimony of Graffenberger and Stephenson. Stephenson credibly testified that immediately after the September 25 accident Claimant said he was "fine" and did not request any medical treatment after the incident. Graffenberger credibly testified that after the September 25 incident he spoke to Claimant and Claimant stated he was "fine" and had turned down the Employer's offer of medical treatment.

30. Claimant's testimony that he was visibly impaired at work after September 25, 2014 is not corroborated by credible and persuasive evidence, such as the testimony of a co-worker. However, Claimant's testimony is contradicted by the credible testimony of Graffenberger and Stephenson. Graffenberger credibly testified that he did not observe Claimant limping until approximately two days prior to October 16, 2014. Stephenson credibly testified he did not observe Claimant limping until the late morning of October 16.

31. Claimant's testimony that he suffered a right knee injury at work on September 25, 2014 is contradicted by Claimant's own statement to Graffenberger. Graffenberger credibly testified that a couple of days prior to October 16, 2015 he observed Claimant limping at work. Graffenberger inquired if Claimant was "okay" and Claimant replied he had "blown out his knee" when he fell off of a chair trying to get into his house. Although Claimant asserts Graffenberger was lying, the ALJ finds the evidence does not establish any persuasive reason for Graffenberger to falsify his testimony. Graffenberger was Claimant's co-worker and not a manager of the Employer's business. The record does not persuasively demonstrate that there was any pre-injury animus between Graffenberger and Claimant that might incline Graffenberger to testify against Claimant.

32. Claimant's testimony that he consistently requested medical treatment for his knee after September 25, 2014, and did so again on the morning of October 15, 2014, is undermined by the texts that he exchanged with Stephenson on October 15. In the texts Claimant notified Stephenson the Mercedes had been an "easy fix." Later Claimant texted Stephenson he was going home because he "didn't feel well." Claimant testified at hearing that he went home on October 15 because his knee was painful and it prevented him from completing the Mercedes job. The ALJ finds that if Claimant's testimony were true he would not have texted Stephenson that the Mercedes was an "easy fix." Further it is probable Claimant's texts would have explicitly mentioned his knee as the reason he was leaving work.

33. Claimant's testimony that he requested Stephenson to provide medical treatment on the morning of October 16, 2014, and that he told Stephenson that his declining performance was caused by a knee injury three weeks earlier, is not credible and persuasive. Stephenson credibly testified that when Claimant was presented with the "write up" at 8:30 a.m. on October 16 Claimant did not mention a knee injury as the reason for his declining performance. Stephenson also credibly testified Claimant did not request treatment for the alleged knee injury until approximately 11:00 a.m. on the morning of October 16. The ALJ infers Claimant was suddenly motivated to ascribe his non-industrial knee problems to the September 25, 2014 accident because the write up caused him to realize he might lose his job and need workers' compensation benefits.

34. Claimant's testimony is not credible and persuasive because it was self-contradictory. At one point Claimant testified that after the alleged incident of October 1, 2014 his pain increased to 20/10. Later Claimant professed to be confused by Dr. Ramsey's note that he sometimes had 20/10 pain. Claimant stated he was confused

because the pain "scale" only went to 10, not 20. Dr. Ramsey's note that Claimant reported occasional 20/10 pain is credible and persuasive.

35. Claimant's testimony that he did not obtain drugs from neighbors is not credible and persuasive. Claimant's testimony is contradicted by Dr. McCranie's credible office note that Claimant told her he bought drugs from friends and received benzodiazepines from neighbors. Claimant's testimony is also contradicted by Dr. Ramsey's note that Claimant was getting unauthorized medications from a neighbor.

36. Claimant failed to prove that it is more probably true than not that on or about October 1, 2014 he sustained an injury to his knee arising out of and in the course of his employment.

37. Claimant failed to prove it is more probably true than not that his right knee condition was caused or aggravated by any injury arising out of and in the course of his employment on or about October 1, 2014. Claimant's testimony that his knee condition was caused or aggravated by a work-related incident on or about October 1, 2014 is not credible and persuasive. Claimant's testimony regarding this incident is found to be incredible for essentially the same reasons stated above. Claimant did not seek any medical treatment after the alleged October 1 injury but continued to perform his regular work. Claimant later told Graffenberger that he was limping because he injured his knee at home when he fell off of a chair. On October 16 when Stephenson presented Claimant with the write up Claimant did not mention that the alleged October 1 injury was a reason for his declining performance. The Claimant's testimony is also found to be incredible because the histories contained in the medical records commencing October 16, 2014 do not make any credible reference to an October 1 incident where Claimant tripped over some metal.

38. The ALJ has reviewed Respondents' Exhibit D (video) and finds that it is entitled to little weight. The ALJ finds the video is not illuminating with respect to the issues in this case.

39. 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 ALLEGED INJURY OF SEPTEMBER 25, 2014

Claimant alleges that he proved it is more probably true than not that on September 25, 2014 he injured his right knee when he tripped over a tool cart and fell. Claimant relies on his own testimony as well as the medical evidence that he suffers from a torn medial meniscus of the right knee. The respondents argue that the compensability of the alleged injury depends largely on Claimant's testimony and that he was not a credible witness. The ALJ agrees with respondents.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment and disability benefits were proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the work-related injury and the claimed disability and need for medical treatment. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any 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).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

As determined in Findings of Fact 27 through 35, Claimant failed to prove it is more probably true than not that he sustained a compensable "injury" to his right knee or other part of his body when he tripped and fell over a tool cart on September 25, 2014. Rather, a preponderance of the credible evidence establishes that Claimant's torn meniscus and alleged disability are probably the result of a non-industrial accident that he suffered shortly before October 16, 2015. Insofar as Claimant's testimony would permit the inference that the September 25 incident caused a torn medial meniscus that warrants surgery and is the cause of his alleged disability, the ALJ finds that testimony is not credible and persuasive for the reasons stated in Findings of Fact 29 through 35.

COMPENSABILITY OF ALLEGED INJURY OF OCTOBER 1, 2014

The Claimant failed to prove that the tear of his medial meniscus was caused or aggravated by tripping over metal at work on or about October 1, 2014. For the reasons stated in Finding of Fact 37, the ALJ determines Claimant's testimony concerning the alleged incident of October 1 is not credible and persuasive. Claimant has failed to establish that it is more probably true than not that he sustained any injury at work on or about October 1, 2014.

The claim for benefits in WC 4-964-273 must be denied. Consequently, the ALJ need not address the other issues raised by the parties.

ORDER

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

1. The claim for workers' compensation benefits in WC 4-964-273 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: August 10, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

1. Whether the claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with respondent on October 15, 2014;

2. Whether the claimant proved by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course and scope of her employment with respondent;

3. Whether, should the claimant prove a compensable claim, the claimant has proven by a preponderance of the evidence that the specific medical benefits provided by Memorial Hospital and Front Range Orthopaedics are authorized;

4. Whether, if the claimant satisfies her burden of proof on compensability, the claimant has proven her entitlement to TTD benefits from October 15, 2014, and continuing by a preponderance of the evidence;

5. Whether, if the claimant proves her condition is compensable, and that she is entitled to TTD benefits from October 15, 2014, and continuing, the respondent is entitled to an offset equal to the claimant's $316 weekly unemployment benefits paid to the claimant beginning December 6, 2014, and;

6. Whether, if claimant proves a compensable claim, respondents have proven by a preponderance of the evidence that claimant was responsible for her termination from her job with respondent on November 17, 2014, and responsible for her resulting wage loss, and respondents therefore have no liability for temporary disability benefits pursuant to C.R.S. Sections 8-42-103 (1) (g) and 8-42-105 (4).

Respondent also requested that any medical benefits awarded be paid in accordance with the Division and WCRP medical fee schedule.

STIPULATIONS

1. Claimant withdrew the issue of TPD benefits endorsed for hearing.

2. Claimant's average weekly wage, if the claim is found compensable, is $293.46.

These stipulations were approved and accepted by the ALJ.

FINDINGS OF FACT

1. The claimant was employed at the respondent-employer on October 15, 2014, the date of reporting of an injury. She was employed as a commercial baker.

2. The claimant began working for the respondent-employer as a commercial baker on June 25, 2013.

3. The claimant's essential job duties as a baker were among other things:

- Prepare all baked and fried products for the department to established standards.
- Set up product to be baked and fried.
- Maintain work area in a safe and sanitary manner.
- Bake and fry products to established standards.
- Receives load, rotate, verifies and stocks to proper location.
- Transports product to preparation and finishing areas.
- Stocks and organizes supplies in designated areas.
- Handling boxes.

4. The claimant's physical demands as a baker required her to:

- Lift 25 to 40 pounds 21-41% of the shift.
- Lift 41to 50 pounds 21-40% of the shift.
- Carry 1 to 10 pounds 61-80% of the shift.
- Carry 11to 25 pounds 61-80% of the shift.
- Carry 26 to 40 pounds 21-40% of the shift.
- Carry 41-50 pounds 21-40% of the shift.
- Reach above shoulders 21-40% of the shift.
- Use of hands 61-80% of the shift.
- Bending of wrists 61-80% of the shift.
- Twisting wrists 61-80% of the shift.
- Squeezing motion with hands 61-80% of the shift.

5. The claimant's typical shift would start by stretching and pulling the loaf bread dough to fit the baker's tray. She would then have to lift the trays of bread into the baker's rack which was approximately six (6) feet high. This required her to lift overhead. Meanwhile, the claimant would pull racks out of the back freezer containing

boxed product which was approximately six (6) feet high. She would then begin to prepare the doughnuts from frozen dough. To prepare the doughnuts, the claimant would place them in baker's racks and glaze them using the glazing machine. The glazing machine weighs approximately fifteen pounds.

6. One the bread dough was finished proofing, the claimant would wheel the baker's rack into a proofer and the dough would proof for about thirty (30) minutes. Then, she would wheel the baker's rack into the oven to bake for about twenty minutes.

7. After preparing the doughnuts, the claimant would go to the back freezer and assess the back stock load. There are two sets of pallets- one for the bakers and one for the decorators. She was assigned to cut the plastic off both pallet loads. She testified that these pallets were approximately eight (8) feet tall. Then, she would take the individual boxes off of the pallet and load them onto a "u-boat". She would stack the "u-boat" with boxes up to the handle bar height, which is about five (5) feet high. Then, the claimant would either push or pull the "u-boat" to her department. The claimant testified that she was instructed to either push or pull the "u-boat" based on which ever was more comfortable. She would then unload the "u-boat" and lay out the products that she was going to need for the day and put away any product that was not needed. Next, the claimant would take out any product that was needed for the next night (frozen breads, baguettes, and pastries). These products were in transits in the freezer about six (6) feet high with back stock boxes on top of the transits. The claimant would have to reach overhead for these products.

8. The claimant testified that her job required a lot of pushing and pulling. She testified that should was required to push and pull approximately fifty to sixty (50 to 60) pounds. She testified that on "u-boats" she could have to push/pull approximately one hundred pounds with the "u-boat" assistance.

9. The claimant testified that she lifted thirty to thirty-five pound boxes. She testified that she would typically lift between 75 to 125 boxes per shift.

10. At first the claimant had difficulty performing her job because she was having difficulty reaching boxes from the top shelves. She had asked for a stool. She was told that a stool in the kitchen would be a direct safety violation because of slip hazards. The claimant asserted she was having trouble reaching because she is 5'2".

11. The claimant testified that she began experiencing right shoulder pain and numbness in her digits for about three (3) months. She experienced pain when reaching

overhead to retrieve boxes. The claimant also noticed pain when loading and unloading the back stock. The claimant testified that she felt pain in her right shoulder.

12. The claimant testified that she gradually became more stiff while working. The claimant testified that the pain was brought on by specific activities. She testified that a week prior to October 15, 2014, a box tilted off of a stack and leaned on right scapula. She testified that hadn't had any other incidents that could explain the pain that she was experiencing in her right shoulder.

13. The claimant testified that on October 15, 2014, she woke up around 4:00 a.m. with pain in her right shoulder. She testified that she could not move her right shoulder.

14. The claimant testified that she went to the emergency department at Memorial Hospital because she was having right shoulder pain. The claimant reported that

> A couple of weeks ago she says some bread from work fell on top of her right scapula and she has had some shoulder pain ever since. She feels like it is more painful with movement. She has been taking Tylenol. No ibuprofen. She has no primary care, no orthopedic surgeon. She denies any falls or significant trauma. She denies numbness or tingling. She denies rashes, swelling, but just states that repetitive use seems to exacerbate her symptoms.

15. It was further noted that the claimant "presents with chronic right shoulder pain that was reinjured 1 week ago when a box of bread fell and struck the shoulder." She was instructed to follow up with Dr. Reeves Doner at Specialty Family Medicine. She was also instructed to follow up Dr. Geoffrey Doner at Front Range Orthopedics in one week.

16. On October 17, 2014, the claimant was examined by Dr. Brian McIntyre at CCOM. The claimant stated that "she awoke on the 15th with inability to move the shoulder. She is unaware of any specific incident causing an injury. A constant ache that progressed into stiff shoulder that she could not move at all."

17. Eric Ridings, M.D. testified at hearing, and examined the claimant on January 19, 2015. His report documents non-physiologic findings on exam, inexplicable subjective symptoms, and inconsistencies in the claimant's presentation and medical history. Dr. Ridings, after performing his examination and reviewing all the medical records, opined, "In my opinion within a reasonable degree of medical probability, the patient's current complaints cannot be related to her work activities at [the respondent-

employer]. More generally, I do not find objective evidence of any diagnosis to explain the patient's history and findings at her right shoulder, right elbow, right wrist, or right hand. There are multiple issues regarding the patient's given history which I cannot medically explain . . . ." The claimant gave Dr. Ridings a history that was inconsistent with the history and reports she gave at Memorial Hospital on October 15, 2014. Dr. Ridings wrote, "I do not have a medical explanation for how one can awake from sleep at home with sudden onset of such severe shoulder pain that the shoulder cannot be moved . . . ." He concluded, "Overall, within a reasonable degree of medical probability, I find no diagnoses for any of the patient's complaints, which are all greater than objective findings (which are lacking)."

18. The ALJ finds and concludes that Dr. Ridings' analysis and opinions are credible and more persuasive than medical evidence to the contrary.

19. The ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with the respondent-employer on or about October15, 2014.

20. The ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course of her employment with the respondent-employer and reported on or about October15, 2014.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address every piece of evidence that might

lead to a conflicting conclusion and need not reject every piece or item of evidence contrary to the findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

4. The claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

5. Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

6. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); see also, *Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957).

7. The Workers' Compensation Act creates a distinction between the terms “accident” and “injury.” The term "accident" refers to an, “Unexpected, unusual, or undesigned occurrence.” § 8-40-201(1), C.R.S. In contrast, an “injury” refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an “injury” is the result. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the “accident” results in a compensable "injury." *Romine v. Air Wisconsin Airlines*, W. C. No. 4-609-531 (October 12, 2006)

8. An occupational disease is a "disease which results directly from the employment or the conditions under which the work is performed," and which is a natural incident of the work, and is not the result of "hazards to which the worker would have been equally exposed outside of the employment." § 8-40-201(14), C.R.S.

9. A claimant seeking benefits for an occupational disease must first establish the existence of the disease and that it was directly and proximately caused by claimant’s employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims,* 989 P.2d 251, (Colo. App. 1999); *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). Once identified, before a disease can be found to be a compensable occupational disease, it must meet each element of the test mandated by the statute, which operates as an additional causal limitation. *Anderson v. Brinkoff*, 859 P.2d 819, 824 (1993). Included in the analysis is the “particular risk” test. Particular risk means that claimant was exposed by his employment to risk causing a disease in a measurably greater degree and in a substantially different manner than are persons in employment generally. *Id.* Even if a particular risk is proven, claimant must also prove that his disease is the result of a special hazard associated with employment and not the type he would be equally exposed to outside of employment. *Id.;* C.R.S. § 8-40-201 (14).

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

11. To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of

a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988).

12. The mere fact that symptoms appear during an employment event does not require a conclusion that the employment was the cause of the symptoms, or that the employment aggravated or accelerated a preexisting condition. Instead, the appearance of symptoms may be the logical and recurrent consequence of a preexisting condition *Jiron v. Express Personnel Services*, W.C. No. 4-456-131 (ICAO February 25, 2003); *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985). As noted in *Martinez v. Monfort, Inc.*, W.C. No. 4-284-273 (ICAO August 6, 1997), "The fact that the claimant's job duties may have intensified her pain does not compel a different result because the ALJ was persuaded that it is the underlying condition which prevents the claimant from returning to work."

13. The question of whether the claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

14. As found above, the ALJ conclues that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

15. The ALJ concludes, as found above, that the weight of the lay and medical evidence establishes that the claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with respondent-employer.

16. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course of her employment with the respondent-employer and reported on or about October15, 2014.

[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: August 28, 2015

/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 sustained a compensable injury to her right knee;

2. Whether the claimant is entitled to reasonable, necessary, and related medical benefits to cure or relieve her from the effects of her injury, specifically Dr. Merchant's referral of the claimant to an orthopedic surgeon.

STIPULATION

The parties stipulated that if this claim is found compensable, the referral by Dr. Merchant to an orthopedic surgeon is reasonably necessary in order for the parties to have a reviewable order.

FINDINGS OF FACT

1. At the time of the injury the claimant worked as a receptionist and scheduler for all parole board hearings.

2. The claimant is still employed by the respondent.

3. On September 18, 2014, the claimant was getting into a co-workers vehicle to go to lunch, in the parking lot of the facility that she worked at, when she slipped on the gravel in the parking lot and twisted her knee. She also felt a popping sensation and felt intense pain.

4. On the morning of September 18, 2014, the claimant's knee felt great and she had no problems at all with her right knee.

5. The ALJ finds that the claimant's testimony is credible and persuasive.

6. There is insufficient evidence to establish that the claimant ever sought medical treatment for her right knee at any point throughout her life up to the date of injury, September 18, 2014.

7. The claimant sought treatment for her right knee after the injury at CCOM. She initially saw Steven Bryne, P.A. who diagnosed the claimant with "sprains and strains of other specific sites of knee and leg." Mr. Bryne did not believe that the claimant's knee injury was related to her work.

8. The claimant was next seen by Dr. Merchant on October 10, 2014. Dr. Merchant agreed with Mr. Bryne's diagnosis concerning the knee and also agreed that the claimant had not suffered a work related injury because the claimant was not entering a company vehicle or engaged in any work activity at the time of the injury.

9. The claimant was sent to Wallace Larson, M.D. for an independent medical evaluation. Dr. Larson saw the claimant on January 21, 2015. In his report Dr. Larson opined that

> [I]t is likely that the patient has some pre-existing osteoarthritis of her knee and a torn medial meniscus. She has not had any imaging studies, either radiographic or MRI. From an orthopedic stand point, it would be indicated to obtain weight bearing radiographs of her right knee, depending on the results, possible treatment with either injection or additional diagnostic studies such as an MRI scan.

10. Dr. Larson also opined that the claimant did not suffer a work related injury because she was not engaged in work activities at the time of the injury.

11. On March 23, 2015, Dr. Larson reviewed weight bearing radiographs and determined that the claimant suffered from moderate to severe cartilage space narrowing medially with mild bony eburnation and small marginal osteophytes with possible stress fracture. Dr. Larson request that an MRI be done to verify the diagnosis.

12. On June 12, 2015 an MRI was completed at the request of Dr. Merchant. That MRI showed 1. Chondromalacia Patellae type III with mild Osteoarthritis in the medial compartment of the joint with small joint effusion. 2. Small tear in the posterior horn of the medial meniscus and 3. Thinning of the anterior cruciate ligament, possibly a remote partial tear.

13. Paul Merchant, M.D. testified by deposition. When he initially saw the claimant on October 2, 2014, it appeared to him that the claimant had suffered an acute injury.

14. The reason that Dr. Merchant did not order further treatment after October 2, 2014, was due to his concern over the work relatedness of the incident since it occurred in a parking lot at lunchtime. Dr. Merchant compared the injured right knee to

the claimant's left knee and it was clear to him from his examination that the claimant had suffered an injury to her right knee.

15. The ALJ finds Dr. Merchant's testimony credible and persuasive.

16. Wallace Larson, M.D. testified by deposition as well. Dr. Larson did not believe that the claimant's knee was asymptomatic at the time of the injury on September 18, 2014. Dr. Larson testified that it would be a matter of history to determine the symptomology of the claimant's knee prior to the injury. Dr. Larson did not examine the left knee to compare the conditions of both knees to help in determining whether or not he claimant had suffered an injury to her right knee on September 18, 2014. Dr. Larson assumes that the claimant had knee pain prior to this injury, even though there is insufficient evidence to that effect.

17. The ALJ does not find Dr. Larson's testimony persuasive.

18. The ALJ finds that the claimant has established that it is more likely than not that she sustained an injury to her right knee arising out of and in the course of her employment with the respondent.

19. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to reasonable, necessary, and related medical care to cure or relieve her from the effects of his injury, specifically the referral to an orthopedic surgeon as requested by Dr. Merchant.

CONCLUSIONS OF LAW

1. To establish a compensable injury, the claimant has the burden to prove by a preponderance of the credible evidence that his condition arose out of and in the course of his employment. *See* §8-41-301(1)(c), C.R.S. *Madden v. Mountain West Fabricator's*, 977 P.2d 861 (Colo. 1999).

2. The case are bar is slightly different to the extent that it involves an injury that occurred in a parking lot. However, the law has been well settled concerning this issue. The courts have consistently ruled that a parking lot provided by the employer is considered to be an extension of the employer's premises, and that injuries occurring in such parking lots are within the course of employment. *Matter of Welham*, 653 P.2d 760 (Colo. App. 1982); *Stewart v. U. S.*, 716 F.2d 755 (10th Cir.1982). As found the

claimant was going to lunch when she stepped into a co-workers vehicle and slipped into a hole causing immediate onset of pain.

3. It is true that injuries sustained while going to and from work do not arise out of employment because they lack a sufficient causal connection to the employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Colorado's appellate courts, however, have long recognized that accidents "occurring in or en route to parking lots maintained on its premises or provided by the employer for the benefit of employees, are compensable as arising out of and in the course of employment." *State Compensation Insurance Fund v. Walter*, 143 Colo. 549, 553, 354 P.2d 591, 593 (1960).

4. The ALJ must then determine if the injury that the claimant suffered is more likely that not to have been caused by the incident alleged. In this case it is clear that the claimant did not have any previous knee conditions or even a previous report of pain, even if the claimant had previous asymptomatic knee conditions. That being the case the statute requires that even if the claimant has a pre-existing condition that is exacerbated by a workers' compensation injury it is compensable. C.R.S.A. § 8-42-104 (1) states: The fact that an employee has suffered a previous disability or impairment or received compensation therefor shall not preclude compensation for a later injury or for death, but, in determining compensation benefits payable for the later injury or death, the employee's average weekly earnings at the time of the later injury shall be used in determining the compensation payable to the employee or such employee's dependents.

5. The question of whether the claimant met his burden of proof is one of fact for determination by the ALJ. *See Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988)

6. 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).

7. 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).

8. When determining credibility, the fact finder should consider among other things the consistency or any inconsistencies of the witness' testimony, the fact that the witness' testimony in important particulars was contradicted by other witnesses; the

reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness, and the bias or prejudice of the witness, if any. *See Prudential Insurance Co. of America v. Cline*, 57 P.2d 1205 (1936), CJI Civil 3:16 (2005).

9. As found, the ALJ concludes that the claimant and Dr. Merchant's testimony is credible and persuasive.

10. After considering all the evidence, the ALJ concludes that the claimant has established by a preponderance of the evidence that she sustained an injury to her right knee arising out of and in the course of her employment with the employer.

11. The respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). 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. 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). Claimant has proven by a preponderance of the evidence that her low back condition is related to the work injury the claimant sustained on January 15, 2013.

12. Here it has been stipulated that the referral by Dr. Merchant is reasonable and necessary.

13. The ALJ concludes that the claimant is entitled to medical benefits per the parties' stipulation.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The claimant's claim for reasonable, necessary, and related medical benefits is granted, specifically the referral by Dr. Merchant to an orthopedic surgeon.

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: August 28, 2015

/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 on July 4, 2014 she sustained a right shoulder injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did Claimant prove by a preponderance of the evidence that as a result of the alleged injury she is entitled to an award of reasonable and necessary medical benefits including right shoulder surgery?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 6 were received in evidence. Respondents' Exhibits A through K were received in evidence.

2. Claimant was employed as the general manager of the Employer's restaurant business. She is also a 7% owner of the business. In her management capacity Claimant performs numerous duties including supervision, bar tending and food preparation.

3. Claimant testified as follows concerning the events of Friday, July 4, 2014. The Employer's restaurant was very busy because of the holiday weekend. At about 2:30 p.m. Claimant was in a walk-in freezer and getting ready to exit when she remembered she needed to take out some steaks. At this moment Claimant reached out with her right arm in order to pick up the steaks. Her arm was extended to the side and slightly below and behind the shoulder joint. Just as Claimant touched the steaks she heard a "crinkle" sound and experienced "discomfort" in her shoulder. Claimant had not yet begun to lift the steaks when she heard the noise and experienced the discomfort.

4. Claimant testified as follows concerning the remainder of her shift on July 4, 2014. She continued working at the restaurant until shortly before 4 p.m. During this period she experienced some discomfort and pain in her right shoulder. By 4 p.m. Claimant was required to leave the restaurant and travel to another Employer facility known as the Tiki Bar. A bartender scheduled to work at the Tiki Bar called in sick and Claimant was required to fill in. While bartending at the Tiki Bar Claimant experienced some increased pain in the right shoulder when she reached overhead to place bottles and pull tap handles and when she picked up an ice bucket.

5. Claimant testified that prior to July 4, 2014 she never had problems with her right shoulder, never had an injury to the right shoulder and never received medical treatment for the right shoulder.

6. At the hearing the parties stipulated that Claimant is not alleging that she sustained a repetitive motion type of injury when working at the Tiki Bar. Claimant's counsel stated in open court that Claimant's sole "issue" is the injury allegedly caused by reaching for the steaks and the testimony concerning the Tiki Bar was solely for the purpose of establishing how Claimant felt after she reached for the steaks.

7. Claimant notified her "partners" of the alleged shoulder injury on the morning of Saturday, July 5, 2015. Nevertheless, on July 5 Claimant continued to work at the restaurant and also at the Tiki Bar. Claimant also worked on Sunday July 6, 2014. On Monday, July 7, 2014 Claimant made an appointment at High Country Healthcare (HCH) for treatment for her shoulder. Claimant knew that HCH was the Employer's designated provider for workers' compensation injuries.

8. On July 7, 2014 Lawrence George, M.D., examined Claimant at HCH. Dr. George recorded a history that Claimant was at work on Friday when she "felt pain in the posterior upper arm and shoulder when she reached for something." Dr. George also wrote that Claimant "was lifting." Dr. George assessed a "strain of [the] right upper arm" and "shoulder pain." He prescribed pain medication. He also imposed restrictions of no lifting greater than "10-15" pounds, no repetitive lifting greater than 5 pounds, no pushing/pulling greater than "5-10" pounds and no reaching overhead or away from the body. Dr. George completed a Physician's Report of Compensation Injury (M 164) and checked a box indicating that his "objective findings" were consistent "with history and/or work related mechanism of injury/illness."

9. On July 14, 2014 Dr. George again examined Claimant. Claimant reported that she wasn't feeling any better but was functioning well at work within the restrictions. Dr. George referred the Claimant for physical therapy (PT).

10. On October 3, 2014 Dr. George recorded that Claimant had been in PT but "wasn't making much progress." X-rays of the right shoulder revealed "mild arthritis" of the acromioclavicular joint and possible tendon calcification superior to the femoral head. Dr. George performed a right shoulder subacromial cortisone injection.

11. On October 27, 2014 Dr. George noted the cortisone injection "helped a lot for a couple of weeks" but the Claimant's pain was "starting to come back including at night." Dr. George referred Claimant for an MRI to "rule out a torn rotator cuff."

12. On October 30, 2014 Claimant underwent an MRI of the right shoulder. The radiologist's impressions were as follows: (1) Longitudinal tear of the infraspinatus myotendinous junction with extension into the infraspinatus articular surface and mild to moderate infraspinatus tendinosis; (2) Disruption of the biceps pulley with subluxation of the long head of biceps tendon, and moderate intra-articular tendinosis of the long head of the biceps tendon and likely partial tearing involving up to 50

percent of total tendon substance; (3) Chronic degeneration of the glenoid labrum including a partially detached tear of the anterior-superior to anterior-inferior labrum.

13. On October 31, 2014 Dr. George reviewed the results of Claimant's MRI. He referred Claimant to Vail Summit Orthopedics (VSO) for a consultation regarding her "torn rotator cuff." Dr. George also completed an M 164 listing Claimant's work related diagnosis as "Rotator Cuff tear R shoulder." Claimant was restricted to lifting, carrying, pushing and pulling no more than 40 pounds and no overhead reaching.

14. On November 4, 2014 orthopedist Erik Dorf, M.D., examined Claimant at VSO. In his office note Dr. Dorf recorded a history that 4 months previously Claimant "was reaching for a box of tenderloins and twisted her arm causing pain in her right shoulder. Claimant reported "pain with rotation of the arm, and forearm." On physical examination (PE) of the right shoulder Dr. Dorf noted mild weakness with internal rotation and weakness with external rotation. He also noted a "positive empty can test" and a positive Yergesons test. Dr. Dorf assessed a "rotator cuff tear" and stated Claimant was "likely to require surgical management of this in the future." Dr. Dorf noted that the Claimant "would like to proceed with an operative treatment plan at this time."

15. On November 4, 2014 Dr. Dorf completed an M 164. Dr, Dorf wrote that Claimant's description of the injury was "lifting tenderloin @ work / twist /pop in R shoulder." Dr. Dorf listed Claimant's work related diagnosis as "RCT R shoulder" and checked a box stating that his objective findings were "consistent with history and/or work related mechanism of injury/illness."

16. Dr. Dorf requested authorization to perform a rotator cuff repair surgery.

17. At the Insurer's request orthopedic surgeon Christopher Isaacs, D.O., completed a records review of Dr. Dorf's request to perform surgery. Dr. Isaacs wrote that based on his review of the records Claimant's reported mechanism of injury was "simply reaching to her side when she had sudden pain in her shoulder" and she had not "yet grasped anything." Dr. Isaacs opined that based on the MRI results the surgery recommended by Dr. Dorf (arthroscopic repair of shoulder with open biceps tenodesis) is appropriate. However, Dr. Isaacs opined that the "mechanism of injury is completely inconsistent with the extensive nature of the MRI findings." Dr. Isaacs explained that "it would have been nearly impossible to have torn multiple components of the rotator cuff complex along with dislocation and tearing of the biceps tendon simply from reaching." Dr. Isaacs concluded that the MRI findings "predated" Claimant's alleged injury and recommended denial of Dr. Dorf's request for surgery.

18. After the request for surgery was denied Dr. Dorf authored an undated "appeal letter." Dr. Dorf wrote that his November 4, 2014 examination of Claimant was "concerning" for a "tear of her proximal biceps." He noted that the MRI showed tearing of the infraspinatus, superior tearing of the subscapularis and "medial subluxation of the biceps." Dr. Dorf stated that he agreed with Dr. Isaacs that "some of these issues are likely chronic." However, Dr. Dorf opined that Claimant's "biceps symptoms were

caused or greatly exacerbated" by a "twisting reach." Dr. Dorf noted Claimant did not report any shoulder symptoms prior to the reaching incident and had "continued to complain of biceps symptoms since."

19. Dr. Isaacs testified at the hearing. Dr. Isaacs is board certified in orthopedic surgery and level II accredited. Dr. Isaacs reiterated his opinion that the MRI findings, including the rotator cuff tear and biceps tendon tear predated the July 4, 2014 reaching incident. Dr. Isaacs does not have an opinion as to what caused the rotator cuff tear and biceps tendon tear except that they were not caused by the reaching incident of July 4. Dr. Isaacs opined that the act of reaching is such a minor physiological stress that it could not have caused the pathologies depicted on the MRI. Dr. Isaacs also disagreed with Dr. Dorf's opinion that the Claimant's bicep symptoms could have been aggravated by the reaching incident. Dr. Isaacs explained that based on his knowledge and experience the act of reaching requires such minimal effort that it could not have altered the pre-existing pathologies. Dr. Isaacs also testified that his opinion would not change if the evidence showed Claimant had been twisting her body and reaching behind when she heard the "crinkle" noise in her shoulder. Dr. Isaacs stated the Claimant was unlikely to have injured the tendons by reaching behind and that the "crinkle" noise the Claimant heard could have been caused by many different things. Dr. Isaacs understood that Claimant had no pre-injury diagnosis of shoulder problems and no pre-injury history of treatment of the shoulder. The absence of pre-injury symptoms did not alter his opinions concerning causation.

20. Claimant proved it is more probably true than not that on July 4, 2014 she sustained a right shoulder injury arising out of and in the course of her employment. Claimant also proved it is more probably true than not that the injury was a proximate cause of her subsequent need for medical treatment including the shoulder surgery recommended by Dr. Dorf.

21. Claimant credibly testified that on July 4, 2014 she experienced the onset of right shoulder symptoms when she reached for meat with her right arm extended to her side slightly below and behind the level of her shoulder joint. Claimant's testimony is largely consistent with the history she provided to Dr. George and Dr. Dorf, as well as the history that Dr. Isaacs gleaned from the medical records. Although there is some question in Dr. George's July 7, 2014 office note as to whether Claimant initially gave a history that she was "lifting" meat or merely "reaching" for meat, the ALJ finds that this discrepancy is minor. The discrepancy does not lead the ALJ to conclude the Claimant attempted to conceal her true history from Dr. George. Indeed, Dr. Dorf's letter of November 14, 2014 and the testimony of Dr. Isaacs reflect that both physicians understand that the alleged "mechanism of injury" involves reaching, not lifting.

22. Claimant credibly testified that the right shoulder symptoms began contemporaneous with the reaching incident of July 4, 2014 when she experienced a "crinkle" sound and "discomfort" in the shoulder. Throughout the remainder of the day Claimant experienced symptoms of shoulder pain, especially when reaching overhead at the Tiki Bar. Claimant credibly testified that she reported this incident to her

"partners" the next day and sought treatment with Employer's authorized providers (HCH) on Monday, July 7, 2014.

23. Claimant proved that the July 4, 2014 reaching incident occurred "in the course of" her employment. Specifically, Claimant was on duty at the Employer's restaurant performing her duties as the restaurant manager. These duties included reaching for steaks to help with food preparation.

24. Claimant proved the July 4, 2014 reaching incident "arose out of" her employment. Dr. Dorf credibly opined that although Claimant had pre-existing degenerative conditions of her shoulder including the biceps tendon and pulley as shown by MRI, the act of reaching back with a "twisting" motion to pick up the steaks probably caused an aggravation of the pre-existing biceps problems. Dr. Dorf credibly and persuasively pointed out that prior to July 4, 2014 Claimant's right shoulder was apparently asymptomatic and she had not sought medical treatment for any shoulder problems. However, after the reaching incident Claimant has continuously complained of symptoms associated with her biceps tendon. Dr. Dorf's opinion is corroborated by Dr. George who diagnosed a work-related "Rotator Cuff tear R shoulder."

25. There is no credible and persuasive evidence, including medical records, to show that Claimant ever complained of or sought treatment for right shoulder symptoms prior to the July 4, 2014 incident.

26. The opinion of Dr. Isaacs that the reaching incident was not sufficient to be a "mechanism of injury" is not as persuasive as Dr. Dorf's contrary opinion. Dr. Isaacs did not examine the Claimant nor did he meet with Claimant to take a direct history. More importantly, Dr. Isaacs did not persuasively refute Dr. Dorf's argument that the temporal relationship between the onset of Claimant's right shoulder symptoms and the reaching incident of July 4, 2014 is an important indicator of a causal relationship between the two events. The ALJ understands Dr. Isaacs to opine that the reaching incident of July 4 was purely coincidental with the onset of Claimant's right shoulder symptoms. However, in light of Dr. Dorf's opinion, the ALJ finds it improbable that the lifting incident and the onset of symptoms are coincidental and not causally related.

27. Claimant proved it is more probably true than not that the industrial aggravation of the pre-existing right shoulder condition is a proximate cause of her subsequent need for medical treatment including the surgery recommended by Dr. Dorf. As found, some of Claimant's shoulder pathology undoubtedly pre-dated the lifting incident of July 4, 2014. However, the medical records and the opinions of Dr. Dorf demonstrate that the lifting incident caused additional injury to the biceps tendon and pulley so as to cause Claimant to experience pain and discomfort. Claimant's right shoulder was asymptomatic prior to July 4 and she was able to perform her regular duties. After that date Claimant was symptomatic and sought treatment for right shoulder symptoms. The ALJ infers from this evidence that there is a direct causal relationship between the reaching incident of July 4 and claimant's need for treatment including the proposed surgery.

28. The parties stipulated at hearing that the surgery proposed by Dr. Dorf is reasonable and necessary to cure and relieve the effects of Claimant's right shoulder condition.

29. Evidence and inferences contrary to 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 ALLEGED SHOULDER INJURY

Claimant contends the evidence establishes it is more probably true than not that when she reached for the meat on July 4, 2014 she caused injury to her shoulder or aggravated pre-existing pathology so as to necessitate medical treatment including the surgery recommended by Dr. Dorf. Claimant argues that this chain of events constitutes a compensable injury that arose out of and in the course of employment. Respondents contend the evidence establishes that Claimant's shoulder pathology is not the result of an injury "arising out of" her employment but is instead the product of a "personal risk" that predated the injury. The Respondents further argue that the act of reaching is "ubiquitous" and is not a "special hazard" of Claimant's employment that would elevate her shoulder pathologies to compensable injuries. The ALJ agrees with Claimant.

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); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is a typical symptom from the aggravation of a pre-existing condition and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the 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, 2o14); *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 July 4, 2014 she sustained an injury to the right shoulder "in the course of" her employment. As determined in Findings of Fact 21 through 23, Claimant experienced the onset of right shoulder symptoms when she reached for some steaks while performing her duties as a restaurant manager. 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 July 4, 2014 she sustained and injury "arising out of" her employment. Specifically, the ALJ concludes that the act of reaching precipitated an aggravation of Claimant's pre-existing biceps tendon and pulley conditions.

As determined in Findings of Fact 24 through 26 the ALJ credits the opinion of Dr. Dorf that, although Claimant had pre-existing shoulder pathology, the reaching incident of July 4, 2014 "aggravated" the biceps tendon and pulley pathology so as to render it symptomatic and cause a need for treatment. As found, Dr. Dorf persuasively explained that the temporal relationship between the lifting incident and the onset of Claimant's symptoms supports the conclusion that the two events are causally related. Dr. Dorf's opinion is corroborated by the opinion of Dr. George. It is also supported by Claimant's credible testimony that she did not have any right shoulder symptoms or treatment prior to the reaching incident of July 4, 2014. Although Dr. Isaacs expressed opinions that conflict with those of Dr. Dorf, the ALJ finds Dr. Isaacs's opinions are not persuasive for the reasons stated in Finding of Fact 26.

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*; *H & H Warehouse v. Vicory, supra.*

As determined in Finding of Fact 27, the reaching incident of July 4, 2014 rendered Claimant's shoulder condition symptomatic and caused her need for medical treatment including the surgery recommended by Dr. Dorf. Thus the industrial injury of July 4 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, supra*; *Nicholl v. Cannino Sausage Co., supra*.

REASONBLE AND NECESSARY MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The parties stipulated that if the claim is compensable the surgery proposed by Dr. Dorf constitutes reasonable and necessary medical treatment. Because the ALJ finds the claim is compensable the Respondents shall provide reasonable and necessary medical treatment including the surgery recommended by Dr. Dorf.

ORDER

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

1. On July 4, 2014 Claimant sustained a compensable injury to her right shoulder 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 including the surgery proposed by Dr. Dorf.

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

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

DATED: August 17, 2015

DIGITAL SIGNATURE:

David P. Cain

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained compensable occupational diseases in the form of bilateral Carpal Tunnel Syndrome (CTS), right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome during the course and scope of her employment with Employer.

2. Whether Claimant has proven 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 work-related injuries.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of 911.00.

2. If Claimant suffered an occupational disease she is entitled to receive Temporary Total Disability (TTD) benefits for the period January 7, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 54 year old female who worked for Employer as a Membrane Specialist. Claimant's job duties entailed separating whey into protein and lactose through a human machine interface. The area in which Claimant worked is a warehouse-type facility with pipes that carry whey through the system to containers or vessels. The vessels are long, cylindrical, metal tubes. Inside the vessels are membranes that filter the whey into protein and lactose.

2. Claimant explained that a typical work shift lasted from 10-12 hours per day or approximately 40-50 hours each week. She engaged in a variety of tasks in performing her job duties. She monitored operations and performed computer work. The computer work involved data entry for daily reports and lasted for approximately 30-60 minutes sporadically throughout each day.

3. Claimant also removed and tested samples of protein that were already in the filtration system. She explained that the vessels were connected to the pipes in the system by small, clear tubes. Claimant removed weekly samples from the tubes by holding a small bag under the stopcock. She then twisted the bags closed for testing.

4. Claimant explained that the most physically demanding part of her job involved changing the membranes. She testified that she spent approximately one to four hours each day changing between five and 30 membranes. The membranes had to be pushed out of the vessel from the back using a metal pole. Each vessel contained up to five membranes. The vessels were eight inches in diameter and up to 20 feet long. Each vessel had an eight-inch diameter metal face plate on the front and back that was attached by two screws. The vessels were stacked six high and reached approximately 12-13 feet off the floor. Claimant noted that she used a platform but still worked overhead when the vessels were above chest height. Each membrane was four feet in length and about eight inches in diameter. The membranes were connected to each other in the vessel by a metal plate called an ATD unit. When wet inside the vessel each membrane weighed 42 pounds.

5. Claimant remarked that at times the membranes were tight and required significant force to push them through. As each membrane came out of the vessel it had to be separated from the membrane behind it. Claimant commented that she had to hold the first membrane and move it up and down to "shake it loose" from the attached membrane. Once a membrane was out of the vessel, Claimant placed it on a mat. She then removed the ATD by prying it off.

6. New membranes were stored in plastic bags in crates or near the ground. The new, dry membranes weighed 32 pounds. Before installing the new membranes Claimant was required to log the serial numbers of the membranes to keep track of their sequence in the vessel. She reattached the ATD to each membrane and placed the membrane in the vessel. Claimant then reconnected the faceplates to the vessels and the vessels to the pipes. She estimated that it took 45-60 minutes to complete the process of changing all membranes in a vessel.

7. Claimant occasionally performed a "bubble test." The procedure involved submerging a membrane in water, holding it beneath the water and running air through it to check for leaks. On days when bubble testing was required, Claimant performed the procedure between two and 30 times during her shift.

8. In June of 2014 Claimant began to develop pain into her right thumb. The pain was associated with numbness and tingling that extended into her right wrist. Claimant also began to develop right elbow pain. She reported her symptoms to Employer and was directed to Workwell Occupational Medicine for treatment. Claimant was diagnosed with flexor tenosynovitis in both wrists. She received splints, medications, physical therapy and work restrictions. The claim was assigned Workers' Compensation case No. 4-953-809.

9. Claimant returned to work within her restrictions. In October 2014 she was notified that she and a coworker would need to begin night shifts to look for defects in membranes. They were expected to change about 30 membranes each night for approximately three to four weeks. The total project consisted of changing 360 membranes. Claimant commented that she changed about 20 of the 30 membranes each night while her coworker changed the remaining 10. Claimant was required to

work at a fast pace because of time deadlines. She explained that her symptoms worsened and she began to develop radiating symptoms into her right shoulder. Claimant reported her symptoms to Employer and chose to visit Banner Occupational Health Clinic for medical treatment. The claim was assigned Workers' Compensation case No. 4-966-230.

10. On November 5, 2014 Claimant visited Laura Caton, M.D. at Banner for an evaluation. Claimant explained her job duties and reported symptoms that included aching pain in both arms and occasional sharp pain in her thumbs, elbows and right shoulder. Dr. Caton diagnosed Claimant with bilateral gamekeeper's thumb, myofascial pain syndrome of the thoracic spine, degenerative joint disease of the bilateral 1st CMC joints and bilateral elbow tenosynovitis. X-rays did not reveal any significant degenerative changes.

11. Claimant returned to work for Employer with restrictions. She visited Dr. Caton a number of times, but Dr. Caton never completed a causation analysis. Dr. Caton reviewed an ergonomic report of Claimant's work activities, but concluded the report "[w]as not specific enough in cycles, force or repetitions to provide an adequate causality assessment" pursuant to the Division of Workers' Compensation Guidelines." She remarked that "[a] full ergonomic assessment with the employee present to measure force, repetitions, and ergonomics of the job site would be key in determination of casualty." Dr Caton prescribed physical and occupational therapy.

12. Claimant attended one physical therapy session but her claim was subsequently denied. On January 7, 2015 Employer notified Claimant that it could no longer accommodate her work restrictions and terminated her employment. Claimant has thus not worked since January 7, 2015.

13. On March 19, 2015 Vocational Evaluator Joe Blythe performed a Job Demands Analysis. Part of his job duties is to assess an individual's work activities for purposes of quantifying the force and repetition involved. Mr. Blythe testified that he is familiar with the Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5 Cumulative Trauma Conditions (*Guidelines*). The purpose of his evaluations is to obtain the correct measurements and data necessary to determine if an individual's work activities meet the criteria set forth in the *Guidelines*. On two occasions, Mr. Blythe traveled to Employer's factory and observed workers' performing Claimant's job activities. He testified that it is not unusual to perform a job site analysis in the absence of the injured worker. In fact, the injured worker is often not available because of work restrictions.

14. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of

supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

15. Mr. Blythe drafted three separate vocational reports evaluating the job site for primary and secondary risk factors for cumulative trauma. During his two visits, he did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture and repetition/duration (elbow flexion). Mr. Blythe concluded that in a 7.5-hour day an individual would meet the force time risk factor only 1.1 hours per day or far less than the required six hours. Even in a 10.5-hour day the force measurement only reached 1.5 hours per day. Similarly, Mr. Blythe concluded that in a 10.5-hour day an individual would meet the elbow flexion risk factor only 1.4 hours per day or far less than the required six hours. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration.

16. In an addendum to his first report Mr. Blythe addressed the membrane changing aspect of Claimant's job. He confirmed with Claimant's supervisor that on two days each week Claimant spent more time changing membranes than what was depicted in the body of his report. Based on the increased percentage of membrane changes the force time for a 10.5-hour day only reached 2.3 hours. In a report dated April 12, 2015 Mr. Blythe prepared an addendum to calculate the force demands assuming that Claimant completed one daily cycle by only changing membranes. Using a workday duration of 10.5 hours the force time equaled 2.8 hours.

17. In order to best calculate the force demands associated with changing membranes, Mr. Blythe returned to Employer's facility a second time to observe workers who were only changing membranes. In his report dated June 27, 2015 Mr. Blythe calculated force measurements based both on a solo worker changing membranes and a team changing membranes. Concerning the solo worker study, a 10.5-hour workday yielded 1.1 hours per day of maximum force. Regarding elbow flexion, a 10.5-hour workday yielded 1.5 hours per day of greater than 90 degrees elbow flexion. For the team study a 10.5-hour workday yielded a maximum force of approximately 2.7 hours and elbow flexion of 1.4 hours per day. Accordingly, Claimant's membrane changing activities did not meet the minimum thresholds for force, repetition or duration to establish an occupational disease pursuant to the *Guidelines*.

18. On March 30, 2015 Claimant underwent an independent medical examination with Elizabeth Bisgard, M.D. At the time of her examination, Dr. Bisgard only had Mr. Blythe's first report. Claimant provided Dr. Bisgard with a complete and accurate account of her job duties. Dr. Bisgard assessed Claimant with right shoulder

impingement with secondary myofascial pain syndrome and signs and symptoms consistent with CTS and de Quervain's tenosynovitis. Based on Mr. Blythe's report, Dr. Bisgard concluded that the work performed by Claimant did not meet the threshold of work related CTS or de Quervain's tenosynovitis pursuant to the *Guidelines*. Dr. Bisgard noted that, although Claimant described using force and awkward positioning, there was enough "rest time in between task and 'down time' to allow sufficient recovery." Specifically, Claimant performed several different activities throughout the day and many of the activities did not meet the minimal force or time duration requirements pursuant to the *Guidelines*.

19. Regarding Claimant's right shoulder, Dr. Bisgard was equivocal. She noted that based on Claimant's job duties the right shoulder impingement might be work related. However, Dr. Bisgard testified at the hearing that upon review of Mr. Blythe's supplemental reports her opinion was no longer equivocal concerning Claimant's right shoulder. She determined that Claimant's work activities did not meet the criteria for cumulative trauma based on Rule 17, Exhibit 4 of the *Guidelines*. Dr. Bisgard explained that Claimant's work activities did not meet the criteria for cumulative trauma to the right shoulder. She also noted that the number of years working above shoulder level is one of the most significant factors contributing to shoulder pathology. Claimant's work above the shoulder was far less than the 13.3 year threshold for developing shoulder pathology.

20. Dr. Bisgard determined that Mr. Blythe's report reflected that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum thresholds in the *Guidelines*. Utilizing the calculations performed by Mr. Blythe, Dr. Bisgard explained that in one hour, a worker averages approximately 5.4 membrane changes. In four hours there would be 21.6 membrane changes. Mr. Blythe concluded that in one hour there were 21 minutes of force time associated with changing membranes. Accordingly, the force time associated with 4 hours would be calculated as 4 hours multiplied by 21 minutes divided by 60 minutes, or 1.4 hours of force time. For a 10-hour workday, changing membranes would equal 3.5 hours of force time and include 54 membrane changes.

21. Dr. Bisgard also remarked that she considered whether Claimant had any secondary risk factors that might shorten the time duration necessary for cumulative trauma. Relying on Mr. Blythe's comprehensive job analysis, Dr. Bisgard determined that Claimant did not have secondary risk factors and that her conditions were not related to her work activities for Employer. .Although Claimant engaged in forceful activities at times in her job, her duties did not meet the minimum threshold of force, repetition and duration to develop CTS or de Quervain's syndrome pursuant to the *Guidelines.* Moreover, Claimant's job duties did not meet the minimum threshold of force, repetition and duration for the development of shoulder pathology.

22. Claimant has failed to establish that it is more probably true than not that she sustained compensable occupational diseases in the form of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome during the course and scope of her employment with Employer. Although Claimant attributed her

symptoms to her work activities, a review of her job duties as a Membrane Specialist reflects that they lacked the requisite force or repetition to cause her conditions. Claimant engaged in a variety of tasks throughout each shift. She monitored operations, performed computer work and tested samples of Employer's product. The most demanding part of Claimant's job was removing and replacing membranes. The persuasive testimony of Mr. Blythe and Dr. Bisgard reveals that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

23. Mr. Blythe drafted three separate vocational reports evaluating Claimant's job site for primary and secondary risk factors for cumulative trauma conditions pursuant to Rule 17, Exhibit 5 of the *Guidelines*. During his two visits to Claimant's job site he did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture and repetition/duration (elbow flexion). Mr. Blythe calculated that in a 7.5-hour day an individual would meet the force time risk factor only 1.1 hours per day or far less than the required six hours. Even in a 10.5-hour day the force measurement only reached 1.5 hours per day. Similarly, Mr. Blythe concluded that in a 10.5-hour day an individual would meet the elbow flexion risk factor only 1.4 hours per day or far less than the required six hours. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum threshold in the *Guidelines*.

24. In order to best calculate the force demands associated with changing membranes, Mr. Blythe returned to Employer's facility to observe workers who were only changing membranes. Mr. Blythe calculated force measurements based both on a solo worker changing membranes and a team changing membranes. Concerning the solo worker study, a 10.5-hour workday yielded 1.1 hours per day of maximum force. Regarding elbow flexion, a 10.5-hour workday yielded 1.5 hours per day of greater than 90 degrees elbow flexion. For the team study a 10.5-hour workday yielded a maximum force of approximately 2.7 hours and elbow flexion of 1.4 hours per day. Accordingly, although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration.

25. Relying on the *Guidelines*, Dr. Bisgard persuasively testified that the combination of repetition, force and cycle time in Claimant's duties as a Membrane Specialist failed to meet the causation requirements for the development of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome. Utilizing the calculations performed by Mr. Blythe, Dr. Bisgard explained that in one hour, a worker averages approximately 5.4 membrane changes. In four hours there would be 21.6 membrane changes. Mr. Blythe concluded that in one hour there were 21 minutes of force time associated with changing membranes. Accordingly, the force time associated with 4 hours would be calculated as 4 hours multiplied by 21 minutes

divided by 60 minutes, or 1.4 hours of force time. For a 10-hour workday, changing membranes would equal 3.5 hours of force time and include 54 membrane changes.

26. Dr. Bisgard explained that Claimant's job duties did not meet the Primary Risk Factors because she did not engage in a repetitive cycle activity with the requisite force. She also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Furthermore, relying on Mr. Blythe's comprehensive job analysis, Dr. Bisgard determined that Claimant's conditions were not related to her work activities for Employer. .Although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration to develop CTS or de Quervain's syndrome pursuant to the *Guidelines.* Moreover, Claimant's job duties did not meet the minimum threshold of force, repetition and duration for the development of shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Finally, Dr. Bisgard remarked that the number of years working above shoulder level is one of the most significant factors contributing to shoulder pathology. Claimant's work above the shoulder was far less than the 13.3 year threshold for developing shoulder pathology.

CONCLUSIONS OF LAW

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

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

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

Occupational Disease

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

7. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the

development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

8. Rule 17, Exhibit 4 specifically includes factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting over 10 times per day over the years may contribute to shoulder disorders. Vibration can also be considered an additional risk factor pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology.

9. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained compensable occupational diseases in the form of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome during the course and scope of her employment with Employer. Although Claimant attributed her symptoms to her work activities, a review of her job duties as a Membrane Specialist reflects that they lacked the requisite force or repetition to cause her conditions. Claimant engaged in a variety of tasks throughout each shift. She monitored operations, performed computer work and tested samples of Employer's product. The most demanding part of Claimant's job was removing and replacing membranes. The persuasive testimony of Mr. Blythe and Dr. Bisgard reveals that, although Claimant engaged in some forceful activities, her job duties did not meet the minimum thresholds for force, repetition or duration to establish a cumulative trauma condition pursuant to the *Guidelines*.

10. As found, Mr. Blythe drafted three separate vocational reports evaluating Claimant's job site for primary and secondary risk factors for cumulative trauma conditions pursuant to Rule 17, Exhibit 5 of the *Guidelines*. During his two visits to Claimant's job site he did not observe any activities occurring frequently enough to constitute either a primary or a secondary risk factor. He noted that Claimant's only activities of any significance were force and repetition/duration (force time) and awkward posture and repetition/duration (elbow flexion). Mr. Blythe calculated that in a 7.5-hour day an individual would meet the force time risk factor only 1.1 hours per day or far less than the required six hours. Even in a 10.5-hour day the force measurement only reached 1.5 hours per day. Similarly, Mr. Blythe concluded that in a 10.5-hour day an individual would meet the elbow flexion risk factor only 1.4 hours per day or far less than the required six hours. Mr. Blythe thus concluded that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the minimum threshold in the *Guidelines*.

11. As found, in order to best calculate the force demands associated with changing membranes, Mr. Blythe returned to Employer's facility to observe workers who

were only changing membranes. Mr. Blythe calculated force measurements based both on a solo worker changing membranes and a team changing membranes. Concerning the solo worker study, a 10.5-hour workday yielded 1.1 hours per day of maximum force. Regarding elbow flexion, a 10.5-hour workday yielded 1.5 hours per day of greater than 90 degrees elbow flexion. For the team study a 10.5-hour workday yielded a maximum force of approximately 2.7 hours and elbow flexion of 1.4 hours per day. Accordingly, although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration.

12. As found, relying on the *Guidelines*, Dr. Bisgard persuasively testified that the combination of repetition, force and cycle time in Claimant's duties as a Membrane Specialist failed to meet the causation requirements for the development of bilateral CTS, right wrist de Quervain's tenosynovitis and right shoulder impingement syndrome. Utilizing the calculations performed by Mr. Blythe, Dr. Bisgard explained that in one hour, a worker averages approximately 5.4 membrane changes. In four hours there would be 21.6 membrane changes. Mr. Blythe concluded that in one hour there were 21 minutes of force time associated with changing membranes. Accordingly, the force time associated with 4 hours would be calculated as 4 hours multiplied by 21 minutes divided by 60 minutes, or 1.4 hours of force time. For a 10-hour workday, changing membranes would equal 3.5 hours of force time and include 54 membrane changes.

13. As found, Dr. Bisgard explained that Claimant's job duties did not meet the Primary Risk Factors because she did not engage in a repetitive cycle activity with the requisite force. She also testified that Claimant's job duties did not meet the Secondary Risk Factors because they did not involve continuous repetitive activity. Furthermore, relying on Mr. Blythe's comprehensive job analysis, Dr. Bisgard determined that Claimant's conditions were not related to her work activities for Employer. .Although Claimant engages in forceful activities at times in her job, her duties do not meet the minimum threshold of force, repetition and duration to develop CTS or de Quervain's syndrome pursuant to the *Guidelines.* Moreover, Claimant's job duties did not meet the minimum threshold of force, repetition and duration for the development of shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Finally, Dr. Bisgard remarked that the number of years working above shoulder level is one of the most significant factors contributing to shoulder pathology. Claimant's work above the shoulder was far less than the 13.3 year threshold for developing shoulder pathology.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

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

DATED: August 24, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury to her left shoulder during the course and scope of her employment with Employer on September 14, 2014.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period November 12, 2014 until terminated by statute.

3. Whether Claimant has demonstrated by a preponderance of the evidence that the request for left shoulder surgery by Roger Davis, M.D. is reasonable, necessary and causally related to her September 14, 2014 industrial injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $320.00.

FINDINGS OF FACT

1. Claimant is a 67 year old female who worked for Employer as a Residential Technician. Her job duties involved caring for residents by transporting them to activities, administering medications and assisting with activities of daily living. Claimant assisted approximately three residents during a typical work shift.

2. On August 25, 2014 Claimant was involved in a motor vehicle accident during the course and scope of her employment with Employer. Claimant testified that she did not injure her shoulder during the motor vehicle accident but developed left shoulder symptoms on the evening after the accident. She described her symptoms as spasms that spanned from her neck, across the left shoulder and into her arm.

3. On September 3, 2014 Claimant visited Terrence Lakin, D.O. for an examination. She completed a pain diagram identifying left shoulder symptoms. Dr. Lakin noted that she might require work restrictions because a client was "grabbing her all the time."

4. Claimant explained that on September 14, 2014 she was assisting a resident move from his bed to a wheelchair. She fastened a gait belt to the resident's waist and began to help him get off the bed. The resident grabbed her left shoulder to gain leverage in an attempt to move into the wheelchair. Claimant remarked that she immediately experienced pain on the top of her left shoulder as a result of the incident.

She did not report the accident and completed her shift because she hoped the pain would subside.

5. During visits to medical providers in September and October, 2014 Claimant noted increasing left shoulder pain. On October 16, 2014 Claimant told Dr. Lakin that a resident required total care and did not cooperate very well so that the work was harder on her shoulders. Dr. Lakin noted that Claimant's left shoulder pain was not related to her motor vehicle accident but to different work expectations and type of work. Notably, Claimant did not mention the September 14, 2014 incident.

6. On November 6, 2014 Dr. Lakin determined that Claimant had reached Maximum Medical Improvement (MMI) for her August 25, 2014 motor vehicle accident. He did not assign Claimant a permanent impairment rating for her left shoulder condition. Claimant completed a pain diagram reflecting left shoulder symptoms substantially identical to the September 3, 2014 pain diagram. Dr, Lakin remarked that Claimant's left shoulder injury occurred "from the [resident] constantly grabbing her left shoulder and pulling on it." He commented that Claimant might need to file another claim for her left shoulder injury "that has happened since her motor vehicle accident."

7. On November 11, 2014 Claimant reported the September 14, 2014 incident to Employer. Claimant returned to Dr. Lakin for an examination on November 13, 2014. Claimant reported that on September 14, 2014 "while lifting a [resident] from the bed to a wheelchair, he grabbed her shoulder to help get up." She then experienced immediate left shoulder pain. Dr. Lakin concluded that Claimant's objective findings were consistent with a work-related mechanism of injury.

8. On December 11, 2014 Claimant underwent a left shoulder MRI. The MRI revealed a "low grade partial-thickness articular sided tear of the distal supraspinatus. Superior and posterior labral tear. Subdeltoid bursitis."

9. On December 17, 2014 Claimant visited Roger Davis, M.D. for a surgical evaluation. Dr. Davis noted the radiologist's diagnosis of a labral tear but his review of the MRI reflected only degenerative changes around the glenoid and humeral head. He diagnosed Claimant with "impingement syndrome with acromioclavicular arthritis, partial rotator cuff tear and probable degenerative labral tearing left shoulder." Dr. Davis commented that Claimant would require preoperative clearance for potential left shoulder surgery because of a previous heart attack, smoking history and COPD.

10. On January 15, 2015 Claimant returned to Dr. Davis for an examination. Dr. Davis diagnosed Claimant with acromioclavicular arthritis, a partial rotator cuff tear and degenerative changes in the glenohumeral joint. He also administered a subacromial space steroid injection that improved Claimant's active range of motion.

11. On February 6, 2015 Claimant underwent an independent medical examination with Jack Rook, M.D. Dr. Rook concluded that Claimant suffered an acute left shoulder injury on September 14, 2014 while transferring a resident. He detailed the following bases for his opinion: (1) Claimant developed the acute onset of left shoulder

pain while she was performing a job activity; (2) the activity involved lifting a 170 pound man while he was pushing down on her left shoulder; (3) she was not having left shoulder pain when she went to work that day; (4) there were no other traumatic events around the time of Claimant's injury; (5) Claimant's non-vocational activities are not physically demanding; and (6) any shoulder discomfort prior to September 14, 2014 was related to her industrial motor vehicle accident.

12. On April 9, 2015 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Considering Claimant's left shoulder MRI, Dr. Fall diagnosed Claimant with age-appropriate left shoulder degenerative joint disease. She determined that the MRI did not reveal any acute findings and any tears could not have been caused by the September 14, 2014 incident. Dr. Fall explained that there was no internal or external rotation of Claimant's left shoulder beyond 90 degrees when she was helping the resident move from his bed to a wheelchair. Rotation of the shoulder would have been necessary to cause any internal derangement.

13. Dr. Fall also testified at the hearing in this matter. She maintained that Claimant did not suffer an acute injury to her left shoulder on September 14, 2014. Dr. Fall explained that Claimant's left shoulder remained in a static position when she was transferring the resident and he grabbed her shoulder on September 14, 2014. She remarked that Claimant's left shoulder MRI findings were diffuse, degenerative in nature, consistent with her age group and negative for evidence of any acute injury or inflammation. Dr. Fall determined that the most likely cause of Claimant's shoulder symptoms was the progression of her pre-existing, degenerative left shoulder condition. The September 14, 2014 incident did not change Claimant's left shoulder pathology, alter her course of treatment or cause a disability.

14. Dr. Fall remarked that she disagreed with Dr. Rook's opinion that Claimant's symptoms "localized" in her left shoulder following the September 14, 2014 incident. She described Claimant's symptoms as diffuse and similar to her pre-existing condition. Moreover, in contrast to Dr. Rook, Dr. Fall noted that the natural degenerative process in Claimant's left shoulder would have continued regardless of whether her non-vocational activities were demanding. Finally, Claimant's left shoulder symptoms in August 2014 and November 2014 were virtually identical.

15. Dr. Fall explained that Claimant is not a good surgical candidate. Claimant had minimal left shoulder MRI findings, good range of motion, adequate strength and contraindications including a previous heart attack and long-term smoking. Finally, any need for surgery was caused by Claimant's underlying degenerative condition.

16. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury to her left shoulder during the course and scope of her employment with Employer on September 14, 2014. Initially, Claimant stated that she injured her left shoulder while transferring a resident on September 14, 2014. However, she had been involved in a work-related motor vehicle accident on August 25, 2014 in which she identified some left shoulder symptoms. Moreover, Claimant did not

report the September 14, 2014 incident until after she was discharged at MMI for her motor vehicle accident on November 11, 2014. Finally, during visits to medical providers in September and October, 2014 Claimant noted increasing left shoulder pain but did not mention the September 14, 2014 incident.

17. Dr. Fall persuasively explained that Claimant's left shoulder MRI did not reveal any acute findings and any tears could not have been caused by the September 14, 2014 incident. She remarked that Claimant's left shoulder MRI findings were diffuse, degenerative in nature, consistent with her age group and negative for evidence of any acute injury or inflammation. Dr. Fall explained that there was no internal or external rotation of Claimant's left shoulder beyond 90 degrees when she was helping the resident move from his bed to a wheelchair on September 14, 2014. She concluded that the most likely cause of Claimant's shoulder symptoms was the progression of her pre-existing, degenerative left shoulder condition.

18. In contrast, Dr. Rook maintained that Claimant suffered the acute onset of left shoulder symptoms on September 14, 2014 while transferring a resident. He explained that Claimant was not experiencing left shoulder symptoms prior to the incident. However, as noted by Dr. Fall, Claimant's symptoms were not "localized" in her left shoulder following the September 14, 2014 incident. Dr. Fall described Claimant's symptoms as diffuse and similar to her pre-existing condition. Moreover, Claimant's left shoulder symptoms in August 2014 and November 2014 were virtually identical. Accordingly, although there was a temporal correlation between the September 14, 2014 incident and Claimant's left shoulder symptoms, any increased pain constituted the logical and recurrent consequences of her pre-existing left shoulder condition. The September 14, 2014 incident thus did not aggravate, accelerate, or combine with Claimant's pre-existing left shoulder condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury to her left shoulder during the course and scope of her employment with Employer on September 14, 2014. Initially, Claimant stated that she injured her left shoulder while transferring a resident on September 14, 2014. However, she had been involved in a work-related motor vehicle accident on

August 25, 2014 in which she identified some left shoulder symptoms. Moreover, Claimant did not report the September 14, 2014 incident until after she was discharged at MMI for her motor vehicle accident on November 11, 2014. Finally, during visits to medical providers in September and October, 2014 Claimant noted increasing left shoulder pain but did not mention the September 14, 2014 incident.

8. As found, Dr. Fall persuasively explained that Claimant's left shoulder MRI did not reveal any acute findings and any tears could not have been caused by the September 14, 2014 incident. She remarked that Claimant's left shoulder MRI findings were diffuse, degenerative in nature, consistent with her age group and negative for evidence of any acute injury or inflammation. Dr. Fall explained that there was no internal or external rotation of Claimant's left shoulder beyond 90 degrees when she was helping the resident move from his bed to a wheelchair on September 14, 2014. She concluded that the most likely cause of Claimant's shoulder symptoms was the progression of her pre-existing, degenerative left shoulder condition.

9. As found, in contrast, Dr. Rook maintained that Claimant suffered the acute onset of left shoulder symptoms on September 14, 2014 while transferring a resident. He explained that Claimant was not experiencing left shoulder symptoms prior to the incident. However, as noted by Dr. Fall, Claimant's symptoms were not "localized" in her left shoulder following the September 14, 2014 incident. Dr. Fall described Claimant's symptoms as diffuse and similar to her pre-existing condition. Moreover, Claimant's left shoulder symptoms in August 2014 and November 2014 were virtually identical. Accordingly, although there was a temporal correlation between the September 14, 2014 incident and Claimant's left shoulder symptoms, any increased pain constituted the logical and recurrent consequences of her pre-existing left shoulder condition. The September 14, 2014 incident thus did not aggravate, accelerate, or combine with Claimant's pre-existing left shoulder condition to produce a need for medical treatment.

ORDER

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

Claimant's request for Workers' Compensation benefits is denied and dismissed.

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

Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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ISSUE

The issue raised for consideration at hearing is whether Claimant suffered a compensable work injury in the course and scope of her employment on November 13, 2014.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. Claimant was and continues to be employed by Employer as a nurse to facilitate Wellness Clinics. At the Clinics, Claimant administers certain tests to assess and evaluate an individual's wellness/health. Claimant was required to travel to Wellness Clinics throughout Colorado.

2. On November 13, 2014, Claimant and her sister were traveling to Glenwood Springs, Colorado for a Clinic which was to occur the next day. The driving conditions were adverse. Vail Pass was icy and snow packed and, at approximately 1:50 p.m., Claimant was involved in an automobile collision. Claimant sustained injuries and was transported to Vail Valley Medical Center by ambulance.

3. It was commonplace for Claimant to travel with her sister to the Wellness Clinics. No credible or persuasive evidence was presented that Claimant's sister did more than travel with Claimant to her destination. It was also commonplace for Claimant to travel the day before a Clinic in order to assure her timely arrival and attendance at the Wellness Clinic.

4. Employer made Claimant's travel arrangements and paid for the hotel accommodations. Employer also paid an hourly drive time rate and reimbursed Claimant for mileage. Employer's representative, William DeFlavio, testified that he was aware that Claimant's sister traveled with her and that Claimant had never been reprimanded for traveling with her sister. Employer's representative also testified that he made the hotel arrangements for Claimant to travel the day before the Clinic.

5. Testimony offered by Respondents' witness, Tammy Swain, Director of Nursing, was considered and rejected as not persuasive. Ms. Swain supervised the clinical side of the Employer's office. Ms. Swain testified that she never met or spoke to Claimant. She testified that it was considered a nursing "best practice" for a registered nurse not to take family

in the car when traveling to a Wellness Clinic. She testified that Employer did not maintain a rule or policy of employment for registered nurses not to take family in their car when traveling to a Wellness Clinic. No credible or persuasive evidence was presented to establish that Claimant was informed that taking her sister to travel with her to a Welness Clinic was contrary to registered nursing best practices or contrary to the Employer's wishes.

CONCLUSION OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. 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 order to recover benefits the claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

3. Generally, injuries that occur while a claimant is going to or coming from the place of employment are not considered to have arisen out of and in the course of the employment. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). However, various factors may be considered in determining whether travel to and from work arises out of and in the course of employment. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel was on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; (4) whether the employment created a special "zone of danger."

An injury sustained during travel initiated at the direct or implied request of the employer, or during travel that confers a benefit on the employer beyond the employee's mere arrival at work is, barring some deviation, sufficient to satisfy the arising out of and in the course of tests because the travel is contemplated by the employment contract. *Id.* at 865.

4. For these reasons, our courts have held that where the employer provides the means of transportation to and from work, or where the employer requires the claimant to drive a vehicle to and from work for use in the employer's business, injuries that occur during the travel are compensable. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Whale Communications v. Claimants in re Death of Osborn,* 759 P.2d 848 (Colo. App. 1988). It is not necessary for the claimant to prove the employer compensated or reimbursed the claimant for the travel if the employment contract contemplates that travel is a substantial part of the service provided to the employer. *Benson v. Compensation Insurance Authority,* 870 P.2d 624 (Colo. App. 1994); *Sanchez v. Southwest Home Health,* W.C. No. 4-504-148 (ICAO June 5, 2002). Further, the performance of an activity that causes the injury need not represent a strict duty of employment or confer a specific benefit on the employer if it is "sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of the employment." *Panera Bread v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

5. Here, the credible and persuasive evidence presented at hearing established that Claimant was in the course and scope of her employment for Employer at the time of the automobile collision. Claimant was required at the request of her Employer to attend Wellness Clinics. Employer paid for the travel time and mileage reimbursement. Employer made hotel arrangement for Claimant to travel the day before a Clinic and paid for the accommodations. It is concluded that Claimant suffered a compensable work injury in the course and scope of her employment for Employer on November 13, 2014, and is therefore covered by the workers' compensation act.

ORDER

It is therefore ordered, as follows:

Claimant's claim is compensable. ~~Respondents shall be liable to Claimant for Workers' Compensation benefits.~~

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: September 10, 2015__

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

The following issues were raised for consideration at hearing:

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

2. Whether the right to select an authorized treating provider passed to Claimant.

FINDINGS OF FACT

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

1. Claimant was hired by Employer on March 20, 2014, as a driver and loader. Claimant's duties for Employer included driving to various job sites, removing unwanted items and hauling them away. Claimant suffered an admitted work injury on September 29, 2014.

2. Claimant's initial rate of pay for Employer was $11.00 per hour. Claimant received a pay raise on September 8, 2014, to $13.50 per hour. When Claimant started working for Employer, he was not working in a full time capacity. In March, April and May of 2014, business at employer was slow and Claimant only worked between ten and twenty hours per week. Claimant's periods of low pay at Employer in March, April and May of 2014 was due, in part, to the fact that Claimant volunteered to give up his shifts at Employer during this slower period while Claimant worked at his second job at Two Men with Big Hearts Moving and Storage, where he received more working hours and earned more.

3. At Two Men with Big Hearts Moving and Storage, Claimant was employed as a driver, loader and mover between February and May of 2014. Claimant testified that he voluntarily left his job with Two Men with Big Hearts Moving and Storage because he was offered more hours at Employer.

4. In May 2014, Claimant's hours increased at Employer, although his hours continued to fluctuate depending on work availability.

5. Mr. Paul Durant, the owner of Employer, employed between six and nine workers in 2014. Each employee's hours depended on the amount of work Employer had available. Employer's busiest time of year starts in March or April, and continues

until August. Mr. Durant did not guarantee any of his employees any number of hours, but when hours were limited, he made an effort to give employees who were top performers as many hours as possible. Mr. Durant considered Claimant to be one of the top performers.

6. Using Employer's payroll records for Claimant's dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation reflects a fair and accurate approximation of Claimant's AWW at the time of his injury on September 29, 2014.

7. Claimant injured his right shoulder while performing work-related duties on September 29, 2014. Respondents filed General Admissions of Liability, dated April 2, and 30, 2015, for medical and temporary disability benefits. Respondents admitted for an AWW of $463.36

8. Mr. Durant was Claimant's supervisor on September 29, 2014. The parties offered conflicting evidence regarding whether Claimant discussed the September 29, 2014, work injury with Mr. Durant on September 30, 2014. Claimant maintained that he told Mr. Durant he had a work injury and needed medical attention but was provided none. Mr. Durant maintained that Claimant indicated he injured himself but he did not need medical attention on September 30, 2014. Mr. Durant advised Claimant to keep him posted whether he needed medical attention. Mr. Durant maintained, and it is found that, Employer was not advised that Claimant needed medical attention until November 2014 when Claimant advised Mr. Durant that his private health insurance provider diagnosed a rotator cuff tear.

9. Following the September 29, 2014, injury, Claimant sought treatment on his own through his primary care physician at Denver Health Medical Center, David Ginosar, M.D. In October 2014, Claimant began treating with Dr. Ginosar for the injuries sustained in this claim. Dr. Ginosar diagnosed Claimant with a rotator cuff tear.

10. In mid-November of 2014, following Dr. Ginosar's diagnosis, Claimant advised Mr. Durant he was diagnosed with a right rotator cuff tear. Mr. Durant instructed Claimant to seek medical care from Michael V. Ladwig, M.D. of Aviation and Occupational Medicine. Mr. Durant also instructed Claimant to discontinue treatment at Denver Health Medical Center. Claimant was not given a choice of providers from whom to seek treatment during the conversation with Mr. Durant in November of 2014.

11. Claimant began treatment with Dr. Ladwig on November 26, 2015. Since that date, Claimant has treated with Dr. Ladwig and the physicians to whom Dr. Ladwig has referred Claimant. Since commencing treatment with Dr. Ladwig, Claimant has not returned to Denver Health Medical Center for treatment related to his right shoulder.

12. The right of selection of a medical provider passed to Claimant in November 2014, when Claimant was not provided a choice of two medical providers as required by Section 8-43-404(5)(a), C.R.S.

CONCLUSIONS OF LAW

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

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

2. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

a. Average Weekly Wage

3. In this case, Claimant contends that he is entitled to increased AWW. The AWW of an injured employee shall be taken as the basis upon which to compute compensation payments. The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity. Section 8-42-102(1), C.R.S.; *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

4. When an injured employee is being paid by the hour, the AWW is usually determined using the "hourly rate" at which the employee was working "at the time of the injury or would have worked if the injury had not intervened." Section 8-42-102(2)(d), C.R.S. If this method does not result in a fair calculation of the injured worker's AWW, then subsection (3) of Section 8-42-102 may apply. An administrative law judge has broad discretion in calculating the employee's AWW according to the facts of the case. *RJS Painting v. Industrial Commission of State*, 732 P.2d 239 (Colo. App. 1986).

5. Using the procedure set forth in Section 8-42-102(2)(d), C.R.S., it is necessary to determine how much Claimant was earning at Employer at the time of the injury, or how much Claimant was likely to have earned had the injury not occurred. This is most fairly and accurately determined by considering checks issued to Claimant by Employer between July 18, 2014, and September 26, 2014. This period constitutes the 12-week period leading up to Claimant's injury, and excludes a period when Claimant was working reduced hours at a lower rate of pay

6. Using dates of pay of July 18, 2014 through September 26, 2014, results in an AWW of $543.18. This calculation is in accordance with Section 8-42-102(1)(d),

C.R.S., and reflects a fair and accurate approximation of Claimant's AWW at the time of his injury.

7. Respondents contend that Claimant's AWW is $463.36 using Claimant's pay between February 24, 2014 and September 26, 2014, combining wages earned from Employer and a concurrent employer, Two Men with Big Hearts Moving and Storage. Respondents' calculation of AWW is rejected as Respondents' calculation includes a period of almost four weeks wherein Claimant had not yet been hired as an employee for Employer and Respondents' calculation uses a period of time immediately following Claimant's date of hire when he volunteered to work reduced hours for Employer.

b. Authorized Treating Physician

8. Claimant contends that the right to select a medical provider passed to him when Respondents failed to comply with Section 8-43-404(5)(a)(I)(A). This section provides that:

> "In all cases of injury, the employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee."

9. The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

10. This statute affords the employer the right to designate at least two physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of Section 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

11. If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

12. The credible and persuasive evidence presented at hearing established that November 2014 is when Mr. Durant was first advised that Claimant's September 29, 2014, work injury required medical attention. At that time, Mr. Durant referred Claimant to Dr. Ladwig and failed to comply with Section 8-43-404(5)(a), C.R.S. by providing Claimant with the choice to two medical providers from which to choose a provider. Therefore, the right of selection of medical provider passed to Claimant in November 2014.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $543.18.

2. The right to select an authorized treating physician passed to Claimant in November 2014. Claimant shall appoint an authorized treating physician and notify Respondents of his choice within seven (7) business days of the date of this Order.

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

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

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

DATED: __August 27, 2015___

DIGITAL SIGNATURE:

Margot W. Jones

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from December 1, 2014 and continuing.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to change his authorized treating physician?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant testified at hearing he began working for employer as a truck driver on January 14, 2011.

2. Claimant has a history of back problems dating back to the 1970's. Claimant had surgery on his low back in 2007 that involved a fusion performed by Dr. Dohm. Following claimant's surgery, claimant was returned to work without restrictions, but continued to receive medical treatment for his low back.

3. On October 17, 2011, claimant reported to Dr. Coleman that he was suffering from chronic low back pain. Claimant was referred for a lumbar spine x-ray on November 7, 2011. The x-ray showed degeneration of claimant's lumbar spine most pronounced at L4-5 and L5-S1.

4. On May 1, 2012, claimant fell when a step on his truck broke. Claimant received medical treatment for complaints of numbness and tingling into his bilateral lower extremities following this incident. Claimant was ultimately referred for a magnetic resonance image ("MRI") of his lumbar spine on June 5, 2012. The MRI showed post-

operative changes at the L4 and L5 levels and soft tissue edema from L3 to S1. Claimant was discharged from medical care on June 8, 2012 and released to return to work without restrictions. Claimant continued to treat periodically for low back pain in 2013 with his primary care physician.

5. Claimant testified at hearing that on November 26, 2014, he was putting tire chains that weighed approximately 80 pounds on his truck when he felt pain in the right of his low back that almost knocked him to the ground. Claimant testified he reported his injury to his supervisor, Mr. Lancaster. Claimant testified he completed his work shift but that his pain started to get worse.

6. Claimant testified he did not seek medical treatment on the date of his injury, and the next day was Thanksgiving, which claimant did not work. Claimant also had the Friday after Thanksgiving off before returning to work on November 29, 2014. Claimant testified he hauled frack tanks on November 29, 2014. Claimant testified that on December 1, 2014 his back hurt so badly that he could not get out of bed. Claimant testified he contacted Mr. Lancaster who made an appointment for claimant with a clinic in Parachute.

7. Claimant was evaluated by Mr. Zimmerman, a physician's assistant with Grand Valley Health and Safety, on December 1, 2014. Mr. Zimmerman noted claimant reported he was chaining his truck up on November 26, 2014 and felt a sharp pain in his back. Claimant reported he currently had pain in his back and down his right leg. Mr. Zimmerman diagnosed claimant with back pain with right L4 radicular symptoms and weakness in his right leg. Claimant was referred for a magnetic resonance image ("MRI") of the lumbar spine and was taken off of work for 2 weeks.

8. Claimant underwent the MRI on December 17, 2014. The MRI showed a right paracentral disc extrusion with contact upon the right L3 and L4 nerve roots and a disc bulge with right paracentral disc protrusion at the L4-L5 level with impingement or contact upon several nerve roots. The MRI also showed a broad disc bulge at the L5-S1 level that contacts the S1 nerve root in the lateral recess.

9. Claimant returned to Mr. Zimmerman on December 22, 2014 with continued complaints of weakness of the right leg, particularly in the right hip flexor, as well as pain that goes into the right groin and down the medial aspect of the right leg. Mr. Zimmerman recommended claimant remain off of work for another month and referred him to Dr. Krauth for neurosurgical evaluation and treatment.

10. Respondents filed a notice of contest on December 12, 2014. Claimant testified at hearing that he thought respondents were denying his claim and sought treatment with his family physician, Dr. Lippmann. Claimant filed a request for a one time change of physician to Dr. Lippmann on December 24, 2014.

11. Claimant was evaluated by Dr. Lippman on January 19, 2015. Dr. Lippman noted claimant reported he was injured on November 29, 2014 when he was

chaining up his truck and felt a sudden twinge of pain in his back with pain radiating down to his right ankle. Claimant reported he had a prior back injury in 2006 when he was on a step that broke and received treatment through Dr. Dohm. Claimant reported he had a recurrence of pain in 2012 when he was treated at the Grand River Medical Center. Dr. Lippman continued claimant off of work. Claimant was referred for a neurosurgical evaluation.

12. Claimant was evaluated by Dr. Ceola on February 6, 2015. Dr. Ceola noted claimant reported a history of lifting a heavy object when he experienced the onset of low back pain. Dr. Ceola noted claimant had a previous history of back issues but opined that the injury at work was the primary reason he was presenting for treatment. Dr. Ceola diagnosed claimant with degenerative spondylolisthesis and lumbar radiculopathy. Dr. Ceola recommended conservative treatment including physical therapy. Claimant was counseled to quit smoking.

13. Claimant was referred by Dr. Ceola to Dr. Dickstein for injections, but the medical care was denied.

14. Respondents referred claimant for an independent medical examination ("IME") with Dr. Fall on May 26, 2015. Dr. Fall reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with her IME. Dr. Fall issued a medical report that summarized her findings on physical examination and opined that claimant's current symptomatology was a result of the chronic, progressive, degenerative changes of his lumbar spine and not related to any acute injury.

15. Dr. Fall testified at hearing consistent with her report. Dr. Fall noted that claimant had undergone an MRI on November 8, 2002 that showed an L4-5 disc protrusion that was contacting the thecal sac. Dr. Fall opined that the 2007 MRI showed more localized findings, including a disc bulge at the L5-S1 level and enlarged facet joints. Dr. Fall noted claimant had a discectomy in January 2008 and MRI findings in June 2012 showed a disc protrusion to the right at the L3-4 level contacting the L4 nerve root.

16. Dr. Fall testified that claimant's discharge note of June 2012 was the most important record, showing claimant had a degenerative spine with arthritis nerve impingement. Dr. Fall testified this would be an ongoing problem for claimant and he should seek treatment outside the workers' compensation system. Dr. Fall testified that she would expect claimant to have ongoing symtpomotology and that anything could cause an increase in claimant's symptoms. Dr. Fall opined that the proposed surgery would not be reasonable because claimant's symptoms are so diffuse. Dr. Fall further opined that the proposed would not be related to claimant's November 26, 2014 injury. Dr. Fall testified it would be hard to identify what injury claimant sustained on November 26, 2014, but that it could be a lumbar strain.

17. Respondents presented the testimony of Mr. Thate at hearing. Mr. Thate is the general manager for employer. Mr. Thate testified if claimant had passed out as a result of his back pain, he would have heard about claimant passing out.

18. Mr. Thate further testified he was sent a change of physician request by the claimant. Mr. Thate testified he did not respond to the request for a change of physician.

19. Respondents presented the testimony of Mr. Bonnell at hearing. Mr. Bonnell testified he was the safety technician for employer. Mr. Bonnell testified he went to see Rocky Mountain Orthopedics on November 17, 2014 because they were asking for a claim number for claimant for an MRI of the lower back. Mr. Bonnell testified he followed up with claimant some time later and claimant told him he was feeling better and no longer needed medical treatment. Mr. Bonnell testified he found out about claimant's alleged injury on November 30, 2014 when claimant called in sick due to back pain.

20. Respondents presented the testimony of Mr. Gurule at hearing. Mr. Gurule is the operations manager for employer. Mr. Gurule testified claimant went to his own doctor on November 17, 2014 because his back was hurting, but the physician would not provide treatment because it was from a workers' compensation injury.

21. Respondents presented the testimony of Mr. Lancaster, a field supervisor for employer. Mr. Lancaster testified claimant told him on November 26, 2014 that he had tweaked his back chaining up his truck a couple days earlier. Mr. Lancaster testified claimant did not request medical treatment on that date.

22. Respondents presented the testimony of Ms. Rodda, the pilot car driver. Ms. Rodda testified she worked with claimant on November 25, 2014 and claimant reported to her that he had hurt his back a few days before while putting chains on the truck. Ms. Rodda testified claimant did not indicate that he wanted to go to a doctor for his back condition.

23. The ALJ credits the testimony of claimant at hearing, along with the medical opinions contained in the reports from Mr. Zimmerman, Dr. Lippman and Dr. Ceola and finds that claimant has demonstrated that it is more probable than not that he suffered an injury to his low back on November 26, 2014 while lifting truck chains. The ALJ finds claimant reported the incident to his employer and eventually sought medical treatment on December 1, 2014.

24. The ALJ notes that claimant has a history of prior treatment to his low back, but credits claimant's testimony and finds that claimant has demonstrated that it is more probable than not that the incident lifting the truck chains aggravated, accelerated, or combined with his pre-existing condition to cause the need for medical treatment.

25. The ALJ credits the medical records from Mr. Zimmerman that took claimant off of work completely as of December 1, 2014 and finds that claimant has demonstrated that it is more probable than not that he is entitled to an award for temporary total disability benefits beginning December 1, 2014 and continuing until terminated by law. The ALJ noted that Dr. Lippman continued claimant's work restrictions that kept claimant off of work completely when he began treating claimant on January 19, 2015.

26. The ALJ finds that claimant requested a change of physician to Dr. Lippman by filling out the change of physician form. The ALJ finds that Dr. Lippman is authorized to treat claimant in this case.

27. Claimant testified at hearing that he earned $20 per hour and worked between fifty four and seventy four hours per week. According to the wage records entered into evidence at hearing, in the twenty four weeks claimant worked between June 2, 2014 and November 16, 2014, claimant earned $36,719.29. This equates to an AWW of $1,529.97.

CONCLUSIONS OF LAW

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

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where

the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he lifted the tire chains and felt a sharp pain in his lumbar spine. The ALJ credits the testimony of claimant at hearing along with the opinions expressed by Mr. Zimmerman, Dr. Lippman and Dr. Ceola to be credible and persuasive on this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a)(VI) allows for the injured worker to request a change of physician. If the request for a change of physician is not responded to within 20 days, the employer or insurance carrier is deemed to have waived any objection to the request for a change of physician.

7. As found, the treatment provided claimant by Mr. Zimmerman, Dr. Lippman and Dr. Ceola was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

8. As found, claimant was initially referred to Mr. Zimmerman for medical treatment. Claimant's claim was denied and claimant requested a change in physician to Dr. Lippman. Respondent did not respond to the change of physician and Dr. Lippman became authorized to treat claimant in this case.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1)

Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

10. As found, claimant has demonstrated that the injury resulted in work restrictions from Mr. Zimmerman and Dr. Lippman resulting in an impairment of wage earning capacity demonstrated by claimant's inability to resume his prior work.

11. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

12. As found, in the twenty four weeks claimant worked between June 2, 2014 and November 16, 2014, claimant earned $36,719.29. As found, claimant's AWW is determined to be $1,529.97.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits based on an AWW of $1,529.97 beginning December 1, 2014 and continuing until terminated by law or statute.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury from Grand River Health and Safety, Dr. Lippman, and Dr. Ceola.

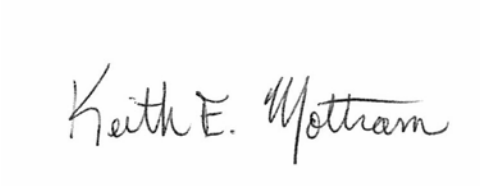
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

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

DATED: August 31, 2015



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right ankle arising out of and in the course of his employment with Respondent on July 20, 2014.

2. If the claim is compensable, whether Claimant has established by a preponderance of the evidence that the platelet rich plasma injections were reasonable, necessary, and related to his July 20, 2014 work injury.

3. If the claim is compensable, whether Claimant has established by a preponderance of the evidence that the March 13, 2015 surgery performed by Bharat M. Desai, M.D. was reasonable, necessary, and related to his July 20, 2014 work injury.

STIPULATIONS/PROCEDURAL ISSUES

1. The Court, with the agreement of the parties, issued a Protective Order in this case. Any references to a patient's name, except by initials, shall be redacted from the record. There are no known instances where evidence was submitted in violation of this Order.

2. In the event that the claim is found compensable, the parties stipulate to the maximum average weekly wage of $1,322.47 per week with a maximum temporary disability rate of $881.65 per week.

3. In the event that the claim is found compensable, the parties agree that Concentra and its referrals are authorized providers.

4. The parties withdrew the issues of temporary disability benefits for consideration at hearing without prejudice. In the event the claim is found compensable, the parties will work together to resolve any outstanding temporary disability benefits issues.

FINDINGS OF FACT

1. Claimant works for Employer as a safety security officer and was first hired in October of 1983. In 2001, Claimant was promoted to the position of safety security officer III and in that capacity supervised 5-6 employees.

2. Claimant works at Colorado Mental Health Institute at Fort Logan. His duties as a safety security officer include: protecting the lives of patients, staff, and

visitors on the grounds; protecting state property; securing buildings; assisting clinical staff with patients; controlling combative and resistive patients; and other miscellaneous duties as assigned. *See* Exhibit 9.

3. Claimant works with a partner and regularly accompanies doctors and nurses when they administer care to patients at the facility. Claimant uses force on occasion in the performance of his job duties.

4. On July 20, 2014 Claimant was so employed. Claimant was called to the North Day Room area of the Mental Health Institute by Nurse Rebecca Vidaurri to assist with patient "L" who was acting aggressively.

5. Claimant's partner that day was Tyler Tripp. Claimant and Mr. Tripp responded to the call, placed patient "L" against a wall, moved patient "L" to a seclusion room, and put restraints on patient "L."

6. During this incident, patient "L" attempted to strike Claimant. Claimant stepped back on his right foot to avoid being hit then lunged forward toward patient "L" to help restrain and get him under control.

7. At the time of the incident, Claimant felt a pulling and slight pain in his right ankle. Claimant continued to work the remainder of his shift and worked the remainder of the month of July.

8. Claimant did not immediately report the incident as a workers' compensation injury. Claimant frequently got scrapes and bangs as part of his regular job duties and believed his right ankle pain would get better over time. Claimant thought at one point it was just old age catching up to him. Claimant also believed there was a stigma against reporting injuries and believed he would not be viewed as a good employee if he had a lot of reported injuries. Claimant was familiar with the requirements of reporting injuries and was familiar with the forms used to make a report. Claimant had previously reported injuries he suffered while working for Employer and as a supervisor had experience directing others to file reports.

9. The first two weeks of August, 2014, Claimant had scheduled time off for vacation. Claimant had planned to ride his motorcycle to Sturgis during his scheduled time off. However, his ankle continued to bother him and his "riding partner" was unable to make the trip. Claimant decided not to go to Sturgis and used the two weeks off work to rest his ankle with hopes that it would get better.

10. Claimant's ankle did not get better. From July 20, 2014 until September 18, 2014 Claimant's right ankle pain progressed slowly. Claimant experienced days where he had pain and days where he did not. Eventually the pain got much worse following his return to work after his vacation.

11. By September 18, 2014 Claimant was limping, had no power in pushing off, and felt as though he was unable to respond adequately to calls on the job. Claimant believed it was not safe for him to continue working.

12. On September 18, 2014 Claimant filled out an Injury/Exposure on the Job (IOJ) form, placed the form in his supervisor's in-box, and sought medical treatment.

13. On the IOJ form, Claimant reported he had injured his right foot/ankle in the back of the ankle running to and lunging at a combative patient who tried to hit him. Claimant listed the date of the injury as July 22, 2014 and listed Tyler Tripp as a witness to the incident. *See* Exhibit 1.

14. Sometime after the July 20, 2014 incident with patient "L" but prior to Claimant's scheduled vacation at the beginning of August, Claimant reported to Tyler Tripp that his ankle was hurting and that he might not go to Sturgis because of his ankle.

15. After Claimant returned from vacation, Claimant spoke with Tyler Tripp and Rebecca Vidaurri about what could have caused his ankle pain. They discussed the call on July 20, 2014 and Claimant believed that was the only incident that could have caused his pain.

16. Normal practice at the Colorado Mental Health Institute at Fort Logan involved documenting all the calls that the safety security officers respond to in a "daily safety blotter." Kent Heath, Claimant's supervisor, reviewed the daily safety blotter for the date of injury Claimant listed on the IOJ form and found no incident that matched Claimant's description of a combative patient. Claimant later realized he listed an incorrect date of July 22, 2014 when the incident occurred on July 20, 2014. Mr. Heath then reviewed the daily safety blotter for July 20, 2014 and again there was no incident in the blotter matching the description.

17. Claimant testified that he observed the incident documented in the daily safety blotter and that it must have been deleted at some point. Mr. Heath testified that he did not delete the incident and that no one would have a reason to delete any entries.

18. Mr. Heath testified that there was no policy of dissuading someone from reporting an injury and that the policy was to report any injury as soon as possible by filling out an IOJ form. He confirmed that Claimant was familiar with the required forms and has filled out IOJ forms in the past.

19. After putting the IOJ form in Mr. Heath's in-box, Claimant sought medical treatment.

20. Claimant was evaluated by Bryan Counts, M.D. on September 19, 2014. Claimant filled out a form stating that the reason for his visit was due to an injury.

Claimant reported that on July 20, 2014 he had been running and or lunging at a patient that had tried to hit him and injured his right ankle/foot. Claimant reported to Dr. Counts that he had pain over his right Achilles tendon since July 20th. Dr. Counts assessed right Achilles tendonitis. Dr. Counts opined that there was a greater than 50% probability that it was a work related injury. *See* Exhibit B.

21. On October 21, 2014 Claimant was evaluated by Kathryn Bird, D.O. Claimant reported worsening pain that waxed and waned and was worse with standing after sitting for a period of time. Dr. Bird noted Claimant continued to work regular duty. Dr. Bird ordered an MRI of Claimant's right ankle. *See* Exhibit B.

22. On October 27, 2014 Claimant underwent an MRI interpreted by Virginia Scroggins, M.D. Dr. Scroggins opined that Claimant had severe non-insertional Achilles tendinopathy with partial tearing and a chronic anterior talofibular ligament sprain. See Exhibit F.

23. On November 6, 2014 Claimant was evaluated by Dr. Bird. She noted Claimant was working regular duty and had not been taking anything for the pain. She reviewed the results of the MRI and referred him to a physiatrist for consultation and treatment of a partial Achilles tendon tear. *See* Exhibit B.

24. On November 19, 2014 Claimant was evaluated by John Sacha, M.D. Dr. Sacha noted Claimant had a slight antalgic gait to the right side and noted Claimant was having significant pain. Dr. Sacha noted Claimant wanted to avoid surgical intervention. Dr. Sacha opined that a platelet rich plasma injection was reasonable to try to speed up recovery. *See* Exhibit 5.

25. On December 11, 2014 Dr. Sacha injected claimant with platelet rich plasma using ultrasound guidance. *See* Exhibit 5.

26. On December 22, 2014 Claimant was evaluated by Dr. Sacha. Claimant reported he was doing well and that his pain had improved markedly. Dr. Sacha noted Claimant was ready to move forward with strengthening and conditioning. *See* Exhibit 5.

27. On January 27, 2015 Claimant was evaluated by Dr. Bird. He reported he was doing a little better, was doing physical therapy that helped, and was working modified duty. Claimant reported he was walking about a mile a day but that walking had been making his ankle sore and swell. *See* Exhibit B.

28. On February 25, 2015 Claimant was evaluated by Dr. Bird. He reported his right ankle was overall worse. He reported he was washing his car at home on February 14, 2015 when the hose whipped around and hit him on the right Achilles tendon and that he dropped to the ground with severe pain. Claimant reported the pain had been worse since then and that he had a difficult time walking. Dr. Bird ordered a

new MRI of Claimant's right ankle to see if Claimant had further torn his Achilles. *See* Exhibit B.

29. On February 27, 2015 Claimant underwent an Independent Medical Evaluation performed by Timothy O'Brien, M.D. Claimant reported the altercation with a patient on July 20, 2014. Claimant reported he did not note ankle pain that day and for the next week did not note ankle pain, but then started to note it in the back of his ankle but did not report it because he thought it would get better. Claimant reported pain that ranged from a 0-8 on a scale of 10 and that the pain was worse when he was more active. Dr. O'Brien noted that Claimant walked with a limp and opined that Claimant had significant swelling and a palpable defect in his Achilles tendon that was a full-thickness defect. *See* Exhibit A.

30. Dr. O'Brien opined that Claimant did not sustain a work related injury on July 20, 2014. Dr. O'Brien noted that the absence of pain experienced by Claimant on the date of injury argues against the occurrence of an injury. Dr. O'Brien noted that Claimant's prior injuries had resulted in altered biomechanics of his foot and ankle and that he had chronic changes due to this that were shown by MRI. He opined that Claimant had overuse tendinitis of the Achilles tendon and that his altered biomechanics resulted in significant increased stress on his Achilles tendon. Dr. O'Brien opined that Claimant's significant atrophy and inflammation of the Achilles tendon was pre-existing and became manifest to Claimant on or about July 20, 2014. Dr. O'Brien opined that the MRI scan showed chronic and longstanding changes including the severe tendinopathy that take months or years to become evident. Dr. O'Brien opined that if an acute injury had occurred on July 209, 2014 he would have expected the MRI scan to show bleeding or hematoma around the severe partial thickness tear. *See* Exhibit A.

31. Dr. O'Brien opined that Claimant was a candidate for an Achilles tendon repair surgery. Dr. O'Brien opined that the injection of platelet rich plasma was an unwarranted intervention that had no science to back its utilization in this case. He opined that there were no studies in a peer review journal achieving level 1 or level 2 evidentiary status to support the use of platelet rich plasma for a chronic Achilles tendon rupture in a diabetic who is obese, or for any type of Achilles tendon injury. Dr. O'Brien opined that the injection was contraindicated and that an ultrasonic guided injection added expense and did not allow a practitioner to more accurately inject. *See* Exhibit A.

32. On March 3, 2015 Claimant underwent a second MRI that was interpreted by Dr. Scroggins. Dr. Scroggins noted there had been development of a full-thickness tear of the Achilles tendon in the area of previously noted tendinopathy. She also noted moderate atrophy of the soleus muscle. *See* Exhibit 6.

33. On March 5, 2015 Claimant was evaluated by Bharat Desai, M.D. Dr. Desai opined that Claimant's injury occurred due to work from Claimant's restraint and attempt to elude a punch. Dr. Desai opined that Claimant had a right Achilles tendon tear and explained to Claimant the surgical and non surgical options. Claimant wished to undergo surgery and Dr. Desai agreed that surgery was appropriate. *See* Exhibit 7.

34. On March 13, 2015 Claimant underwent surgery to repair his right acute Achilles tendon tear. Dr. Desai noted Claimant in fact had a complete tear that was clearly visible in surgery. Dr. Desai noted that Claimant had significant chronic as well as acute Achilles tendon issues. Dr. Desai noted there was a significant amount of Achilles tendon damage and that it was not just an acute Achilles tendon tear. *See* Exhibit 7.

35. Prior to the work incident in July of 2014, Claimant had an altered gait on the right side. Claimant suffered a lawnmower incident in 2007 which caused the second toe on his right foot to be amputated and his third toe to be realigned pointing inward. Claimant also suffered a motorcycle accident in 2012 and broke his right tibia also contributing to an altered gait on the right side.

36. On May 5, 2015 John Hughes, M.D. performed a case review. Dr. Hughes opined that Claimant was an increased degree of susceptibility for a right Achilles tendon rupture due to his diabetes and previous traumatic injuries to his right foot. Dr. Hughes opined that Claimant sustained progressive tendon tearing and that the progression shown between the two MRIs was consistent with progressive tendon rupture. Dr. Hughes opined that the progressive tendon rupture was set in motion by Claimant's work related injury on July 20, 2014 and that on July 20, 2014 Claimant strained his right Achilles tendon. Dr. Hughes noted that Claimant was not symptomatic with any Achilles tendon pathology prior to July 20, 2014. Dr. Hughes opined that Claimant had probable occult tendinopathy of his right Achilles tendon pre-existing his work related injury but that he suffered a work related right Achilles strain on July 20, 2014 that progressed to a right Achilles tendon rupture. *See* Exhibit 2.

37. The opinions of Dr. Hughes are found credible and persuasive. His opinions are consistent with Claimant's presentation and the progression of Claimant's pain and Achilles tendon shown by MRIs. Dr. Hughes' opinions are supported by the onions of Dr. Counts and Dr. Desai who both opined that the injury was work-related and by Dr. Desai who opined that there were both acute and chronic Achilles tendon issues.

38. On June 4, 2015 Claimant was evaluated by Dr. Desai. Dr. Desai noted Claimant was doing very well following surgery, had good range of motion, and that his wound was healed. Dr. Desai noted there was no evidence of any ongoing Achilles issues. *See* Exhibit 7.

39. On June 10, 2015 Dr. O'Brien provided a supplement report. Dr. O'Brien disagreed with Dr. Hughes' opinion that Claimant's progressive tendon rupture was set in motion by Claimant's July 20, 2014 incident. Dr. O'Brien opined that an Achilles tendon that is strained or torn absolutely does not go unrecognized and that it is a very painful injury resulting in a limp, dysfunction, and the need for urgent medical attention. Dr. O'Brien opined that Claimant's lack of ankle or Achilles tendon pain on July 20, 2014 was consistent with the absence of any injury to the tendon on that date. Dr. O'Brien

also opined that diabetics develop chronic tendinopathy in the Achilles tendon that progresses over time to the point that an Achilles tendon rupture becomes evident. He opined that Claimant did not develop an Achilles tendon rupture due to an incident on July 20, 2014 but developed an Achilles tendon rupture due to chronic attritional deterioration of the Achilles tendon consistent with his age, body habitus, and diabetes. *See* Exhibit A.

40. Dr. O'Brien testified at hearing consistent with his reports. He opined that you truly can't be functional with an Achilles tendon tear, can't put weight on your leg, and that partial ruptures are just as painful. He opined that Claimant struggled with his Achilles tendon for a long time before the incident and that the tendon slowly stretched out over time and that the work incident on July 20, 2014 did not exacerbate Claimant's pre-existing condition. Dr. O'Brien opined that Claimant's Achilles was partially torn before July 20, 2014, and that by October, 2014 Claimant had a fully torn Achilles tendon, but that it was not caused by the July 20, 2014 incident.

41. The opinions of Dr. O'Brien are not found as credible or persuasive as the opinions of Dr. Hughes. Dr. O'Brien's opinions are not supported by Claimant's presentation in this case, the progression of Claimant's symptoms, and the state of Claimant's Achilles tendon as shown by MRI.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals*

Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. 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). The question of whether the claimant met the burden of proof to establish a compensable injury 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 met his burden to prove it is more likely than not that he suffered an injury to his right Achilles tendon on July 20, 2104. Although medical providers agree that Claimant had pre-existing tendinopathy in his right Achilles tendon, there is disagreement as to whether Claimant suffered an injury to his Achilles tendon on July 20, 2014. After a review of all of the evidence and testimony, the ALJ concludes that the events of July 20, 2014 caused Claimant's pre-existing tendinopathy to develop into an Achilles strain that later progressed to a full thickness Achilles tear. The opinion of Dr. Hughes in this regard is found credible and persuasive. Claimant is credible that he experienced slight pain at the time of the July 20, 2014 incident and believed it would just go away. This pain continued on and off and Claimant reported it to Mr. Tripp prior to his planned vacation at the beginning of August. The pain from the July 20, 2014 incident prevented Claimant from taking a planned motorcycle trip during the first two weeks of August while he had time off for scheduled vacation. Prior to July 20, 2014 Claimant was working full duty in a physically demanding job and despite any pre-existing tendinopathy, Claimant had no difficulties performing his job duties. Between July 20, 2014 and the beginning of August, Claimant had enough pain to verbally mention it to Mr. Tripp and to decide against taking a motorcycle trip. Although Claimant believed the injury would go away on its own, he is found credible that he had

pain at the time of the incident and that it continued to wax and wane. Claimant is credible in explaining the reason he delayed reporting the injury for approximately two months was due to his believe the pain would resolve on its own. Further, although the daily safety blotter makes no mention of the July 20, 2014 incident with patient "L," the incident itself was confirmed by the testimony of Mr. Tripp. The lack of entry into the blotter does not take away the credibility of Claimant and Mr. Tripp who both described a very similar incident.

The opinions of Dr. Hughes are also supported by the opinion of Dr. Counts that the injury was work related. Further, the opinions of Dr. Hughes are consistent with the opinions of Dr. Desai. Dr. Desai opined that the injury was work related and after performing surgery on Claimant's Achilles tendon opined that Claimant had both chronic and acute Achilles tendon issues. Dr. O'Brien's opinions in this matter are not found as persuasive. Dr. O'Brien opined that someone with an Achilles tear, even partial, would experience it as devastating and would have significant dysfunction. However, as found above, at the time Claimant was diagnosed by Dr. O'Brien with a full thickness tear in February of 2015, Claimant was functional. Claimant had good days and bad days and had pain that ranged from a 0 to an 8 and was able to walk albeit with an antalgic gait. Claimant, as shown by MRI, had at least a partial Achilles tendon tear as of October of 2014, yet Claimant did not have significant dysfunction or the need for urgent medical attention. Claimant just knew he wasn't getting better and needed to be treated. Treatment records show that on November 6, 2014 Claimant (with a partial tear) was working regular duty and not on pain medication. Similarly, as of January 27, 2015 Claimant was walking one mile per day (with a partial tear). This was one month before Dr. O'Brien concluded that Claimant in fact had a full thickness Achilles tendon tear. Claimant did not present in the fashion Dr. O'Brien opined someone with a partial or full tear would present despite findings on MRI confirming the tear existed. Although most patients may present in a certain way, Claimant did not do so. The conclusion of Dr. O'Brien that Claimant would have needed urgent care on July 20, 2014 if he in fact suffered an injury to his Achilles tendon is not found persuasive. Rather, Dr. Hughes' opinion that Claimant's injury on July 20, 2014 was consistent with an Achilles tendon strain that later progressed to a full thickness tear is credited. Although Claimant had pre-existing tendinopathy and deterioration of his Achilles tendon that made him more susceptible to injury, this does not disqualify his claim. The events of July 20, 2014 caused Claimant to suffer an Achilles tendon strain that later developed into a full thickness tear. Claimant has demonstrated, more likely than not, that the work incident caused the need for medical treatment of his Achilles tendon.

Medical Benefits

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).

Claimant has met his burden to establish by a preponderance of the evidence that the March 13, 2015 surgery performed by Dr. Desai was reasonable, necessary, and related to his July 20, 2014 work injury. As found above, the surgery was recommended by multiple providers including Respondents' expert. Although Respondents argue the surgery is not related to the July 20, 2014 injury this is not persuasive. Claimant sustained an injury to his right Achilles tendon as result of his employment and the surgery was both reasonable and necessary to cure and relieve the effects of his injury.

Claimant has failed to establish by a preponderance of the evidence that the platelet rich plasma injections were reasonable, necessary, and related to the July 20, 2014 work injury. Although Dr. Sacha opined that trying the platelet rich plasma injection was a reasonable step to take, Dr. Sacha failed to provide an opinion as to the necessity of the injections. Dr. Sacha did not opine as to the likelihood that the injections would be successful or provide any scientific support for the use of platelet rich plasma on an Achilles tendon. Dr. O'Brien credibly opined that the injections are not supported by any studies in a peer review journal achieving level 1 or level 2 evidentiary status and that the injections were contraindicated. After weighing the evidence, the Claimant has failed to show how the platelet rich plasma injections were both reasonable and necessary to cure and relieve the effects of his Achilles tendon injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right ankle arising out of and in the course of his employment with Respondent on July 20, 2014.

2. Claimant has established by a preponderance of the evidence that the surgery performed by Dr. Desai on March 13, 2015 was reasonable, necessary, and related to his July 20, 2014 work injury.

3. Claimant has failed to establish by a preponderance of the evidence that the platelet rich plasma injections were reasonable, necessary, and related to his July 20, 2014 work injury. Claimant's request for this treatment to be paid for by Respondents 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: August 24, 2015

/s/ Michelle E. Jones

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

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his back as a consequence of an assault occurring December 16, 2014. The threshold question regarding compensability is whether the assault was due to an inherently private dispute between Claimant and a co-worker and thus, unrelated to Claimant's employment or whether the assault was sufficiently connected to Claimant's work-related functions so as to "arise out of" his employment.

II. If Claimant did suffer a compensable injury to his back, whether he proved by a preponderance of the evidence that he is entitled to all reasonable, necessary, and related medical treatment.

III. If Claimant's low back injury is compensable, whether he is entitled to temporary total and/or temporary partial disability benefits as a result.

IV. Whether the right of selection has passed to Claimant, who has chosen Dr. Timothy Hall as his Authorized Treating Provider.

V. Whether Claimant has established by a preponderance of the evidence that his average weekly wage is $557.68.

Because the undersigned ALJ finds that Claimant's injuries did not arise out of his employment, but rather as a consequence of an assault involving an inherently private dispute, this order does not address issues II-V.

FINDINGS OF FACT

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

1. Claimant alleges he suffered a work related injury to his back on December 16, 2014 after being pushed into a forklift by a co-worker when a verbal exchange between the two became personal.

2. Respondents filed a Notice of Contest on January 6, 2014.

3. Claimant worked for Employer as a forklift operator and pallet builder. Claimant's primary duty was to build pallets with cases of liquor/beer, wrap the product placed on the pallet and transport the "built" pallet to the scale with a forklift for weighing.

4. On December 16, 2014, Claimant and his co-worker, Cameron Horner, who also worked as a pallet builder were working near each other at Employer's warehouse. Both Claimant and Mr. Horner were proceeding to the scale to weigh a pallet they had built. Mr. Horner felt Claimant cut in front of him with his forklift in an effort to get to the scale first. According to Mr. Horner, Claimant then took a long time on the scale to weigh his pallet. Consequently, Mr. Horner shook his head at him. Claimant responded by telling Mr. Horner not to shake his head at him. Mr. Horner testified that he then told Claimant he "would do what the fuck [he] wanted" resulting in Claimant calling Mr. Horner a "bitch."

5. Mr. Horner then drove his forklift from the area of the scale to "stage" his pallet and continue his work. Mr. Horner testified that he tried to stay away from Claimant, but it was inevitable that they would see and come in close proximity to one another during their shift.

6. The back-and-forth name-calling and verbal exchange continued for some time and the disagreement became pointedly personal when Claimant started talking about Mr. Horner's personal life. Mr. Horner testified that Claimant called him a "piece of shit father" and told him that he "didn't deserve to breathe the air that he was breathing." Mr. Horner testified he became very uncomfortable with the situation.

7. After the verbal quarrel had started, Claimant took a 15 minute authorized break, at 7:00 p.m. Claimant's supervisor, Abdullah "Trench" Mayo, had heard the verbal spat between Mr. Horner and Claimant. He pulled Claimant aside during the 7:00 p.m. break to counsel him as to appropriate workplace behavior. Mr. Mayo testified he heard Claimant making personal comments towards Mr. Horner's family and his family life prompting his decision to pull Claimant aside. Mr. Mayo testified he specifically heard Claimant tell Mr. Horner "you're a shitty father. You don't deserve to breathe the air around me. You have to be with your son to be a father."

8. After talking with Mr. Mayo, Claimant returned to work. Claimant ignored Mr. Mayo's counseling and began taunting Mr. Horner about his personal life again while the two were building pallets in close proximity to one another. Each then attempted to dismantle the others pallets by removing product from it. Claimant admitted that the argument got personal and that he shouted personal, non work-related remarks at Mr. Horner regarding Mr. Horner's son and family life. According to Mr. Horner the verbal attack was so personal that he felt compelled to shove Claimant as he was standing between a pallet and forklift.

9. Mr. Horner testified that he was provoked into pushing Claimant as a consequence of the personal comments he made as Claimant was "making fun of me and my personal life." According to Mr. Horner, Claimant "was picking at my personal life, like bringing out stuff that he had no right to talk about. I felt violated." Consequently, Mr. Horner testified that he retaliated.

10. Claimant testified that he likely took the 7:00 to 7:15 PM break and that about 2

hours elapsed between the time of the argument at the pallet scale and the time he made personal comments to Mr. Horner resulting in him being shoved. Mr. Mayo testified that the argument culminated into Mr. Horner shoving Claimant at around 9:30-10:00 PM. The ALJ credits the testimony of Mr. Mayo to find that a verbal argument, which had its nexus in the parties work duties started before 7:00 PM at the pallet scale. The ALJ finds further that Claimant was counseled about infusing personal issues into the workplace during the 7:00 PM break and that Claimant ignored this directive, choosing instead to re-initiate a verbal exchange with Mr. Horner about matters that had no connection to the parties work related functions.

11. Per Mr. Horner's credible testimony and Claimant's own admission he was not pushed until he made a comment about Mr. Horner's abilities to act as a father to his son. Based upon the evidence presented, the ALJ finds that Mr. Horner's motivation for assaulting Claimant was purely personal and had nothing to do with being cut off in the line to the pallet scale, taking too long on the scale, the name calling thereafter or the removal of product from his pallet, just before the pushing incident occurred.

12. After being pushed, Mr. Horner testified that Claimant fell back over the fork of the forklift and "caught himself" on the 3 ft. tall rack of the forklift, then "pushed himself back up and got right back in my face." Claimant testified similarly, specifically that the shove caused him to fall backwards after getting caught on the forks of the fork lift. According to Claimant he twisted and struck his back on the mast of the forklift suffering immediate pain. Based upon the testimony of Mr. Horner and Claimant, the ALJ finds that Claimant never fell to the ground. Claimant testified that he did not retaliate, choosing instead to take a smoke break.

13. After this altercation, which Mr. Mayo did not witness, he found Claimant by the back door, taking the aforementioned "smoke" break. Mr. Mayo told Claimant that it was not a designated break time and asked what was going on. Claimant told Mr. Mayo about being pushed and requested that Mr. Horner be fired. Mr. Mayo explained that he would not fire a veteran employee based upon the events leading up to him being pushed. According to Mr. Mayo, Claimant "was inconsolable" making it clear that he was going to hurt Mr. Horner, that he refused to work around Mr. Horner and that he wanted him fired. Mr. Mayo testified he again counseled Claimant about not making such comments, as he had made to Mr. Horner, and that the gist of their conversation was "don't take personal shots at people's families."

14. Claimant returned to work and finished his shift on December 16, 2014. He testified that he worked with a deep aching in his low back and experienced progressive stiffness throughout the balance of his shift. According to Claimant, he did not seek medical care because he felt his injury was minor and his pain would go away on its own.

15. Mr. Horner testified Claimant never said that he hurt his back after being pushed

into the forklift. Similarly, Mr. Mayo testified that Claimant never said he injured his back on December 16, 2014 when he counseled Claimant at the back door, when Claimant resumed his shift or after Claimant finished his shift and left for the evening.

16. Claimant returned to work the following day, December 17, 2014, for his regular shift. Claimant still wanted Mr. Mayo to fire or discipline Mr. Horner for pushing him, so Mr. Mayo talked to Claimant and Mr. Horner. He then passed them off to his supervisor, Dynetro "Dino" Podhirny for further counseling. According to Mr. Mayo, Claimant never mentioned back pain before beginning his shift on December 17, 2014.

17. Prior to starting his shift on December 17, 2014, Claimant and Mr. Horner met with Mr. Podhirny regarding the pushing incident from the night before. Mr. Podhirny testified Claimant told him that he called Mr. Horner names, "saying he wasn't a good father and he was a piece of shit." Mr. Horner then told Mr. Podhirny he pushed Claimant as a result.

18. Mr. Podhirny testified that during their meeting Claimant "made it clear that he wanted [Mr. Horner] to be terminated." Mr. Podhirny refused to terminate Mr. Horner and recognized, after a short period of time of discussing that with Claimant, he wasn't going to be able to resolve the situation. Consequently, Mr. Podhirny, who shares an office door with his supervisor, Myrl Johnson, advised Mr. Johnson that he could not resolve the situation and "Myrl took over from there."

19. Claimant never reported that his back hurt to Mr. Podhirny before starting his shift on December 17, 2014. Mr. Podhirny also testified that he saw no indication that Claimant was injured. According to Mr. Podhirny, Claimant "wasn't moving funny. He wasn't acting funny. He never indicated to me that he was injured and couldn't perform his full job duties."

20. Mr. Johnson testified he heard Claimant's statement's to Mr. Podhirny through the open door adjoining their offices. Mr. Johnson testified he heard Claimant's statements repeating what he had said on December 16, 2014, which were "personal over family and who was a better parent and that Cameron was a horrible parent and didn't deserve to be a father." Mr. Johnson testified he heard the meeting with Mr. Podhirny become "belligerent," which was when Mr. Podhirny sent Claimant and Mr. Horner over to his office. Mr. Johnson testified that when he met with Claimant and Mr. Horner, he "did not notice any injuries on either employee and neither said they were hurt." Mr. Johnson testified that when Claimant began working his shift on December 17, 2015, he did not report any injury.

21. Claimant worked approximately 1/3 of his shift, i.e. 3 hours on December 17, 2014, after which he testified that his low back pain increased precluding him from working further. He went home.

22. Claimant reported to the Emergency Department (ED) at Memorial Hospital at

2:32 PM on December 18, 2015 complaining of low back pain. He provided the following history: ". . . was working with his friend the other night at work. States his friend pushed him, he twisted around, straining his right low back and his leg got caught on a metal fork off (sic) a loading device, and said he landed on his right side. He has right lateral lumbar back pain and states his right side hurts at this time." The ALJ finds this history suggestive that Claimant reported that he actually fell, landing on his right side. Such history is inconsistent with Claimant's own testimony and is contradicted by the testimony of Mr. Horner that Claimant did not fall.

23. Physical examination was positive for complaints of tenderness, pain and muscle spasm but otherwise negative for bony tenderness, crepitus, step off, ecchymosis or edema. The final assessments following Claimant's ED visit were coded as: 1. Lumbago, 2. Sprain of lumbar region, 3. Contusion of unspecified site. It also listed a Clinical impression of: 1. Acute back pain. 2. Lumbar spine strain. 3. Contusion. The report from Claimant's ED encounter does not address work restrictions.

24. Claimant then saw Physician Assistant (PA-C) Robert Crandell at Integrity Urgent Care on 12/23/14. PA Crandell wrote that Claimant "was pushed at work and tripped over the forks of a fork lift, injuring his back." He documented abnormal/painful ROM in the upper and lower back as well as moderate paraspinous tenderness on the right side of the lumbar spine. He also documented right SI joint tenderness and mild muscle spasm. Assessment was noted as: Sprain/strain lumbroscaral and muscle spasm. PA Crandell also imposed work restrictions from 12/23/14 to 12/31/14 of no lifting, repetitive lifting, pushing, pulling or carrying more than 5 pounds. Postural limitations included no crawling, kneeling, squatting or climbing.

25. Claimant returned to work on December 26, 2014. He presented the aforementioned medical records imposing work restrictions to Employer and Myrl Johnson initiated the workers compensation claims paperwork. Claimant was assigned a light duty position of sitting in a chair counting pallets or trucks on December 26, 2014. Mr. Mayo testified when Claimant returned to work on December 26, 2015, he received the same daily wage as he had up to December 17, 2015.

26. Claimant returned to Integrity Urgent Care on January 2, 2015 at which time he was evaluated by PA-C Andrew Austin. The report from this date indicates that PA Austin ordered an x-ray of the lower spine, which was subsequently read as a "normal examination." He also referred Claimant to physical therapy (PT) "2 times a week for 2-3 weeks." Claimant's work restrictions were liberalized from 5 pounds to 15 pounds lifting, pushing, pulling and carrying. Repetitive lifting remained at 5 pounds and Claimant was precluded from crawling, kneeling squatting and climbing. Claimant's next appointment was scheduled for January 16, 2015. Claimant did not return to Integrity Urgent Care and did not start the recommended physical therapy due to denial of the claim.

27. Claimant's Employer required a Preparticipation Physical Evaluation to determine

his work capacity. The physical was completed on January 17, 2015 at Integrity Urgent Care. The examination required that Claimant complete a medical history form. In completing the required history form, Claimant responded "NO" to question 23. "Do you have a bone, muscle, or joint injury that bothers you?" He also responded "NO" to question 2. "Do you have any ongoing medical conditions?" Claimant's subsequent physical examination was completed by PA Austin, the same PA who evaluated him at Integrity Urgent Care on January 2, 2015. Claimant's back was among the body parts comprising the musculoskeletal system evaluated by PA Austin. That examination revealed normal findings only. Claimant testified he still had pain at the time of this examination, but he needed an income so misrepresented the condition of his back.

28. Claimant, while working for Employer applied for a job at Swire Coca Cola ("Coca Cola") on March 18, 2015. Claimant testified this new job would pay more than his job at Employer. Claimant was hired by Coca-Cola, full time at $14.00/hour, as a truck loader effective April 15, 2015. He then quit his job with Employer. As part of his hire with Coca-Cola, Claimant indicated that he needed no accommodations and had no disability.

29. While working at Coca Cola, Claimant applied for a job at Adarand Constructors ("Adarand"). He was hired by Adarand and separated from employment with Coca-Cola on May 1, 2015. At the time he was seeking employment with Adarand, Claimant stated on this job application that he could perform the job for which he was applying without accommodations. He applied and was hired for the position of "Installer." The "Installer" job description clearly states that the holder of the position must "be able to perform extremely strenuous work consistently throughout the day, while lifting of up to 125 pounds occasionally and 50 pounds repeatedly."

30. Dr. Mitchell performed an independent medical examination ("IME") of Claimant on June 1, 2015. She generated a report following that IME. In her report, Dr. Mitchell wrote "the mechanism of injury and early examination findings are consistent." When asked about this on cross examination, Dr. Mitchell admitted that this portion of her report had not changed.

31. Dr. Mitchell further noted that "The current diagnosis of lumbar spine is consistent with the mechanism of injury, which is twisting and hitting his back on the forklift. This is consistent with the objective findings as documented in the medical records of 12/23/14 and 01/02/15." When questioned about this at hearing, Dr. Mitchell testified that this opinion has not changed.

32. Dr. Mitchell recommended a course of physical therapy twice a week for 4-6 weeks following her IME. She also indicated that medications such as a mild muscle relaxant and anti-inflammatories would be appropriate as well as an MRI given the duration of Claimant's symptoms. In her IME report, Dr. Mitchell anticipated MMI in 2-3 months"; however, after receipt of additional information unavailable to her at the time of her IME she retracted the aforementioned recommendations during her hearing testimony.

33. Dr. Mitchell testified Claimant complained of back pain during her IME. At the IME, Claimant did not inform Dr. Mitchell he was doing heavy lifting at his current position at Adarand. Prior to the IME, Dr. Mitchell reviewed Claimant's medical records from December 23, 2014 through January 2, 2015. She did not have Claimant's employment records at the time of the IME or when writing her IME report. She subsequently reviewed Claimant's employment records, testifying that if Claimant did have an injury in December 2014, it had resolved by January 17, 2015 when Claimant completed his employment physical at Integrity Urgent Care.

34. Dr. Mitchell testified based on Claimant's employment records, specifically his job description for Adarand requiring "extremely strenuous work consistently throughout the day while lifting up to 125 pounds occasionally and 50 pounds repeatedly", that "he is capable of performing a very heavy job." Dr. Mitchell testified Claimant has been working in hard labor positions, without restriction and without reasonable accommodations since leaving his job for Employer. According to Dr. Mitchell it is reasonable for a person performing such heavy labor to have a sore back at the end of the day. She testified that Claimant's current back pain is not due to the shoving incident in December 2014. Rather, she attributed Claimant's current back pain to the physical demands of his current job for Adarand.

35. Concerning her previous recommendation for physical therapy, Dr. Mitchell testified as follows: Claimant "is obviously quite functional. The purpose of physical therapy is to restore function and he can do a very heavy job; so I don't think he needs physical therapy." Dr. Mitchell does not recommend any medical treatment related to the December 2014 incident.

36. Dr. Mitchell testified Claimant's current work restrictions are due to his May 2015 facial work injury at Adarand. (T: 53 18-22) She testified that she would not assign any work restrictions regarding Claimant's back.

37. The ALJ finds Dr. Mitchell's testimony to be credible and persuasive.

38. Claimant testified that he was involved in a car accident a few days prior to the work assault. Nonetheless, he testified that he suffered no injuries, did not go to the hospital or Emergency room, and sought no care as a result. Claimant characterized the accident as a "fender bender." He worked the day after the accident testifying that he was completely pain-free.

39. Based upon the totality of the evidence presented, the ALJ finds that the assault was precipitated by a private dispute having no connection to the conditions and obligations of employment, which was imported to the workplace by Claimant after he was instructed to stop his personal verbal attacks. Consequently, the ALJ finds that Claimant has failed to carry his burden of establishing that his injuries arose out of his 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 (Act), Sections 8-40-01, 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 evidence presented, that Claimant's implication that he needs treatment for ongoing pain as a consequence of the December 16, 2014 assault unpersuasive. The persuasive evidence contradicts Claimant's implication and establishes that he is currently working in a physically demanding job without restriction associated with his low back. Consequently, there is no need for physical therapy according to the convincing testimony of Dr. Mitchell. Moreover, the ALJ finds Claimant's credibility suspect given his admission that he misrepresented the condition of his back during his January 17, 2015 employment physical. Claimant's testimony that he misrepresented the condition of his back to assure that he could continue to work is unconvincing given that Employer had placed him in a modified duty position and he was earning a wage at the time.

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).

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra.* Colorado courts have repeatedly emphasized that the determination of whether alleged injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennet v. Furr's Cafeterias, Inc.*, 549 F. Supp 887 (D. Colo. 1982).

F. An assault is considered to "arise out of" the employment if the underlying dispute giving rise to the assault has an inherent connection to the employment, or is the result of a "neutral force". *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *In Re Questions Submitted by U.S. Court of Appeals*, *supra*. Accordingly, injuries suffered during an assault are compensable if the assault grew out of an argument over performance of work, possession of work tools or equipment, delivery of a paycheck, quitting or being terminated. Further, even if the subject of the dispute is unrelated to the work, injuries in an assault are compensable if work-related tensions exacerbate the underlying dispute. However, where the assault arises from an inherently private dispute imported into the employment and the dispute is not exacerbated by the employment, the resulting injuries are not compensable. *In Re Questions Submitted by U.S. Court of Appeals, supra*. In arguing that his back injury is compensable, Claimant points to the fact the injury occurred within the time and place limits of his employment. He also asserts that the injury arose out of an employment

relationship because the assault was precipitated by Mr. Horner's perception that Claimant "seemingly cut him off in line" to the scale or because Claimant was "taking too long to weigh his pallet for Mr. Horner's liking" or because the parties were "actively messing with each other's pallets." Consequently, Claimant argues that the requisite causal connection between the injury and his employment has been established. The ALJ is not persuaded, finding instead that the assault was precipitated by a private dispute surrounding Mr. Horner's family life and attributes as a father. Here, the credible and convincing evidence establishes that the original argument, where the combatants had exchanged verbal insults at the scale had passed and Claimant had taken a break where he was instructed not to infuse personal issues into the workplace again. Choosing to ignore that directive and re-engage Mr. Horner in a personal dispute over his family life precipitated Claimant's assault and constitutes evidence that he (Claimant) imported the dispute into the workplace.

G. Claimant asserts that even if the argument was inherently private, his injuries are nevertheless compensable because his dispute with Mr. Horner was exacerbated by the employment. As noted above, injuries resulting from assaults stemming from inherently private disputes imported into the employment remain compensable if the dispute is exacerbated by the employment. *In Re Questions Submitted by U.S. Court of Appeals, supra*.; *Valasquez v. Industrial Commission*, 581 P.2d 748 (Colo.App. 1978). Here, Claimant argues that the confines of his employment exacerbated the dispute leading to his assault because the two men were in "close proximity with one another the whole night." The ALJ understands Claimant's argument to be that "but for" the "enforced contacts" occasioned by the duties of the job and the confines of the warehouse, Claimant's assault would not have occurred. The ALJ is not convinced. Rather, the ALJ concludes that based upon the extremely personal nature of the comments made to Mr. Horner, Claimant, more probably than not, would have been assaulted no matter where these combatants encountered one another. Such assaults are not compensable. *See Valasquez v. Industrial Commission, supra.* Based upon the evidence presented, the ALJ concludes that Claimant's employment did not exacerbate the dispute nor did the conditions and obligations of his employment cause the friction which resulted in the assault. *Horodyskyj v. Karanian, supra*. Consequently, the ALJ concludes that Claimant has failed to establish, by a preponderance of the evidence, that his low back injury "arises out of" his employment.

H. In concluding that Claimant has failed to prove that his injuries arose out of a compensable assault, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Ferhat Varupa, v. Bron Tapes Inc.*, W. C. No. 4-552-808 (ICAO, October 29, 2003) instructive. In *Varupa*, the claimant, who was Muslim was assaulted by a co-worker following the escalation of a verbal exchange with the co-worker concerning the superiority of Muslims or Christians which expanded to include vulgar remarks about their mothers. The ALJ determined the claimant had no connection with the co-worker outside the workplace and would not have encountered the co-worker had he not worked for the respondent-employer. Expressly relying on *Rendon v. United Airlines,* 881 P.2d 482 (Colo. App. 1994), the ALJ further found that "but for" the employment the

claimant would not have been assaulted. Consequently, the ALJ determined the injuries were compensable.

I. On review, the Industrial Claims Appeals Panel reversed, rejecting the ALJ's reliance on the holding in *Rendon* to conclude that the "but for" test was applicable to determine the compensability of the work-place assault under the facts of the case. In *Rendon*, the claimant was injured as a result of verbal and physical assaults by co-workers who believed the claimant to be a homosexual. The court upheld an ALJ's determination that the injuries were compensable. The *Rendon* court reasoned that: "In such circumstances, the cause of the event is the friction and strain created by the work environment that places claimant in a position to receive the impact of his co-workers' personality and increases the likelihood of assault. It is because of the employment, and only because of the employment, that the claimant is subjected to his tormentor as an established fixture of the employment environment. (citation omitted) Furthermore, it is solely the obligations of the employment that compel the association of the employees, which would otherwise not come about, and it is this enforced and uneasy association that leads to the explosive finale. . . . In addition, the fact that a claimant or a fellow employee may overreact to an adverse condition of employment or that the overreaction may stem from some unusual quality of either employee's personality does not alter the fact that the subject of that reaction had an inherent connection with employment." *Id* at 485.

J. However, in *Horodyskyj v. Karanian*, 32 P.3d 470, 476 (Colo. 2001), our Supreme Court rejected the court's reasoning in *Rendon* and concluded that analysis improperly eliminated the "causality requirement needed for an injury to arise out of the employment." The Supreme Court held the *Rendon* test improperly framed the issue as "but for the bare existence of the employment" rather than "but for the conditions and obligations of the employment." *Ibid* at 476. Therefore, the court held that evidence employees met through the employment "is not enough to cause offensive on-the-job conduct between them to fall within the 'friction and strain' of the job." *Ibid* at 476.

K. In this case, Claimant makes an argument similar to that asserted in *Rendon* and *Varupa*, namely that he would not have been assaulted had he not worked for Employer and had he not been forced to work in close proximity to Mr. Horner. Accordingly, Claimant alleges that his assault was precipitated by the conditions and obligations of his employment. As found, the ALJ is not convinced. To the contrary, just as the assault in *Varupa* was precipitated by the verbal taunting associated with a personal religious dispute; the assault in the instant case was precipitated by a deeply personal dispute concerning Mr. Horner's abilities to discharge his paternal obligations. The fact that these combatants had no connection to each other outside the workplace or the fact that they had to work in close proximity to one another is, according to the holding expressed in *Horodyskyj*, legally insufficient to establish a sufficient causal connection between the injuries and the employment. On the evidence presented, the ALJ

concludes that Claimant's assault was precipitated by a private dispute having no connection to the conditions and obligations of the employment. Consequently, the claim must be denied and dismissed as Claimant has failed to establish that his injuries have an origin in his work-related functions and are sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra.* Simply put, Claimant's injuries did not "arise out of" his employment. In view of that, Claimant's remaining claims need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries arising out of a December 16, 2014 assault 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: August 24, 2015

/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 sustained a compensable right foot Achilles tendon strain while ascending two stairs on January 25, 2015 entitling her to reasonable, necessary medical treatment, including care received through Dr. Ralph Wentz, D.P.M.

FINDINGS OF FACT

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

1. Claimant works as a correctional officer in the kitchen of the Buena Vista Correctional facility. As the Officer in charge, Claimant's duties include supervising offenders in the kitchen and preparing/baking all food for service. Claimant's duties keep her on her feet and moving around for the majority of her shift. Consequently, Claimant walks and/or stands on concrete floors for 8 hours per day while in the prison.

2. On January 25, 2015, at around 1:15 PM, Claimant developed pain in her right foot/heel while ascending two stairs at work. Claimant's pain worsened throughout her shift. Consequently, she reported her pain to the shift commander and a first report of injury was taken. Claimant was able to complete her shift and return home where she attempted to relieve her persistent pain with a hot bath followed by ice.

3. On Monday, January 26, 2015, Claimant's pain was "somewhat" better but her right heel was still sore. Accordingly, Claimant called Human Resources (HR) to report her injury. During her conversation with an HR representative, Claimant requested that she be permitted to see a doctor. Claimant was directed to a designated clinic.

4. At 12:54 on January 26, 2015, Claimant presented to Constance Gable, Family Nurse Practioner (FNP) at Heart of the Rockies Regional Medical Center. During this encounter, Claimant reported that she was "going up stairs at work" when she felt a "pulling sensation" on the back of her right foot in the "achilles tendon area." A physical examination of Claimant's foot revealed "very mild tenderness at medial side of R achilles tendon attachment" and "no localized erythema or heat." An x-ray was ordered. Claimant's right foot x-ray demonstrated small calcaneal spurs as well as pes cavus (high arch). The ALJ finds from the evidence presented that Claimant's right calcaneal spurring pre-existed the January 25, 2015 alleged date of injury.

5. At the conclusion of her January 26, 2015 appointment, Claimant was

referred to physical therapy (PT), instructed to take Ibuprofen, rest, ice, use an ACE wrap 24/7 and elevate her leg as much as possible. Work restrictions included no standing. Claimant was assessed as having "probable mild achilles tendonitis."

6. On February 2, 2015 Claimant returned to FNP Gable reporting improvement in her symptoms when using ice and taking Ibuprofen. FNP Gable commented that Claimant's January 26, 2015 x-ray demonstrated a "Heel spur" and that Claimant was a known patient to Dr. Wentz for this and that she had shoe orthotics. Physical examination revealed continued right "mild tenderness along medial side of Achilles tendon." Claimant was assessed as having "probable achilles tendon strain and was informed that her next visit would need to be scheduled with Dr. Kanar.

7. Prior to seeing Dr. Kanar, Claimant testified that she was advised by the adjuster assigned to the case that the claim was denied and that as a consequence all treatment "stopped." The Third Party Administrator, through their representative, Jackie L. Slade filed a Notice of Contest on February 6, 2015.

8. Claimant testified that because all further treatment had been denied she elected to return to Dr. Wentz on February 12, 2015. The evidentiary record indicates that Claimant saw Dr. Wentz on February 12, 2015 and that Dr. Wentz completed "State of Colorado Fitness-to-Return Certification paperwork indicating that Claimant was capable of full duty work without restriction beginning February 15, 2015. Claimant testified that she paid $50.00 out-of-pocket for services rendered during the February 12, 2015 appointment.

9. Claimant testified that Dr. Wentz recommended additional physical therapy during her February 12, 2015 appointment. Although, the medical report of Claimant's February 12, 2015 visit was not introduced into evidence, Respondents' Exhibit A, page 1, which the ALJ finds is part of the paper work completed by Dr. Wentz regarding Claimant's fitness for duty, indicates that he treated Claimant on February 12, 2015 for an "Achilles strain" and that Claimant was referred for additional treatment in the form of "US." The ALJ finds that the reference to "US", more probably than not indicates a request for ultrasound treatment through physical therapy.

10. Claimant returned to work without restriction on February 15, 2015.

11. On March 6, 2015, Claimant returned to Dr. Kanar for re-evaluation. The ALJ finds, after careful review, that the report generated from this date of visit contains no meaningful information concerning the cause of Claimant's right heel pain. To the contrary, the report does not address Claimant's heel pain at all. The report simply notes that the visit involved a routine medical examination and lists Claimant's "Problems" as: "Hypothyroidism" and being "Overweight."

12. Based upon the evidence presented, the ALJ finds Claimant's reports of pain while ascending two steps at work on January 25, 2015 credible. Nevertheless, this finding does not resolve the question of causality for that pain and whether Claimant sustained a compensable injury as a consequence of walking up some stairs. Based

upon the factual findings set forth below, the ALJ finds that Claimant has failed to carry her burden of proof.

13. Claimant has a prior history of left foot pain dating back to May 16, 2013. On this date, Claimant was evaluated by Dr. Wentz for persistent left foot pain over the head of the forth metatarsal of the left foot worse with weight bearing. An x-ray revealed a healed 3rd metatarsal stress fracture. Dr. Wentz assessed the cause of Claimant's pain as 4th metatarsal "overload due to neglected 3rd metatarsal stress fracture." He did not state a cause for Claimant's 3rd metatarsal stress fracture. Claimant was provided a prescription for bilateral foot orthotics (BFO) to use for one month followed by reassessment.

14. Claimant returned to Dr. Wentz on June 13, 2013 with complaints of plantar metatarsal phalangeal (MP) joint pain. Consequently, Dr. Wentz administered a capsulitis injection into the 4th metatarsal phalangeal joint capsule and recommended "orthotic therapy with L4 metatarsal head accommodation."

15. On January 16, 2014, Claimant returned to Dr. Wentz with complaints of right heel pain, aggravated by weight bearing which had developed the week prior to her visit. Physical exam revealed pain localized to the right "posterior right calcaneus at the insertion of the achilles tendon." An x-ray of the right heel was obtained and demonstrated "early inferior and posterior calcaneal spurs. Dr. Wentz provided the following diagnostic impression: "right heel pain with insertional achilles tendinitis with a differential diagnosis of "calcaneal stress fracture not yet visualized radiographically." The treatment plan included use of "BFO's with bilateral heel lifts", anti-inflammatory medication and rest.

16. By January 30, 2014, a repeat x-ray of the right foot revealed a "sclerotic line across the tuber of the calcaneus." Consequently, Dr. Wentz provided a diagnosis of "right calcaneal stress fracture." Claimant was placed in a fracture boot and restricted to a non-weight bearing (NWB) status for four weeks. Additional laboratory testing was ordered and Claimant was instructed to return for follow-up in four weeks.

17. The ALJ finds the January 26, 2015 x-ray of Claimant's right foot/heel to demonstrate changes similar to those of the right foot, as explained by Dr. Wentz in his January 16, 2014 report, namely early calcaneal spurring. Consequently, the ALJ finds Claimant's spurring pre-dated Claimant's January 25, 2015 injury (See ¶ 4 of the above Findings of Fact).

18. Based upon the evidence presented, including careful inspection of Dr. Wentz' reports, the ALJ is unable to find support that Dr. Wentz related Claimant's right heel condition, including insertional Achilles tendinitis and/or calcaneal fracture to Claimant's occupation as a correctional officer. According to Dr. Wentz, there was "no history of injury." Moreover, Dr. Wentz raised concern for non-occupational causes of Claimant's left and right foot problems, including a family history of Osteopenia and the potential for vitamin D or calcium deficiencies.

19. During cross examination, Claimant admitted that she ascends and descends stairs in her home and encounters stairs outside of work on a daily basis. Claimant did not testify that the stairs she encounters at work are unique or different in character than other stairs she encounters on a daily basis. The ALJ finds that stairs, in general are ubiquitous and that Claimant, in this case was equally exposed to the hazard which she asserts is the cause of her right heel condition outside of work. Claimant also submitted a WebMD page entitled Insertional Achilles Tendinopathy which provides the following:

> Insertional Achilles tendinopathy is tendon damage in the area where the tendon attaches to the heel bone. *It tends to develop when the tendon is rubbing on a bone spur or other type of bone growth."* (emphasis added)

20. Given the similar findings between Claimant's right heel x-rays combined with Dr. Wentz' records, which fail to connect Claimant's heel pain/condition to her work duties and Claimant's equal exposure to stairs outside of her employment, the ALJ finds Claimant's contention that her right foot/heel pain was caused by ascending two steps at work unpersuasive. Rather, the persuasive evidence presented, including the x-rays, persuades the ALJ that the injury to Claimant's right Achilles tendon occurring January 25, 2015 was probably caused by the natural progression of a pre-existing non-industrial condition imported to the workplace by Claimant rather than simply ascending two steps. Claimant's testimony to the contrary is unconvincing.

21. Based upon a totality of the evidence presented, the ALJ finds that Claimant failed to prove that the stairs she encountered at work constituted a special hazard which combined with a pre-existing condition to result in a compensable injury to Claimant's right heel.

CONCLUSIONS OF LAW

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

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

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

C. When determining credibility, the fact finder should consider, among other things the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (1936). A Workers' Compensation case is decided on its merits. Section 8-43-210, C.R.S.

D. To recover workers' compensation benefits, the Claimant must prove she suffered a compensable injury. A compensable injury is one which arises out of and in the course of 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). Based upon the evidence presented, the ALJ finds that Respondents are not contending that Claimant's alleged injury did not occur in the course of her employment. Rather, based on the testimony presented and the records submitted, the undersigned ALJ understands Respondents contention to be that Claimant's asserted injury did not "arise 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.* As noted above, 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. 2014. The fact that claimant may have experienced an onset of pain while performing job duties does not mean that she sustained a work-related injury 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).

F. Based upon the persuasive evidence presented, including the x-rays, the ALJ concludes that Claimant's right Achilles tendinopathy/tendinitis and/or strain was, more probably than not, caused by the natural progression of pre-existing, non-industrial calcaneal spurring rather than her ascending two stairs as claimed. In other words, while Claimant may have experienced pain when ascending stairs, the ALJ concludes her pain was precipitated by a pre-existing condition that she brought to the workplace and not an activity or condition distinctly associated with her employment, i.e. ascending

two stairs.

G. In concluding that Claimant has failed to prove, by a preponderance of the evidence, that she suffered a compensable work injury, the ALJ has considered the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). Under the "special hazard" rule," a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Id*. The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See National Health Laboratories v. Industrial Claim Appeals Office, supra; Ramsdell v. Horn, supra.* In this case, the ALJ concludes that Claimant's right Achilles tendon injury was precipitated by a pre-existing, non-industrial condition rather than a discrete injury while ascending two steps. On the evidence presented, the ALJ concludes that Claimant imported to her workplace a predisposition to injuring her Achilles tendon merely ascending steps given the pre-existing spurring revealed by the x-ray of the right heel, the last occurring on January 26, 2015. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to prove that she sustained a compensable work injury to her left heel. *National Health Laboratories, supra.*

H. To be considered an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Gates Rubber Co. V. Industrial Commission,* 705 P.2d 6 (Colo. App. 1985) (hard level concrete floor not special hazard because it is a condition found in many non-employment locations); *Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). In this case, Claimant failed to establish that a stairs which she encountered at work constituted a special hazard of employment which would increase the risk or extent of injury. To the contrary, Claimant's did not set these steps apart from any others she encounters on a daily basis, in terms of design or character during her testimony. Thus, while the ALJ concludes that Claimant sustained an injury to her right heel as a consequence of her pre-existing calcaneal spurring, she failed to prove that the instrument which she alleges caused her injury, namely stairs constituted a special hazard in this case. Accordingly, her claim for benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's January 25, 2015 claim for a work related injury is denied and dismissed.

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

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

DATED: __August 11, 2015__

/s/ Richard M. Lamphere

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

STIPULATIONS & ADMISSIONS

At the commencement of the hearing, the parties resolved several issues by way of stipulation and judicial admissions. Respondents judicially admitted that Claimant sustained a compensable psychological injury in the form of PTSD, anxiety, and depression related to the accidental death of a coworker on January 7, 2015. Respondents further admitted that Claimant was entitled to TTD benefits commencing January 29, 2015 and continuing until February 20, 2015 for this compensable injury.

Respondents disputed that Claimant sustained a compensable injury to his right shoulder as a consequence of his admitted psychological injury. Accordingly, Respondents contest that Claimant is entitled to medical treatment and additional wage loss benefits after February 20, 2015 due to Claimant's inability to work as a consequence of the subsequent, unrelated, right shoulder injury.

Finally, the parties stipulated to an AWW in the amount of $625.52 on the date of injury, increasing to $726.99 effective June 1, 2015 based on COBRA health insurance cost. The ALJ approves the parties' stipulations and admissions.

REMAINING ISSUES

The issues to be determined by this decision are:

I. Whether claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder as a consequence of his admitted psychological injury.

II. If Claimant did sustain a compensable right shoulder injury, whether he is entitled to medical benefits for his right shoulder condition.

III. Whether Claimant is entitled to wage loss benefits from after February 20, 2015.

FINDINGS OF FACT

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

1. Claimant sustained an industrial injury on January 7, 2015 in the course and scope of his employment. Claimant worked at the Employer's glass production and finishing facility in Pueblo.

2. On January 7, 2015, Claimant was performing his regular duties, which included moving large sheets of glass with a crane. He needed to maneuver the crane through large stacks of glass colloquially known as "stoges." Claimant was unaware that two coworkers were changing light bulbs nearby using a scissor lift. The crane Claimant was operating hit the scissor lift and knocked it over. One of the coworkers fell to the floor, was seriously injured and subsequently died.

3. Claimant personally witnessed the coworker lying on the ground in a pool of blood before he was taken away by paramedics. That image has been the source of repeated distressing recollections and "flashbacks" of the incident for Claimant. Additionally, Claimant feels a great deal of remorse and guilt for his role in causing the fatal accident.

4. Claimant was evaluated by his primary care provider, Veronica Ritchey, FNP-C on January 9, 2015. The appointment had already been scheduled prior to the accident to establish a PCP under his new insurance. Nurse Ritchey noted that he was having "depression and anxiety . . . from an incident that occurred recently at work and [he] is having some difficulties dealing with this and is not sleeping." Nurse Ritchey prescribed Xanax and Zoloft for the anxiety, depression and sleep disturbance.

5. The Employer gave Claimant a couple of days off after the accident. When he returned to work, he began struggling with anxiety and depression related to the accident. He experienced panic attacks associated with physical symptoms such as stomach pain, lightheadedness, dizziness, and heart palpitations. Initially, Claimant did not realize these symptoms were manifestations of panic attacks.

6. Claimant left work and went to see Nurse Ritchey on January 29, 2015 after a panic attack which caused him to become lightheaded and dizzy while he was carrying a large sheet of glass. Nurse Ritchey documented that "the death at work is weighing heavy on him and he is constantly reminded of the incident and every time he goes into a panic attack and is dizzy with sob [shortness of breath], palp, [palpitations] N/V [nausea and vomiting] and is afraid that he is going to get hurt himself at work." As a result of these symptoms, Nurse Ritchey requested that Claimant be given a medical leave of absence. Nurse Ritchey noted that "[d]ue to the recent situation at his place of employment, Alex is having some health concerns that lead me to believe it would be necessary to put him on personal FMLA starting 1/30/2015. . . . This health concern will put the patient at increased risk for injury therefore I will evaluate him on a weekly basis for return to work status." Nurse Ritchey subsequently completed a FMLA leave form, where and she indicated Claimant was unable to work at this time "due to safety risk."

7. Claimant has not returned to work since January 29, 2015. He has not been released to work without restrictions, and he has not been offered any modified duty.

8. Claimant saw Nurse Ritchey again on February 5, 2015, at which time he was still reporting symptoms including "chest pain and palpitations," "nightmares," "headaches and dizziness . . . with panic episodes," "vertigo," and sleep disturbance.

9. The Employer made counseling services available to employees who wanted help coping with the incident, and Claimant saw Marjorie Genova, MA, LPC on four occasions. At the initial evaluation, Ms. Genova documented that Claimant was "experiencing intense feelings of guilt and grief for the accidental death of his colleague." She further documented that he was suffering from nightmares, flashbacks, anxiety. Physical symptoms included increased blood pressure, stomach pain, and "dizziness." Ms. Genova diagnosed Claimant with "PTSD from the work-related accident."

10. On February 10, 2015, Claimant experienced a panic attack at home and went upstairs to get his medication. He was lightheaded and dizzy, and subsequently fell down the stairs, injuring his right shoulder.

11. Later that day, Claimant went to the Employer's designated facility, CCOM. He reported that his current symptoms included feeling "dizzy." CCOM directed him to seek attention at St. Mary Corwin Hospital Emergency Room (ER) for the shoulder. The ER record reflects that "[Claimant] was having a panic attack and was going upstairs to get his medications when he apparently passed out and woke up at the bottom of the stairs." The ER gave Claimant a sling and recommended orthopedic evaluation.

12. Claimant was evaluated by Dr. Nanes at CCOM for the first time on February 13, 2015. Dr. Nanes documented that "he continues with ongoing rather severe panic attacks and PTSD-like symptoms." Dr. Nanes noted that "he started to have a panic attack [at home] and he was going up the stairs to get his medicine when he fell and landed on his right shoulder." Dr. Nanes referred Claimant for an MRI of the right shoulder to assess a suspected rotator cuff tear. He also referred Claimant to Amy Alsum, LCSW for psychological counseling.

13. The Respondents denied liability for the right shoulder based on a record review performed by Dr. Larson. On February 25, 2015, Dr. Nanes stated that "his right shoulder condition has been denied by the insurance company and the patient was advised to see his primary care physician for this injury."

14. As instructed, Claimant contacted Nurse Ritchey and was referred for a right shoulder MRI under his health insurance. The MRI showed rotator cuff tears, so Nurse Ritchey referred Claimant to an orthopedic surgeon, Dr. Jennifer FitzPatrick.

15. Claimant was evaluated by Dr. FitzPatrick on March 23, 2015. Dr. FitzPatrick noted that he "was having a panic attack and thus ran up the stairs to get his medication and fell." Dr. FitzPatrick diagnosed rotator cuff tears, and recommended surgery. The surgery was performed on April 10, 2015. Arthroscopic findings included "a large tear" of the subscapularis tendon, a mid substance tear of the subscapularis tendon at the musculotendinous junction, and dislocation of the biceps tendon. Dr. FitzPatrick opined that the intraoperative findings were "evidence of an acute injury."

16. Claimant had his final visit with Ms. Genova on February 20, 2015. The report states he was "feeling improved," but was still having issues with "flashbacks and ruminating thoughts."

17. Claimant began treating with Amy Alsum, LCSW on March 4, 2015 on referral from Dr. Nanes. At that time, he was having "panic attacks occurring 2 or 3 times a day, when he feels as if he is having a heart attack. He becomes dizzy. His heart rate speeds up. He is sweaty and has difficulty breathing." Ms. Alsum documented that "he also hurt his shoulder about a month after the incident. He was at home when he experienced a severe panic attack. When he has panic attacks he becomes dizzy, and on this particular day he fell down some stairs as he was trying to get to his medications and hurt his right shoulder."

18. Claimant has continued working with Ms. Alsum on a regular basis since March 2015. Records reflect that he still suffers from severe anxiety and frequent panic attacks. Ms. Alsum also documented severe anxiety episodes triggered by any attempt to return to his workplace. For example, on March 16, 2015, Ms. Alsum noted:

> [H]is readiness to return to work was addressed. He reports that he went back to his workplace last week, to pay his insurance premium, and his anxiety was so high that he could not make himself enter the building. He was receptive to discussing how he can utilize exposure therapy, that is, to increase his exposure to the workplace by small increments, utilizing calming techniques as he does so. He is currently not ready to return to work, but is receptive to working toward the goal of returning to work.

19. Similarly, on March 25, 2015, Ms. Alsum documented that "[h]e has made one attempt to get to the parking lot at work, but was overwhelmed with anxiety." On April 8, 2015, Claimant reported that "he continues his efforts to manage his anxiety related to a work accident. He has been driving through the parking lot at work, on a daily basis. This has gone well, but when he tried to stop the car and stay in the parking lot for a minute, he had a panic attack. He was encouraged to continue his efforts."

20. The ALJ finds Claimant's testimony credible and supported by the medical record evidence.

21. Claimant's February 8, 2015 right shoulder injury is a compensable consequence of his January 7, 2015 industrial injury. Although the shoulder injury did not occur at work, it was clearly precipitated by Claimant's well-documented panic attacks, which the ALJ finds and concludes are a manifestation of Claimant's admitted PTSD/anxiety condition.

22. The right shoulder surgery performed by Dr. FitzPatrick was reasonable, necessary, and causally related to Claimant's compensable fall on the stairs. Based upon the evidence presented, the ALJ finds and concludes that the changes noted on the March 14, 2015 MRI were, more likely than not, acute and caused by Claimant's fall on the stairs.

23. The right shoulder treatment that Claimant received, including surgery, was authorized because Dr. Nanes, Claimant's authorized provider at CCOM for the psychological injury, referred Claimant to his primary care provider for treatment of the shoulder. Based on the referral of Dr. Nanes, Claimant saw Nurse Ritchey, and was subsequently referred to Dr. FitzPatrick for surgery. Therefore, Dr. FitzPatrick was within the chain of authorized referrals for the compensable injury.

24. Claimant has been temporarily disabled as a consequence of his industrial injury since January 29, 2015. As of the date of the hearing in this matter, Claimant had not been placed at MMI, been released to regular duty, or returned to work.

CONCLUSIONS OF LAW

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

A. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for

observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

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.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between employment and the alleged injuries. *Section* 8-43-201, C.R.S. 2014.

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).

G. As found, Claimant's February 8, 2015 right shoulder injury was proximately caused by his panic attacks, which are directly related to his January 7, 2015 industrial injury. As such, the right shoulder injury is a compensable consequence of the admitted injury.

H. Respondents argue, based primarily on the testimony of Dr. Larson, that Claimant did not sustain an acute injury to his right shoulder in a fall on the stairs, and even if he did the injury is unrelated to his admitted psychological injury because it occurred at home. In other words, Respondents' contend that if Claimant injured his right shoulder that injury did not arise out of and in the course and scope of Claimant's employment. Based upon a totality of the evidence presented, the ALJ is not convinced.

In his written report, Dr. Larson opined that Claimant's right shoulder injury is a consequence of a non-occupationally related incident although he did not give a specific medical basis for that opinion. Rather, Dr. Larson simply indicated that Claimant's "anxiety did not cause him to fall on his stairs at home." At hearing, Dr. Larson did not dispute that Claimant has panic attacks. He also testified that he had no basis to dispute that Claimant becomes dizzy or unstable when he has a panic attack. He simply indicated that dizziness is an "uncommon" symptom of a panic attack and that a panic attack would cause someone to fall. The ALJ credits Claimant's testimony to find and conclude that his panic attacks make him light headed and dizzy and that his dizziness likely lead to his fall down some steps in the rush to secure his anti-anxiety medication to abort his panic attack. The contrary testimony of Dr. Larson is unpersuasive.

I. Although the shoulder injury did not occur at work, it was clearly precipitated by Claimant's well documented panic attacks, which are a manifestation of Claimant's admitted PTSD/anxiety condition. In reaching this conclusion the ALJ agrees with Claimant that settled case law reflects a wide variety of secondary events and injuries that were deemed to be proximately related to an original compensable injury. For example, in *Johnson v. Industrial Commission*, 366 P.2d 864 (Colo. 1961), the court awarded death benefits for a worker who died of pneumonia. The claimant had suffered a chest wall injury as a result of a compensable accident. Subsequently, he became sick with pneumonia and died. There was no suggestion that the pneumonia had been caused by his employment. Rather, the causal nexus was found in the fact that pain from the admitted injury prevented the man from coughing and clearing his bronchi. The court found that "the decedent died from bacterial pneumonia which undoubtedly went to the point of fatal termination because of the confusing factor of the decedent's injury which caused him pain and that the pain of the injury kept him from coughing and clearing out his bronchi." *Id*. at 865. The court found that "the injury was the proximate, although not the immediate, cause of the death." *Id*. Noting that "it is not necessary that the injury be the immediate cause, but only the proximate cause of the death in order to sustain an award," the court concluded that compensability was established as a matter of law.

J. Similarly, in *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970), the claimant had sustained a compound fracture of his right leg in a compensable industrial accident. While he was still recovering from that injury, he slipped on an icy sidewalk and re-fractured his right leg. The court found that the second fracture was causally related to the original compensable injury, because it had left the leg in a weakened condition and more susceptible to injury. The court rejected the employer's argument that the second accident constituted an "intervening event," because it had "occurred when Ball was on a personal errand and not working for his employer." *Id*. at 623. The court noted that "even though Ball fell on the icy sidewalk, his leg would not have been re-fractured but for the fact of the prior fracture."

K. Respondents' argument in this case is essentially the same argument raised by the employer, and rejected by the court, in the *Standard Metals* case. Here, Respondents are arguing that Claimant's shoulder injury occurred at home, and not during the performance of any work duties. Even though Claimant's right shoulder injury

occurred at home, the ALJ finds and concludes it would not have occurred "but for" the pervasive, persistent anxiety and work-related panic attacks precipitated by his admitted work related psychological injury. Consequently, the ALJ concludes that a causal connection between the Claimant's right shoulder complaints and his admitted psychological injury exists in this case. The right shoulder injury is compensable.

L. Once a claimant has established a compensable work injury, the claimant 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. 2014*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo. App. 1999). 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).

M. Based upon the evidence presented, the ALJ concludes that Claimant's need for right shoulder surgery was related to his compensable fall from his stairs. Crediting Claimant's report to Dr. Larson and his testimony, the ALJ finds that before his fall, he had no history of problems with or treatment directed to the right shoulder. The ALJ finds Dr. Larson's opinion, that there was nothing on the MRI suggesting that an "acute" injury, unpersuasive. Based upon the evidence presented, the ALJ finds and concludes that the changes noted on the March 14, 2015 MRI were, more likely than not, acute and caused by Claimant's fall from the stairs. Having determined the issue of relatedness of Claimant's need for treatment, including surgery, for the right shoulder the ALJ addresses the issue of authorization for such treatment.

N. The ALJ agrees with Claimant that the treatment for the right shoulder was authorized because Dr. Nanes, Claimant's authorized provider at CCOM for the psychological injury, referred Claimant to his primary care provider. On February 25, 2015, Dr. Nanes stated that "[h]is right shoulder condition has been denied by the insurance company and the patient was advised to see his primary care physician for this injury." (Cl. Ex. 4, p. 64). The ALJ finds and concludes that this constitutes a valid referral for authorization purposes under *Cabela v. ICAO*, 198 P.3d 1277 (Colo. App. 2008). In *Cabela*, the designated ATP had concluded that a knee condition was not causally related to her employment, and recommended that the claimant follow-up with her personal physician. Subsequently, the claimant established compensability for her knee condition at hearing. In concluding that all treatment received through the claimant's primary care providers was considered authorized, the Court held:

> As the ALJ found, the employer's physician, an ATP, referred claimant to her personal primary care physician. The referral reflects no purpose other than treatment for claimant's knee problems, and claimant's testimony indicates that she understood the referral to be for treatment of her knee. Indeed, the ALJ found that claimant sought medical attention for her knee

> from her primary care doctor. Thus, even if the employer's physician provided the referral under the mistaken belief that the knee condition was not work-related, we perceive no factual basis for the ALJ's conclusion that the referral was made outside the ordinary course of treatment. Instead, ***we hold that the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer***. We thus conclude the referral made here was in the ordinary course of treatment. *Id*. at 1281. (Emphasis added).

O. Here, Dr. Nanes referred Claimant to his PCP for treatment of the right shoulder, because it was "denied by the insurance company" based primarily on the report of Dr. Larson that Claimant's shoulder injuries were a consequence of a "nonindustrial incident." Based on that referral, Claimant saw Nurse Ritchey, and was subsequently referred to Dr. FitzPatrick for surgery. Therefore, Dr. FitzPatrick was within the chain of authorized referrals. The ALJ finds and concludes that the "mistake" by Dr. Larson in concluding that the shoulder injury was "noncompensable" in this case also lies with the Employer. Consequently, the undersigned is persuaded that Claimant's care, including his surgery at the hands of Dr. FitzPatrick for his right shoulder is authorized.

P. Because Claimant's right shoulder injury is deemed compensable, Respondents are required to reimburse Claimant and his health carrier for any related medical expenses under § 8-42-101(6)(a). Specifically, § 101(6)(a) provides

> If … the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

Q. Section 101(6)(a) was enacted in 2013 to ensure that injured workers, and health insurance carriers, are reimbursed for all injury-related medical treatment provided outside of the workers' compensation system while a claim or benefit is under a denial. This case presents exactly the scenario the statutory amendment was intended to address.

R. To establish entitlement to TTD benefits, a claimant must show that he was "disabled," that he left work as a result of the injury, and that he missed at least three days from work. *E.g., City of Colorado Springs v. ICAO*, 954 P.2d 637, 639 (Colo. App. 1997). In this context, a "disability" exists if the industrial injury causes restrictions or limitations that impair the claimant's ability to effectively and properly perform the duties of his regular employment. *E.g., Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Further, the claimant need not prove the industrial injury is the sole cause of the wage loss, so long as it is a contributing cause. *Horton v. ICAO,* 942 P.2d 1209 (Colo. App. 1996). Once commenced, TTD benefits continue until the occurrence of one of the terminating events listed in § 8-42-105(3).

S. At hearing, the Respondents admitted that Claimant was temporarily disabled as a result of the now-admitted injury of PTSD/anxiety and depression. Respondents further stipulated that Claimant is entitled to TTD benefits commencing January 29, 2015 through February 20, 2015. Nonetheless, Respondents argue that TTD benefits should terminate on February 20, 2015, based on a notation that Claimant's psychological status had "improved" as of that date and/or that he was disabled by his non-work related right shoulder injury. The ALJ is not convinced for several reasons.

T. First, as a general rule, once commenced, TTD benefits continue until terminated by one of the events enumerated in § 8-42-105(3)(a)-(d). Those events are MMI, return to work, full duty release, or refusal of modified duty. None of those events of occurred in this case. Accordingly, there is no legal basis to terminate TTD benefits. To the extent that Respondents assert that Claimant had reached psychological MMI on February 20, 2015, the ALJ is unconvinced because no physician indicated he was at MMI as of that date. Only "an authorized treating physician" can make a determination of MMI. *Section 8-42-107(8)(b)(I).* The ALJ finds Ms. Genova to be a therapist, and therefore not legally authorized to declare MMI. The Court does not have jurisdiction to determine MMI in the absence of an opinion from an authorized treating physician.

U. Second, Respondents' argument that Claimant had "improved," and therefore would no longer be considered "disabled" after February 20, 2015 is factually incorrect. To the contrary, the medical record clearly establishes that he continues to struggle with severe PTSD, anxiety, and depression, which the ALJ concludes from the totality of the persuasive evidence presented, precludes him from returning to work at this time. His treating therapist, Amy Alsum, has documented that Claimant has experienced numerous panic attacks simply driving by or trying to go into his place of work. Although he is working on "desensitization" therapy, he still is not psychologically ready to return to work, notwithstanding his shoulder injury. Accordingly, the evidence demonstrates that Claimant is currently "disabled" by his psychological impairments. He was temporarily totally disabled before the shoulder injury occurred and he continues to be disabled by those mental impairments.

ORDER

It is therefore ordered that:

1. Claimant's February 8, 2015 injury to his right shoulder is compensable.

2. Respondents shall provide all reasonable and necessary medical treatment of Claimant's right shoulder injury, including reimbursement to Claimant for out-of-pocket expenses, and any expenses paid by Claimant's health insurance carrier for surgery performed by Dr. Jennifer FitzPatrick.

3. Respondents shall pay TTD benefits commencing January 29, 2015 and continuing until terminated by law, based on the stipulated average weekly wage.

4. Respondents shall pay statutory 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: __August 24, 2015__

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he sustained a compensable inguinal hernia on March 2, 2015 during the course and scope of his employment with Employer.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $440.17.

2. If Claimant suffered a compensable inguinal hernia he is entitled to treasonable, necessary and related medical benefits.

3. If Claimant suffered a compensable inguinal hernia he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 3, 2015 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 65 year old male who began working for Employer as a Painter on February 17, 2015. He had not worked for the previous eight years after he retired from operating his own painting business. Claimant's job duties primarily involved interior and exterior painting of an apartment complex managed by Employer.

2. Claimant explained that on March 2, 2015 he was carrying five gallon buckets of paint from a storage room to other buildings in the complex where he was painting. He noted that the buckets weighed approximately 70 pounds each. Claimant commented that there was an appliance dolly on-site but it could not be used to move paint because the belt was too high to wrap around the buckets. He remarked that, based on his prior experience, paint buckets would tip over when he turned a corner.

3. Claimant noticed some abdominal symptoms while carrying the first bucket of paint. By the time he carried the third bucket he experienced immediate discomfort in the right groin area. After carrying the fourth bucket, Claimant noticed increased pain, but completed his work shift. His symptoms began at about 4:00 p.m. and his shift ended at 5:00 p.m. Claimant stated that he did not report his symptoms to Employer because he was concerned about losing his job.

4. Claimant went home, lied in bed and fell asleep "on and off." He then planned to take a shower. While stepping into the shower Claimant noticed a significant

mass in his right groin area. He applied ice to his groin area but his symptoms persisted.

5. Claimant's supervisor Shaun Harris testified at the hearing in this matter. Mr. Harris testified as to the events of March 2, 2015. He recounted that four buckets of paint had been delivered to the office at noon that day and told Claimant they needed to move the paint after lunch. Mr. Harris remarked that when they returned from lunch at around 1:00 p.m., he moved two of the buckets himself. He further commented that Claimant used the dolly to move the other two buckets of paint. Mr. Harris further testified that Claimant did not complain of discomfort at all on March 2, 2015 and he did not appear to be in pain at the end of the day.

6. On March 2, 2015 Claimant visited the Memorial Hospital Emergency Room for treatment. Claimant reported that for the "last few weeks he has been having increasing pain in his right groin, intermittently having a lump in his right groin." He explained that "he has had a lump that he has not been able to get to go away." The attending physician diagnosed Claimant with a right inguinal hernia. He was able to reduce Claimant's hernia so that it was no longer incarcerated. Claimant felt significantly better. The physician assigned work restrictions of no heavy lifting and referred Claimant for a surgical evaluation.

7. On March 10, 2015 Claimant visited Larry J. Butler, M.D. for an evaluation. Dr. Butler noted that Claimant suffered an incarcerated right inguinal hernia. Claimant reported that he had suffered the hernia "for a longstanding period" but it became incarcerated a few days earlier. Dr. Butler commented that Claimant has had increasing difficulty reducing the hernia and "remains quite symptomatic." He reduced the hernia with minimal difficulty. Dr. Butler recommended repairing the hernia with mesh.

8. On May 13, 2015 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant reported that on March 2, 2014 he carried five gallon buckets of paint approximately 30 to 50 feet down a hill and then up some stairs. He noted that during his two week period of employment for Employer he carried about 15 five gallon buckets of paint. Claimant began to develop symptoms including aching leg, arm and chest muscles by the time he carried his third paint bucket on March 2, 2014. He also developed right groin discomfort. Claimant explained that he completed his work shift, went home and prepared to take a shower at approximately 8:00 p.m. As he was planning to take a shower, Claimant noticed a mass approximately four inches in diameter and two inches in height protruding from his right groin inguinal region. Claimant was subsequently diagnosed with a right inguinal hernia at the Memorial Hospital Emergency Room.

9. After conducting a physical examination and reviewing Claimant's medical records, Dr. Paz concluded that Claimant's right inguinal hernia was not causally related to his March 2, 2014 work activities. He noted that Claimant discovered his hernia approximately four hours after carrying five gallon paint buckets on March 2, 2015. Dr. Paz explained that the clinical evolution of an inguinal hernia occurs over days or

weeks. He commented that a mass expanding over a four hour time period would likely cause severe pain and discomfort. Dr. Paz summarized that the "incidental identification of such a mass is inconsistent with a rapid evolution of an inguinal hernia." He thus determined that the proposed surgical treatment for Claimant's right inguinal hernia was not related to the March 2, 2015 industrial incident.

10. On June 5, 2015 Claimant underwent an independent medical evaluation with Timothy O. Hall, M.D. Dr. Hall recounted that Claimant was carrying five gallon buckets of paint on March 2, 2015 when he developed pain in his right groin area. He stated that Claimant had reported to Dr. Butler that his hernia had been a longstanding problem that became incarcerated on March 2, 2015. Dr. Hall disagreed with Dr. Paz and concluded that Claimant's right inguinal hernia was caused by his March 2, 2015 work activities for Employer. He explained that Claimant's job duties of lifting buckets of paint were consistent with the development of a hernia. Claimant was de-conditioned and discovered the symptoms a relatively short time after the inciting event. Dr. Hall thus remarked that "I cannot think of any other more reasonable explanation for the development of this hernia."

11. Dr. Paz testified at the hearing and through an evidentiary deposition in this matter on August 6, 2015. He maintained that Claimant's right inguinal hernia was not caused by his work activities for Employer on March 2, 2015. He explained that Claimant's report to the Memorial Hospital Emergency Room revealed that Claimant had a hernia for a longstanding period of time prior to his employment with Employer. Dr. Paz commented that the emergency room note reflected that Claimant sought treatment on March 2, 2015 because his hernia was no longer reducible. He testified that incarceration of a hernia is when the contents of the hernia become entrapped within an extruded piece of intestine and create a bulge. Dr. Paz noted that the emergency room records reflected the bulge had been present before March 2, 2015, had previously been reducible and was similarly reducible on March 2, 2015. He summarized that the inconsistencies in reports, references to a previous bulge and Claimant's prior desire for treatment based on the bulge and not pain, made it medically improbable that Claimant's hernia was work-related. Dr. Paz commented that, based on Claimant's reports of a longstanding hernia and preexisting symptoms, the hernia was likely present prior to Claimant's employment with Employer and "many weeks prior" to the emergency room visit.

12. Dr. Paz explained that it was not medically probable that Claimant's inguinal hernia was work-related. He testified that the levels of pain and function Claimant reported on March 2, 2015 were not consistent with the levels of pain that he would have felt for a bulge of that size to develop in such a short period of time. Dr. Paz remarked that the nerve endings and peritoneum tissue that would be displaced by such a rapid progression of the bulge would have caused intense pain. He commented that the peritoneum is a very sensitive tissue and causes severe pain that typically does not even respond to morphine. Dr. Paz determined that it is not clinically reasonable that Claimant's bulge expanded that much in one day. He explained that the extreme level of pain would likely override any individual pain tolerances.

13. Dr. Paz remarked that, even if Claimant's pre-existing hernia became larger at work on March 2, 2015, it would not have accelerated his need for medical treatment. Dr. Paz maintained that Claimant's medical treatment for the hernia would have remained the same regardless of the size of the hernia as long as it remained stable. He testified that the imposition of Claimant's work restrictions on March 3, 2015 would have been required at the time the hernia first developed. Dr. Paz remarked that the restrictions would have been required from the start to prevent strangulation of the hernia. The medical records reflect that Claimant's hernia had been incarcerated for an extended period and was not aggravated to the extent of becoming a strangulated hernia.

14. Claimant has failed to establish that it is more probably true than not that he sustained a compensable inguinal hernia on March 2, 2015 during the course and scope of his employment with Employer. Claimant explained that on March 2, 2015 he was carrying five gallon buckets of paint from a storage room to other buildings in the complex where he was painting. By the time he carried the third bucket he experienced immediate discomfort in the right groin area. Claimant returned home after completing his work shift, prepared to shower and noticed a significant mass in his right groin area. At the Memorial Hospital Emergency Room Claimant was diagnosed with a right inguinal hernia. The attending physician was able to reduce Claimant's hernia so that it was no longer incarcerated. Despite Claimant's account, the medical records, the credible testimony of Mr. Harris and the persuasive testimony of Dr. Paz demonstrate that Claimant's inguinal hernia was not caused, aggravated or accelerated by his work activities for Employer.

15. The persuasive evidence reveals Claimant's reports regarding his medical history, the onset of symptoms, and the discovery of the mass have either shifted over time or are directly contradicted. Because his claim significantly rests on his testimony regarding the onset of symptoms and presence of the hernia mass, Claimant has failed to establish a causal connection between his hernia and work activities on March 2, 2015. Initially, Mr. Harris testified that four buckets of paint had been delivered to the office at noon on March 2, 2015 and told Claimant they needed to move the paint after lunch. Mr. Harris remarked that when they returned from lunch at around 1:00 p.m., he moved two of the buckets himself and Claimant used the dolly to move the other two buckets of paint. Mr. Harris further testified that Claimant did not complain of discomfort at all on March 2, 2015 and he did not appear to be in pain at the end of the day. Furthermore, Claimant informed the Memorial Hospital personnel on March 2, 2015 that he had pain for a "few weeks" and an intermittent lump that he had been pushing back in but could not do so himself on that day. There is no mention of a growth in the mass, but instead simply that he was seeking treatment because he could no longer decrease the bulge. Finally, Claimant reported to Dr. Butler that he had suffered the hernia "for a longstanding period" but it became incarcerated a few days earlier. Dr. Butler commented that Claimant has had increasing difficulty reducing the hernia and "remains quite symptomatic."

16. Dr. Paz persuasively maintained that Claimant's right inguinal hernia was not caused by his work activities for Employer on March 2, 2015. Dr. Paz explained that it was not medically probable that Claimant's inguinal hernia was work-related. He testified that the levels of pain and function Claimant reported on March 2, 2015 were inconsistent with the levels of pain that he would have felt for a bulge of that size to develop in such a short period of time. He summarized that it is not clinically reasonable that Claimant's bulge expanded that much in one day. Finally, Dr. Paz explained that, even if Claimant's pre-existing hernia became larger at work on March 2, 2015, it would not have accelerated his need for medical treatment. Dr. Paz maintained that Claimant's medical treatment for the hernia would have remained the same regardless of its size as long as it remained stable. He testified that the imposition of Claimant's work restrictions on March 3, 2015 would have been required at the time the hernia first developed.

17. In contrast, Dr. Hall disagreed with Dr. Paz and concluded that Claimant's right inguinal hernia was caused by his March 2, 2015 work activities for Employer. He explained that Claimant's job duties of lifting buckets of paint were consistent with the development of a hernia. Claimant was de-conditioned and discovered the symptoms a relatively short time after the inciting event. Dr. Hall thus remarked that "I cannot think of any other more reasonable explanation for the development of this hernia." However, Dr. Hall's analysis was predicated on Claimant's reports and failed to adequately consider the multiple conflicting medical records regarding the development and growth of the hernia. Dr. Paz noted that the emergency room records reflected the bulge had been present before March 2, 2015, had previously been reducible and was similarly reducible on March 2, 2015. He summarized that the inconsistencies in reports, references to a previous bulge and Claimant's prior desire for treatment based on the bulge and not pain, made it medically improbable that Claimant's hernia was work-related. Accordingly, Claimant has failed to demonstrate that his work activities for Employer on March 2, 2015 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might

lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable inguinal hernia on March 2, 2015 during the course and scope of his employment with Employer. Claimant explained that on March 2, 2015 he was carrying five gallon buckets of paint from a storage room to other

buildings in the complex where he was painting. By the time he carried the third bucket he experienced immediate discomfort in the right groin area. Claimant returned home after completing his work shift, prepared to shower and noticed a significant mass in his right groin area. At the Memorial Hospital Emergency Room Claimant was diagnosed with a right inguinal hernia. The attending physician was able to reduce Claimant's hernia so that it was no longer incarcerated. Despite Claimant's account, the medical records, the credible testimony of Mr. Harris and the persuasive testimony of Dr. Paz demonstrate that Claimant's inguinal hernia was not caused, aggravated or accelerated by his work activities for Employer.

8. As found, the persuasive evidence reveals Claimant's reports regarding his medical history, the onset of symptoms, and the discovery of the mass have either shifted over time or are directly contradicted. Because his claim significantly rests on his testimony regarding the onset of symptoms and presence of the hernia mass, Claimant has failed to establish a causal connection between his hernia and work activities on March 2, 2015. Initially, Mr. Harris testified that four buckets of paint had been delivered to the office at noon on March 2, 2015 and told Claimant they needed to move the paint after lunch. Mr. Harris remarked that when they returned from lunch at around 1:00 p.m., he moved two of the buckets himself and Claimant used the dolly to move the other two buckets of paint. Mr. Harris further testified that Claimant did not complain of discomfort at all on March 2, 2015 and he did not appear to be in pain at the end of the day. Furthermore, Claimant informed the Memorial Hospital personnel on March 2, 2015 that he had pain for a "few weeks" and an intermittent lump that he had been pushing back in but could not do so himself on that day. There is no mention of a growth in the mass, but instead simply that he was seeking treatment because he could no longer decrease the bulge. Finally, Claimant reported to Dr. Butler that he had suffered the hernia "for a longstanding period" but it became incarcerated a few days earlier. Dr. Butler commented that Claimant has had increasing difficulty reducing the hernia and "remains quite symptomatic."

9. As found, Dr. Paz persuasively maintained that Claimant's right inguinal hernia was not caused by his work activities for Employer on March 2, 2015. Dr. Paz explained that it was not medically probable that Claimant's inguinal hernia was work-related. He testified that the levels of pain and function Claimant reported on March 2, 2015 were inconsistent with the levels of pain that he would have felt for a bulge of that size to develop in such a short period of time. He summarized that it is not clinically reasonable that Claimant's bulge expanded that much in one day. Finally, Dr. Paz explained that, even if Claimant's pre-existing hernia became larger at work on March 2, 2015, it would not have accelerated his need for medical treatment. Dr. Paz maintained that Claimant's medical treatment for the hernia would have remained the same regardless of its size as long as it remained stable. He testified that the imposition of Claimant's work restrictions on March 3, 2015 would have been required at the time the hernia first developed.

10. As found, in contrast, Dr. Hall disagreed with Dr. Paz and concluded that Claimant's right inguinal hernia was caused by his March 2, 2015 work activities for

Employer. He explained that Claimant's job duties of lifting buckets of paint were consistent with the development of a hernia. Claimant was de-conditioned and discovered the symptoms a relatively short time after the inciting event. Dr. Hall thus remarked that "I cannot think of any other more reasonable explanation for the development of this hernia." However, Dr. Hall's analysis was predicated on Claimant's reports and failed to adequately consider the multiple conflicting medical records regarding the development and growth of the hernia. Dr. Paz noted that the emergency room records reflected the bulge had been present before March 2, 2015, had previously been reducible and was similarly reducible on March 2, 2015. He summarized that the inconsistencies in reports, references to a previous bulge and Claimant's prior desire for treatment based on the bulge and not pain, made it medically improbable that Claimant's hernia was work-related. Accordingly, Claimant has failed to demonstrate that his work activities for Employer on March 2, 2015 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

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

DATED: August 26, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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