Respondent's answer brief was filed on June 3, 2015. On the same date, Claimant indicated that there would be no reply brief. Consequently, the matter was deemed submitted for decision. After a consideration of the briefs, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's Petition to Re-Open; and, if reopened, medical benefits [including a changing of authorized treating physician (ATP)]. The Respondent alleges that it did not have sufficient notice of the "change of physician" issue. There is no space for the "change of physician" issue of the Application for Hearing" form, however, there is a general space for "medical benefits."

The Claimant bears the burden of proof, by a preponderance of the evidence, on all issues, with the exception of alleged lack of sufficient notice on the "change of physician" issue, in which case the Respondents bears 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 Claimant (d.o.b. March 4, 1969), a 14-year employee of the Employer, suffered an admitted compensable low back injury while in the course and scope of employment on April 14, 2013. The Claimant is employed as a firefighter. He underwent conservative treatment for this injury and was eventually placed at maximum medical improvement (MMI) on July 15, 2013.

2. On July 25, 2013, the Claimant authored a memo to his Employer affirming his belief that through treatment he experienced significant improvement in recovering from his injury and that he was ready to return to work. The Claimant returned to work as a firefighter on July 25, 2013, where he remains employed.

3. The Claimant has a pre-injury history of back pain. Both before and during the Claimant's treatment for the admitted April 14, 2013 workplace injury, he repeatedly failed to disclose the full scope and history of related back ailments. Specifically, he did not disclose to the physicians assessing and treating his 2013 workplace injury that he suffered back pain since 2009, which required infrequent chiropractic adjustment.

4. On October 2, 2013, the Respondent filed a Final Admission of Liability (FAL), admitting that the Claimant reached MMI on July 25, 2013, without impairment, and denying post-MMI medical maintenance benefits.

The Change of Condition/Worsening

5. In October of 2014, the Claimant experienced a recurrence and worsening of lower-back and left sciatica pain. He attributes this recurring pain to his April 14, 2013 admitted workplace injury.

6. On October 20, 2014, Chad Prusmack, M.D. evaluated the Claimant to determine the nature and extent of his pain. After a physical examination, and upon reviewing an MRI (magnetic resonance imaging) of the Claimant's back, Dr. Prusmack was of the opinion that the Claimant suffered from an annular tear at L5-S1, and a disc herniation paracentral to the right with some lateral recess stenosis.

7. Dr. Prusmack state the opinion that the Claimant's current lower back pain and left sciatica pain is worse and it is due to the original work-related injury sustained on April 14, 2013. Dr. Prusmack recommends that the Claimant undergo an L3-S1 discectomy and fusion procedure to help remedy the recurrent medial ailment.

The Petition to Re-Open

8. On October 22, 2014, the Claimant informed the Employer of his desire to re-open his claim from April 14, 2013. In addition, the Claimant expressed an interest in having Dr. Prusmack as his ATP, going forward.

9. On October 23, 2014, Respondent contacted the Employer regarding the Claimant's request to reopen the workers' compensation claim. Respondent expressed an unwillingness to voluntarily reopen the claim, given the year-long gap between Claimant achieving MMI and the newly reported injury.

10. On December 2, 2014, the Claimant filed a Petition to Re-open his claim based on change in condition, error, and mistake. He attached to his Petition a report from Dr. Prusmack, in which Dr. Prusmack states the opinion that the Claimant's current injury is worse and this is attributable to the work related injury sustained on April 14, 2013.

11. On December 5, 2014, the Claimant filed an "Application for Hearing and Notice to Set" because his attempt to re-open his workers' compensation claim on October 22, 2014 had been denied.

Medical

12. On December 19, 2014, Giancarlo Checa, M.D., examined the Claimant. Dr. Checa performed a lumbar discogram at L3-L4; L4-L5; L5-S1, finding, in part, that the Claimant suffered the following:

> "- Mild-to-moderate diffuse disc bulge with diffuse grade 4 tearing of the annulus at L-4 – L- 5
> - Mild diffuse disc bulge with grade 4 tearing of the annulus anteriority and posteriorly on the right...
> - Mild disc bulge with a shallow central disc protrusion and grade 3 tearing of the anulus posteriorly...
> - Slight convex left curvature on the lumbar spine
> - Slight anterior wedging of L1 vertebral body. <u>This is unchanged from the prior MRI</u>."

13. On December 23, 2014, the Respondent approved the Claimant's request to be examined by the Todd Sweeney, M.D., one of the ATPs for the admitted work-related injury sustained on April 14, 2013.

14. Following the December 23, 2014 examination, Dr. Sweeney noted in his report that he last examined the Claimant in July 2013, at which time the Claimant had reached MMI and returned to work without restrictions. In addition, Dr. Sweeney noted that the Claimant reported a recurrence of sciatica pain down his left and right leg, and that the Claimant recently visited with Dr. Prusmack about this pain. Lastly, Dr. Sweeney stated the opinion that the Claimant's recent symptoms appear chronologically unrelated to previous admitted workplace injury. For the reasons stated herein below, the ALJ finds the opinions of Dr. Prusmack and Dr. Ghazi more persuasive and credible than the opinion of Dr. Sweeney.

15. On April 2, 2015, the Respondent referred Claimant to ATP Usama Ghazi, D.O. After performing a physical examination of the Claimant, and reviewing available medical records, Dr. Ghazi concluded that the Claimant's worsened condition is related to his April 14, 2013 work injury. In his report, Dr. Ghazi stated the following opinion, in pertinent part:

> "- His radicular pain follows the exact same pattern as he complained of prior to this and seems to be related to the L4-5 levels.
> - While it has certainly been a long time since he presented with any radicular pain complaints, I still believe his symptoms are related and identical to those that he had in 2013 from his work injury.

- [t]he true nature of radiculopathy and disk injuries is that their symptoms can either recur frequently or remain chronically, or in more rare cases such as Mr. Hanshue's case, they can recur a year or two down the road.
- his onset of radicular symptoms occurred with this injury and his recurrent radicular symptoms are in the same distribution and, therefore, attributable to the same lumbar levels, and as such, his injury and symptomatology is the same for which I saw him back in 2013, and therefore, I believe it is related."

Independent Medical Examination (IME) by Elizabeth Bisgard, M.D.

16. On April 27, 2015, the Respondent's medical expert, Elizabeth Bisgard, M.D., performed an IME of the Claimant, and reviewed available medical records. With this information, Dr. Bisgard prepared a report regarding the Claimant's recurring low back and sciatica pain. In her report, Dr. Bisgard detailed the Claimant's pre-injury medical history as well as the treatment history for the admitted workplace injury. Dr. Bisgard highlighted the fact that the Claimant failed to share relevant pre-injury medical history with the various doctors treating the work injury. In addition, Dr. Bisgard's report emphasizes the differing opinions among the medical professionals who examined the Claimant concerning the cause of his recurrent low back pain—some believed that the Claimant's recurring pain is related to the workplace injury, others did not. Dr. Bisgard requested additional records before reaching a final conclusion regarding the causal relatedness between the Claimant's recurring pain and the admitted workplace injury.

17. On May 20, 2015, Dr. Bisgard prepared an addendum report, following her review of the Claimant's additional medical records. Dr. Bisgard is of the opinion that the Claimant's current symptoms are not causally related to the April 14, 2013, work injury. The ALJ infers and finds that Dr. Bisgard's opinion that the Claimant's recurrent low back and sciatica pain is not causally related to the admitted April 14, 2013 workplace injury is contrary to the weight of the evidence. To accept Dr. Bisgard's opinion in this regard, the ALJ would be required to diminish the seriousness of the admitted injury, and determine that that only a year after MMI the Claimant returned to a baseline of a naturally progressing degeneration of his back, despite the location and nature of his recurrent symptoms. The ALJ infers and finds that such a stretch would be beyond any reasonable bounds.

Notice of "Change of Physician" Issue

18. The Respondent alleges that it did not have sufficient notice of the "change of physician" issue. There is no space for the "change of physician" issue on the Application for Hearing" form, however, there is a general space for "medical benefits." By letter of December 18, 2014, the Respondent denied a change of physician to Dr. Prusmack, and indicated that the Claimant could return to Dr. Sweeney who, in July 2013, was of the opinion that the Claimant's present symptoms (Finding No. 14 herein above) were unrelated to the admitted compensable injury. The ALJ infers and finds that Dr. Sweeney would be in an untenable position to continue to be a workers' compensation ATP, treating the Claimant for non work-related conditions. Indeed, there is no rational reason supporting a return to Dr. Sweeney as an ATP. On the other hand, the ALJ infers and finds that the Respondent was aware that Dr. Prusmack was of the opinion that the Claimant's present condition was work related and Dr. Prusmack had treatment recommendations for a work-related condition. The ALJ, therefore, infers and finds that the Respondent had reasonable notice, prior to the hearing, that the Claimant was seeking a change of physician to Dr. Prusmack. When the "change of physician" prong of "medical benefits" was brought up at hearing, the Respondent offered no underlying reasons concerning any effects of not being provided specific notice, in the form of an articulated sub-category of the "medical" issue, although no space therefore was provided in the "Application" form or the Case Information form. The ALJ, therefore, infers and finds that the Respondent had reasonable notice that "change of physician" would be an issue under the heading of "medical benefits."

Ultimate Findings

19. Considering the totality of the evidence, including the medical records and the Claimant's testimony, the ALJ rejects the opinion of Dr. Bisgard concerning lack of causal relatedness of the Claimant's pain, and instead finds that the opinions and recommendations of Dr. Prusmack, Dr. Checa, and Dr. Ghazi are more consistent with the totality of the evidence. The ALJ finds that the Claimant's recurrent low back and sciatica pain is causally related to the injury of April 14, 2013, and represents a "change of condition" since MMI. Further treatment, as recommended by ATPs, is warranted.

20. The Claimant's testimony, as well as the medical records, establish that the Claimant's need for additional medical treatment and/or surgery is reasonably necessary, causally related to the admitted injury of April 14, 2013, and represents a change of condition since MMI. The ALJ rejects the contrary opinions on lack of causal relatedness, rendered by Dr. Sweeney and Dr. Bisgard.

21. The Respondent had reasonable notice that a "change of physician" request was implicit in the "medical" issues set for hearing.

22. While somewhat scripted and mechanical, the ALJ finds that the Claimant's testimony was credible. Further, the ALJ finds the opinions of ATP Dr. Ghazi, as well as the opinions of Dr. Prusmack and Dr. Checa, to be more significantly more credible than the opinion of Dr. Sweeney and the Respondent's expert, Dr. Bisgard, on the issue of causal relatedness because the opinions of the former are more consistent with the totality of the evidence and the seriousness of the Claimant's admitted back injury.

23. The ALJ makes a rational choice between conflicting opinions, to accept the opinions of Dr. Ghazi, Dr. Prusmack, and Dr. Checa, as based on substantial evidence, and to reject the opinions of Dr. Sweeney and Dr. Bisgard on the issue of causal relatedness of the Claimant's present, worsened condition.

24. The ALJ rejects the Dr. Bisgard's and the Respondent's "age degenerative" theory and finds that the Claimant has proven, by a preponderance of the evidence that his work-related condition has changed and worsened since he reached MMI on July 15, 2013, and that additional medical treatment is reasonably necessary to cure and relieve the effects of the worsened condition, and **not** attributable to the natural progression of pre-existing non-work related back degeneration.

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. Further, as found, the opinions of ATP Dr. Ghazi as well as those of Dr. Prusmack and Dr. Checa, were more credible than the opinions of dr. Sweeney and Respondent's expert, Dr. Bisgard, on the issue of causal relatedness of the worsening because the opinions of the former were more consistent with the totality of the evidence and the seriousness of the Claimant's admitted back injury.

Substantial Evidence

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

Re-Opening

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, an error, a mistake, or **a change in condition**. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S; *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, she must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). As found, the Respondent's "age degeneration" theory was rejected and the Claimant established that his work-related condition changed and worsened since he reached MMI on July 15, 2013, and the recommendations for additional medical treatment and/or surgery are reasonably necessary and **not** attributable to the natural progression of a pre-existing non-work related back degeneration.

Reasonable Notice of "Change of Physician" Issue

d. "The fundamental requisites of due process are notice and the opportunity to be heard." *Franz v. Indus. Claim Appeals Office,* 250 P.3d 755, 758 (Colo. App. 2010) [quoting *Hendricks v. Indus. Claim Appeals Office,* 809 P.2d 1076, 1077 (Colo. App. 1990)]. Workers' compensation benefits are a constitutionally protected property interest which cannot be taken without the due process guarantees of notice and an opportunity to be heard. *See Whiteside v. Smith,* 67 P.3d 1240, 1247 (Colo. 2003). Notice requirements apply to both parties. Reasonable notice requirements need not specify, in the application for hearing, the exact statute upon which a claimant relies in order to afford adequate notice of the legal basis of a claim. *See Carlee Carson v. Indus. Claim Appeals Office* [(No. 03CA0955, October 7, 2004) (not published), *cert. denied,* February 22, 2005]. A general request for the relief sought will suffice. *See Fang v. Showa Entetsu Co.,* 91 P.3d 419 (Colo. App. 2003). As found, the Respondent had reasonable notice that a "change of physician" request was implicit in the "medical" issues set for hearing.

Medical Benefits

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the Claimant's medical treatment is causally related to the worsening of the originally admitted low back injury of April 14,

2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the worsening of the originally admitted back injury.

f. An ALJ may order a **change of physician** if the present treating physician's long-term treatment worsens or does not improve a claimant's condition. *See Ames v. Indus. Claim Appeals office,* 89 P.3d 477 (Colo. App. 2003). Under a recent statutory amendment, a claimant may obtain a one-time change of physicians by filing a written notice on a form designated by the Director of the Division of Workers' Compensation. § 8-43-404 (5) (a) (III), C.R.S. This statutory change illustrates a loosening of provisions providing strict employer-control over authorized treating physicians (ATPs). The fact that a claimant has more faith in a doctor other than the ATP may not be a sufficient reason for a change in the authorized treating physician. *See Yeck v. Indus. Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If, however, the ATP in the workers' compensation system is of the opinion that a claimant's condition , or worsened condition, is not causally related to a work injury, it may plausibly be plausibly inferred that an injured worker seeking work-related treatment has no **faith** in the ATP. An ALJ would be doing such ATP and such claimant a favor by ordering a change of physicians. As Voltaire said, **faith** is 90% of the cure.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to a re-opening and subsequent 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 re-opening and post-MMI medical benefits, including the recommended additional treatment and/or surgery.

ORDER

IT IS, THEREFORE, ORDERED THAT:

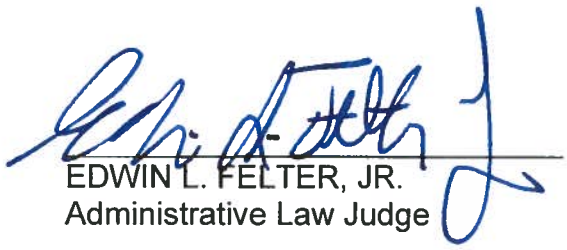
A. W.C. No. 4-916-350-01 is hereby re-opened.

B. The Claimant's implicit request for a change of physician to Chad Prusmack, M.D., is hereby granted, prospectively, as of the hearing date, May 26, 2015.

C. The Respondent shall pay the costs of all authorized medical care and treatment for the admitted injury of April 14, 2013, including the additional treatment and/or surgery recommended by authorized treating physicians, including Dr. Prusmack, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this 19 day of June 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 addressed by this Order involve permanent partial disability, conversion of scheduled impairment to impairment of the whole person and entitlement to maintenance medical treatment. The specific questions to be answered are:

I. Whether Claimant is entitled to conversion of her 19% scheduled upper extremity impairment to 11% whole person impairment;

II. Whether Respondents have produced clear and convincing evidence to overcome Dr. Castrejon's Division IME opinion that Claimant sustained 19% scheduled permanent impairment;

III. Whether Claimant is entitled to an award of post-MMI maintenance medical benefits.

FINDINGS OF FACT

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

1. Claimant works as a store manager for Employer who operates a retail store in Westcliffe, Colorado. She has worked in this capacity for the past 5 ½ years.

2. As the store manager, Claimant's duties vary. She supervises four other employees in the store, is accountable for completing payroll, balancing the budget and taking inventory. While she has administrative responsibilities, Claimant also engages in physical tasks including stocking and unloading freight.

3. The claimant sustained an admittedly compensable on the job injury to her right shoulder on August 19, 2013 when she was unloading the distribution center's truck. The claimant indicated that when unloading the truck, product is rolled down from the back of the semi-truck down rollers and into the building where the product is picked up and put into wheeled metal carts called "boats" for stocking onto the sales floor.

4. On August 19, 2013, Claimant maneuvered a boat stacked with 24 packs of 20 oz. bottles of water from the back of the store to the front of the store to unload the water where a product display was set up. She got about a quarter of the material unloaded when she felt a sharp pain in her right shoulder. She stopped for a while thinking the pain would go away but, since the workers only have a short period of time to unload the truck and get everything set up, Claimant attempted to go back and

complete the job. When she returned to work, Claimant heard a ripping sound in her right shoulder resulting in pain so severe that it took her to her knees. Claimant had another worker finish up while she retired to her office to gather herself together.

5. Claimant reported the injury to the employer's telephone injury report line and was referred by them to CCOM in Canon City where she was evaluated by a physician's assistant (PA), Stephen Quakenbush on August 20, 2013.

6. Claimant completed a pain diagram for PA Quakenbush on August 20, 2014, indicating she was experiencing stabbing pain in the right shoulder and pins and needles in the right finger tips. The claimant rated her pain at a level 8/10. PA Quakenbush diagnosed Claimant with a right shoulder sprain, possible rotator cuff injury, and right paracervical, trapezius, and parascapular muscular strain. PA Quakenbush took Claimant off of work and recommended physical therapy and an MRI.

7. An MRI of the right shoulder was completed on August 22, 2013. The MRI demonstrated mild degenerative changes of the acromioclavicular joint, fluid in the subdeltoid subacromial bursa concerning for bursitis and increased signal in the distal supraspinatus tendon, which may represent a partial thickness tear at the attachment. The infraspinatus and subscapularis tendons appeared intact. The quality of the MRI was limited due to "significant motion artifact."

8. Claimant returned to PA Quakenbush on August 23, 2014 where she completed a pain diagram, indicating pain in the back of the right shoulder, without additional pain complaints documented. The claimant rated her pain at a level 5/10. PA Quakenbush kept the claimant off work and referred her to Dr. Jennifer Fitzpatrick, an orthopedic physician, for evaluation.

9. Claimant began physical therapy with the Custer County Clinic on August 26, 2013.

10. Claimant was examined by Dr. Jennifer FitzPatrick on August 27, 2013. Dr. FitzPatrick diagnosed a partial rotator cuff tear with a marked painful right shoulder. Dr. FitzPatrick provided a cortisone injection and instructed Claimant to follow up in a month.

11. Claimant continued with physical therapy. While the aforementioned cortisone injection helped for approximately five days, Claimant's pain complaints did not completely resolve and remained in the same location.

12. Employer offered the claimant modified employment, within the physician-imposed restrictions, which the claimant accepted. The claimant returned to modified work on August 28, 2014.

13. Claimant's continued to improve with physical therapy. However, on September

6, 2013, while at home, Claimant reached up instinctively to grab a plate that was about to fall going to fall, causing extreme shoulder pain and prompting Claimant to report that she was, "back to square one". Respondents assert that this event constitutes an efficient intervening injury severing the causal connection between Claimant's admitted shoulder injury and her entitlement to benefits including her need for additional treatment, i.e. the surgery performed by Dr. Weinstein.

14. Claimant returned to CCOM and was seen by Dr. Richard Nanes on September 12, 2013. She completed a pain diagram on this date which indicates that she was experiencing pain at a 7/10 level with stabbing in the front of the right shoulder as well as the right and left fingertips. Claimant requested to be seen by Dr. David Weinstein instead of Dr. Fitzpatrick.

15. Claimant was evaluated by Dr. Weinstein on September 27, 2013. Dr. Weinstein diagnosed Claimant with right rotator cuff tendinitis with partial rotator cuff tear, right biceps tendinitis, right acromioclavicular joint inflammation, and right trapezial myofascial inflammation. Dr. Weinstein discussed with the claimant that these diagnoses could heal non-operatively. Consequently, he recommended conservative treatment before considering arthroscopic surgery.

16. Additional therapy proved unsuccessful. Thus, Dr. Weinstein performed surgery on the right shoulder on December 7, 2013. Dr. Weinstein's operative note supports that he performed a "right arthoscopic subacromial decompression;" a "right arthroscopic rotator cuff repair of subscapularis and debridement of supraspinatus tendon tear;" a "right arthroscopic biceps tendodesis;" and a "right arthroscopic distal clavicle resection." As noted above, Respondents assert that Claimant's biceps, infraspinatus and subscapularis tendon tears are explained by her instinctively reaching upwards to grab a plate that was about to fall. As support, Respondents cite that the MRI obtained August 20, 2013 demonstrated the infraspinatus and subscapularis tendons to be intact. The ALJ is not persuaded finding that the MRI was of poor quality secondary to "significant motion artifact." Based upon the evidence presented, including the MRI and the findings in Dr. Weinstein's operative report, the ALJ finds that the infraspinatus, subscapularis, and biceps tearing are, more probably than not related to Claimant's August 19, 2013 admitted right shoulder injury from lifting 24 packs of 20 oz. bottles of water.

17. Claimant underwent an extended course of post-operative physical therapy. On December 26, 2013, Dr. Nanes evaluated the claimant and noted the physical therapist felt the claimant's range of motion was "quite good". He released the claimant to return to modified duty as of January 13, 2014. In her treatment associated pain diagram, Claimant documented only aching pain across the front of the right shoulder.

18. Claimant returned to Dr. Weinstein on March 6, 2014, in follow-up. On March 6, 2014, Dr. Weinstein noted the claimant was doing well with a mild amount of discomfort. On physical exam, Claimant had forward elevation to 170 degrees with external rotation to 50 degrees. Dr. Weinstein opined that Claimant was doing "very well" and anticipated MMI in six weeks.

19. On April 8, 2014, Dr. Nanes evaluated the claimant. He noted that Claimant had pain in the right shoulder, which she considered to be "light". On physical exam, Dr. Nanes noted "excellent and nearly full" range of right shoulder motion, with all movements being pain free.

20. Dr. Weinstein's April 30, 2014 progress report indicates that Claimant was "doing much better" with mild weakness and no other complaints. He noted that she was participating in therapy on a regular basis and had experienced good improvement in her symptoms. On physical exam, Claimant had 170 degrees of forward elevation and internal rotation to L5. Dr. Weinstein recommended continued physical therapy and transition to a home exercise program. Dr. Weinstein released Claimant to return to work, without restrictions, and opined that she was approaching MMI.

21. Dr. Nanes re-examined Claimant on May 6, 2014. During this examination, Claimant described her pain as "almost gone", with pain at a level 0/10. On physical exam, Dr. Nanes documented "excellent", pain free full range of motion of the right shoulder. He noted that Claimant would not need an impairment rating, "as all 6 of her right shoulder motion are completely full". He released the claimant to return to work, without restrictions.

22. Claimant returned to Dr. Nanes for evaluation on June 17, 2014. On physical exam, Dr. Nanes again noted, "excellent and full range of motion of the right shoulder and the movement are without any pain". Dr. Nanes opined that Claimant had an excellent response to surgery and had full range of motion in all six directions. Therefore, he placed the claimant at MMI with no impairment, no restrictions and no need for medical treatment post-MMI.

23. Claimant returned to her regular job as a store manager for the Employer on June 17, 2014. As noted above, Claimant's job duties vary. During her testimony, Claimant described physical requirements of the job as including the ability to lift up to 40 pounds, twisting, turning, kneeling, squatting, reaching overhead, gripping, grasping, keyboarding, unloading trucks, moving merchandise, and stocking. Based upon this testimony, the ALJ finds that while Claimant is the store manager, her job is physically demanding. Claimant has worked her regular job with Employer since being placed at MMI by Dr. Nanes.

24. On June 23, 2014, Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Nanes' in his June 17, 2014 MMI report. Claimant filed a timely objection and the matter proceeded to a Division Independent Medical Examination (DIME) performed by Dr. Miguel Castrejon on September 17, 2014.

25. Dr. Castrejon agreed that the claimant reached MMI, consistent with Dr. Nanes' opinions. However, Dr. Castrejon opined Claimant suffered 6% scheduled impairment for loss of shoulder range of motion. Dr. Castrejon also assigned 3% scheduled

impairment for "motor weakness involving the supraspinatus/infraspinatus, which equates to the suprascapular nerve" by application of Tables 14 and 11 of the *AMA Guides to the Evaluation of Permanent Physical Impairment,* 3d Ed., Revised. Finally, Dr. Castrejon assigned 10% impairment per the Division's Rating Tips, for the distal clavicle resection performed by Dr. Weinstein. Dr. Castrejon's combined impairment rating totaled 19% scheduled impairment of the right upper extremity. Nineteen percent scheduled impairment converts to 11% percent whole person impairment. Dr. Castrejon opined no additional medical care is necessary to maintain the claimant at MMI.

26. Respondents objected to Dr. Castrejon's impairment rating and had Claimant evaluated by Dr. Jorge Klajnbart. In his report dated March 15, 2015, Dr. Klajnbart noted that he did not "see any evidence of injury to the suprascapular nerve" and that Claimant's muscular weakness arose postoperatively for which treatment was focused on regaining strength in the subscapularis and supraspinatus. According to Dr. Klajnbart, Claimant demonstrated "symmetric strength in all upper extremity musculature." Consequently, Dr. Klajnbart did not "concur with the assignment of impairment per Tables 14 and 11" of the *AMA Guides to the Evaluation of Permanent Physical Impairment*, 3d Ed. Revised (hereinafter the *AMA Guides*)

27. The ALJ takes judicial notice of the *AMA Guides* to find that Table 11 relates specifically to "determining impairment of the upper extremity due to loss of power and motor function resulting from peripheral nervous system disorders". Table 14 relates specifically to "Specific Unilateral Spinal Nerve Impairment Affecting the Upper Extremity". Dr. Klajnbart testified that Table 11 of the AMA Guides deals with determining impairment based on loss of power and motor deficits which he did not observe during his evaluation.

28. Respondents contend that Dr. Castrejon erred when he included an additional 3% scheduled impairment per Tables 11 and 14 for weakness equating to the suprascapular nerve because Claimant sustained injury to her shoulder injury only, without peripheral nerve involvement. As emphasized, the ALJ finds Respondents argument to stress that there must be some direct nerve injury/condition causing loss of power or weakness in the muscles innervated by the specific nerve affected before it is appropriate to resort to Table 11 and 14 in determining upper extremity impairment. The *AMA Guides* specifically refers to such nerve involvement as "peripheral spinal nerve lesions" supporting Respondents contention that a particular peripheral spinal nerve must be involved and compromised before rating upper extremity impairment through the use of Tables 11 and 14.

29. Based upon the evidence presented, the ALJ finds Claimant's upper extremity weakness and loss of power is, more probably than not, a function of favoring/protecting the injured arm and not the result of any peripheral nerve injury. Indeed, careful review of the medical record does not support a finding that Claimant sustained any injury to a peripheral nerve, either during the initial event or as a consequence of any treatment necessitated thereafter. Accordingly, the ALJ finds the Dr. Castrejon deviated from and misapplied the *AMA Guides* when he rated Claimant for the consequences of a disorder

that she does not have. Based on the evidence presented, the ALJ finds that Claimant's rating for decreased range of motion in the right shoulder addresses the extent of impairment in the shoulder for weakness and loss of power. Consequently, Respondents have proven by clear and convincing evidence that it is highly probable that the DIME physician's opinions concerning permanent impairment are incorrect. Dr. Castrejon's impairment rating has been overcome by clear and convincing evidence.

30. Dr. Klajnbart, in his report of March 15 indicates that he disagrees with Dr. Castrejon regarding the goniometric ratings of the claimant's loss of range of motion slightly but admitted during his deposition that these could be based upon the claimant's activities before the examination. He agreed that the Division of Worker's Compensation rating tips indicated that a 10% rating was required for a distal clavicle resection (excision) but was somewhat confused initially as to whether that was as a whole person or on the schedule in his deposition. Although Dr. Klajnbart did not attach a rating impairment work sheet to his report in his deposition of May 7, 2015, he opined that the claimant sustained an overall impairment of 8% percent as whole person when the scheduled impairments for range of motion loss and the distal clavical resection were combined and converted. Dr. Klajnbart further stated that he was not aware of any need for apportionment.

31. Claimant testified credibly that she has pain in the back of her neck all the way across to the shoulder and pain in the scapula area which is a nonstop, constant pain. She has additional pain in the front that extends from the neck to the shoulder and increases with activity. The pain in the scapula area is constant and never goes away. It is like a dull throb. Claimant described its location as being about 3 inches from the bottom of the armpit towards the back. She stated that, if she attempted to make a golf swing, the pain in the area of the scapula becomes intense like a sharp, stabbing pain. The issues with the pain on top in front of the clavicle occur when she has attempted to do things such as bowling. When she attempted to take the bowling ball behind her, she has a pulling sensation and pain across the top by the neck. The pain is located between her neck and shoulder. The claimant cannot sleep on her right shoulder as the pain in the back and scapula hurts. Claimant still has pain and soreness in the area where dry needling attempts were performed by Dr. Scheper. If Claimant attempts to perform activities such as vacuuming or wiping down a counter, she has pain across the back between the shoulder and neck and her scapula pain increases. If she attempts to unload the trucks at work, the pain in the scapula area increases and she must stop after 10 minutes of work. Claimant has a horse that she can no longer saddle as cinching the saddle on the horse causes intense scapular pain.

32. Based on Dr. Klajnbart's deposition testimony, the ALJ infers and finds that the acromiom and clavical are located on the front of the body, on top of the shoulder proper and medial (more towards the center of the body) to the glenohumeral joint in the sagittal plane. Consequently, the ALJ finds the acromion and clavicle anatomic structures beyond the glenohumeral joint and not part of the arm itself.

33. The preponderance of the persuasive evidence presented demonstrates that

Claimant's permanent impairment extends beyond her left arm. Accordingly, the ALJ finds that conversion of Claimant's scheduled impairment to impairment of the whole person is warranted in this case.

34. The ALJ credits Dr. Klajnbart's impairment rating opinions to find that Claimant has 8% whole person impairment.

35. Based upon the evidence presented, Claimant failed to meet her burden of proving that she requires medical treatment to maintain her condition at MMI.

CONCLUSIONS OF LAW

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

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

B. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S.* However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). 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.*

C. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. 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. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998). Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.

D. It is true, as Claimant points out, that "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, as noted by Claimant "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, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of 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 his/her "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office, 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.*

E. In this case, the ALJ agrees with Claimant that the persuasive evidence warrants conversion of her scheduled impairment to impairment of the whole person. As found, both the acromion and the distal clavicle are structures beyond the "arm." Consequently, the subacromial decompression and distal clavicle resection, which permanently altered these anatomical structures, were performed above and medial to the glenohumeral joint and therefore, above the "arm." *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008)(finding that subacromial decompression was done at the acromion and the coracoacromial ligament to relieve the impingement, which was related to the scapular structures above the level of the glenohumeral joint"); *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO, April 13, 2006) (finding that distal clavicle resections are proximal to the glenohumeral joint and therefore, on the trunk of the body). Furthermore, the consistent and convincing evidence establishes that Claimant suffers from persistent pain and weakness in the scapula and surrounding stabilizing musculature of the upper back (infraspinatus, supraspinatus and subscapularis) which affects her sleep and limits her ability to perform activities, including lifting with the right arm. In concluding that Claimant is entitled to conversion of her scheduled impairment to impairment of the whole person, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Steinhauser v. Azco,*

Inc., W.C. No. 4-808-991 (ICAO, January 11, 2012) and *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (ICAO, March 27, 1986) instructive. In *Steinhauser,* the Panel affirmed the conclusion of the ALJ that pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment. Similarly, in *Franks* pain affecting the trapezius and difficulty sleeping on injured side supported the ALJ's finding of whole person impairment. On the evidence presented, the ALJ concludes that the instant case is analogous to *Steinhauser* and *Franks* in that Claimant has produced convincing evidence that she has persistent scapular pain and weakness in the muscles stabilizing the scapula which limits her functional abilities and her sleep. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that she sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which warrants conversion of his scheduled impairment to whole person impairment.

F. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and Subsection (8) provides a Division Independent Medical Examination ("DIME") process for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). The heightened burden of proof in Subsection (8) applies only if the threshold determination is made that the impairment is not limited to the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the rating of the DIME. *Webb v. Circuit City Stores, Inc.*, W.C. No. 4-467-005 (ICAO, August 16, 2002). Because the ALJ concludes that Claimant has sustained functional impairment beyond the schedule, the clear and convincing burden to overcome the DIME applies in this case.

G. Section 8-42-107(8), C.R.S., provides that the DIME physician's finding of medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence has been defined as evidence which demonstrates that it is highly probable the DIME physician's determinations are incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (1995). Consequently, to overcome the DIME report, there must be evidence which proves that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co. v. Gussert, supra.* Whether the party challenging the DIME physician's determinations has overcome the report by clear and convincing evidence is generally one of fact for determination by the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *Metro Moving and Storage Co. v. Gussert, supra.*

H. Workers' compensation physicians in Colorado are charged with utilizing the *AMA Guides, Revised 3rd Edition* and the *Division of Workers' Compensation Accreditation Guidelines* in rendering a determination as to a patient's permanent impairment rating stemming from a work related injury. The Division has additionally

propounded *Impairment Rating Tips* to assist rating physicians in assigning permanent impairment ratings. Whether a physician has properly applied the *AMA Guides* in arriving at a Claimant's impairment rating is a question of fact for the ALJ's determination. *See Metro Moving & Storage Co. v. Gussert, supra*. As found here, substantial evidence establishes that Dr. Castrejon deviated from and misapplied the *AMA Guides* when he rated Claimant according to Tables 14 and 11 for the consequences of a peripheral nerve that is not contributing to her impairment. Based upon evidence presented, the effect of such deviation resulted in Claimant receiving impairment for weakness when impairment for weakness was taken into account based upon Claimant's impairment for range of motion loss. Consequently, the ALJ concludes that it is highly probable that Dr. Castrejon's opinions concerning permanent impairment are incorrect. As Dr. Castrejon's impairment rating has been overcome and Claimant has functional impairment beyond the arm at the shoulder, the ALJ adopts Dr. Klajnbart's 8% whole person rating as expressed in his deposition testimony.

I. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Citing *Grover*, the Court reaffirmed that "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Thus, while a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment, the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan, supra.* If the claimant reaches this threshold, the court stated, as the second step, that the ALJ should enter "a general order, similar to that described in *Grover*." In this case, the ALJ concludes that Claimant failed to introduce persuasive evidence to substantiate her claim for post MMI maintenance medical benefits. Indeed, no physician has recommended medical benefits to maintain Claimant at MMI for her industrial shoulder injury.

ORDER

It is therefore ordered that:

1. The permanent impairment rating of Dr. Castrejon is set aside and the rating expressed by Dr. Klajnbart during his deposition is adopted.

2. Claimant's request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is GRANTED.

3. Insurer shall pay permanent partial disability benefits consistent with a 8% whole person disability rating pursuant to C.R.S. § 8-42-107(8)(d), taking credit for any PPD benefits previously admitted and paid.

4. Claimant's request for an award of medical benefits post-MMI is DENIED AND DISMISSED.

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

6. All matters not determined herein 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: June 30, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
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STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501	
In the Matter of the Workers' Compensation Claim of: **JOHN ABEYTA,** Claimant, vs. **MESA COUNTY COLORADO,** Employer, and **TRISTAR RISK MANAGEMENT,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-620-040-04**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Hearing in this matter was held on October 1, 2014 and on December 9, 2014 before Keith E. Mottram, Administrative Law Judge.

Claimant was present and represented by Christopher Richter Esq. Respondents Mesa County and Tristar Risk Management were represented by Thomas W. Blake Esq. Respondent Mesa County and Pinnacol Assurance were represented by Jeff Francis, Esq. This matter was digitally recorded in Grand Junction, Colorado from 1:01 p.m. until 5:06 p.m. on October 1, 2014 and from 8:33 a.m. until 3:24 p.m. on December 9, 2014. Claimant's Exhibits 1-17 were admitted at hearing. Respondents Mesa County and Tristar Risk Management Exhibits A-JJ and LL-MM were admitted at hearing. Respondents Mesa County and Pinnacol Assurance Exhibits AAA-VVV were admitted at hearing.

In this order, John Abeyta will be referred to as "Claimant"; Mesa County will be referred to as "Employer"; Pinnacol will be referred to as "Insurer 1" and Tristar Risk Management will be referred to as "Insurer 2."

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2003); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

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Date: 6/17/2015

/s/Gail Dyet
Court Clerk

#JSRMV2NA0D18CTv

ISSUES

- Whether claimant has proven by a preponderance of the evidence that his use of the medication Provigil is authorized, related, and reasonably necessary to cure and relieve him from the effects of his November 21, 2003 work injury?

- Whether claimant has proven by a preponderance of the evidence that his use of the medication Provigil is authorized, related, and reasonably necessary to cure and relieve him from the effects of his April 11, 2005 work injury?

- Whether Insurer 1 and/or Insurer 2 have proven by a preponderance of the evidence that claimant suffered a subsequent, intervening injury/condition which severs liability for claimant's use of the medication Provigil in whole or in part?

- Whether Insurer 2 has proven by a preponderance of the evidence that liability for claimant's use of the medication Provigil should be apportioned to the November 21, 2003 work injury and/or to claimant's non-work-related conditions?

- Whether Insurer 1 has proven by a preponderance of the evidence that Insurer 2 and/or claimant are barred by the doctrines of issue preclusion (collateral estoppel) and/or law of the case from apportioning liability for claimant's use of the medication Provigil to the November 21, 2003 work injury?

- The parties requested that the Order indicate that all medical bills are to be paid pursuant to the Colorado Medical Fee Schedule.

FINDINGS OF FACT

1. Claimant was employed with employer at the detention center. Claimant testified his job duties for employer required him to handle disruptive or combative inmates and his job involved significant physical activities. Claimant sustained a compensable injury to his cervical spine on November 21, 2003. Insurer 1 admitted liability for this claim which was assigned W.C. No. 4-620-040.

2. Claimant was referred for medical treatment following his November 21, 2003 injury to Dr. Stagg. Dr. Stagg referred claimant to Dr. Copeland for orthopedic evaluation. Dr. Copeland recommended physical therapy. Dr. Stagg also referred claimant to Dr. Gilman for diagnostic testing.

3. Dr. Gilman performed an electromyelogram and nerve conduction study (EMG/NCV) of claimant's right upper extremity on January 19, 2004. The EMG was noted to be normal with no evidence of cervical radiculopathy, but suggestive of borderline carpal tunnel syndrome.

4. Dr. Stagg referred claimant for a magnetic resonance image ("MRI") of the cervical spine on January 27, 2004. The MRI was performed on February 5, 2004 and demonstrated a bulging disc and C5-6 with a smaller disc bulge at C6-7. The radiologist that reviewed the MRI noted that the C5-6 bulge extended into the right C6 foramen and noted potential nerve root compression on the right at C5-6.

5. Claimant was subsequently referred to Dr. Gebhard. Dr. Gebhard evaluated claimant on February 23, 2004. Dr. Gebhard noted claimant's MRI results and diagnosed claimant with a herniated nucleus pulposus at C5-C6 on the right. Dr. Gebhard recommended claimant continue with conservative non-operative treatment. Dr. Gebhard noted that if claimant did not improve, he may be a candidate for a decompressive discectomy and fusion at the C5-C6 level.

6. Claimant was referred to Dr. Janssen for a second opinion regarding his cervical spine on April 6, 2004. Dr. Janssen noted that claimant had a C5-6 cervical disk herniation with right C6 radiculitis, but no evidence of radiculopathy or myelopathy. Dr. Janssen noted claimant had no decreased function and only decreased sensation along the C6 distribution. Dr. Jannsen noted claimant denied wanting to have surgery and recommended claimant return to Dr. Gebhard.

7. Claimant returned to Dr. Stagg on May 20, 2004 and noted he was doing quite a bit better. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Stagg on July 14, 2004. Dr. Stagg provided claimant with a permanent impairment rating of 13% whole person and recommended ongoing medical treatment consisting of nonsteroidal anti-inflammatory medications and continued follow up visits.

8. Insurer 1 filed a final admission of liability ("FAL") admitting for the whole person impairment rating on July 21, 2004. The FAL also admitted for maintenance medical treatment.

9. Claimant continued to follow up with Dr. Stagg after being placed at MMI. Claimant was evaluated by Dr. Stagg on November 18, 2004 and noted he was having difficulty sleeping and reported numbness into his upper extremity. Dr. Stagg noted that when claimant was placed at MMI, there were indications that if claimant's symptoms worsened, he may need additional physical therapy and potentially surgery. Dr. Stagg noted that claimant remained at MMI, but recommended a short course of physical therapy.

10. Claimant sustained his second injury with Employer on April 11, 2005 when he was participating in physical agility testing and was assisting with a tackling dummy. Claimant was injured while catching the tackling dummy.

11. Claimant sought treatment following the injury with Dr. Duke on April 20, 2005. Claimant presented an accident history to Dr. Duke that he had helped his wife with housecleaning and developed a onset of severe upper back pain and left arm pain five days prior. Claimant denied any new injuries. Claimant eventually sought a hearing on this claim to determine if the symptoms were related to a new injury on April 11, 2005. This claim was determined to be compensable by Order of an ALJ on September 8, 2006.

12. Claimant was referred by Dr. Duke to Dr. Janssen. Claimant eventually underwent a microscopic dissection of the spine; intraoperative fluoroscopy for localization at the subaxial spine, an anterior C6-7 cervical discectomy, hemicorpectomy, bilateral spinal cord decompression, removal of extruded disc fragment, with C7 nerve root decompression, and foraminotomy and anterior C6-7 cervical prosthesis of 5 mm extra-large Prodisc reconstructions and an anterior C5-6 cervical arthroplasty on May 25, 2005 under the auspices of Dr. Janssen.

13. Claimant underwent an MRI of the lumbar spine on June 10, 2005. The MRI of the lumbar spine showed moderate left foraminal encroachment at L4-5 secondary to eccentric disc protrusion and facet arthrosis. Claimant returned to Dr. Janssen on June 28, 2005 and noted that his left upper extremity pain had been relieved post surgery. However, claimant was experiencing severe lower extremity pain.

14. Claimant underwent a course of treatment for his lumbar spine with Dr. Janssen including a translaminar lumbar epidural steroid injection on June 28, 2005. Dr. Janssen eventually performed a left sided L5 foraminotomy and nerve root decompression and left-sided L4 formaminotomy and partial discectomy and decompression at the L4-L5 level on September 8, 2005.

15. Claimant also continued to complain to Dr. Janssen of right upper extremity symptoms. Dr. Janssen noted on August 23, 2005 that he was referring claimant for an EMG of his right upper extremity. The EMG was performed by Dr. Leimbach on September 8, 2005. Dr. Leimbach noted that the findings were consistent with a right C6 radiculopathy. Dr. Price testified at hearing that the EMG showed right sided radiculopathy and demonstrated a change from the prior EMG in January 2004.

16. Claimant underwent surgery on his lumbar spine on November 3, 2005 under the auspices of Dr. Janssen.

17. Claimant continued to treat conservatively with physical therapy for his cervical condition. Claimant was referred for a repeat cervical MRI on June 1, 2006 that showed no evidence of cord compression or high grade foraminal narrowing. Claimant also underwent a repeat MRI of the lumbar spine. The MRI of the lumbar spine showed evidence of a recurrent herniation at the L5-S1 level that compromised the neural foramen.

18. Dr. Janssen noted on June 2, 2006 that his review of the MRI's showed no evidence of extradural compressive pathology in the cervical spine. Dr. Janssen did recommend additional lumbar surgery that was performed on October 11, 2006. The surgery consisted of a left sided L4 foraminotomy and nerve root decompression with a left sided L5 foraminotomy and removal of the partial disc herniation at the L5 level. Following the surgery, claimant continued to complain of left leg pain and numbness.

19. With regard to claimant's cervical spine, claimant was referred to Dr. Price for medical treatment. Dr. Price evaluated claimant initially on December 13, 2006. Dr. Price has provided various treatments for claimant, including but not limited to medications (Gabapentin, Lyrica, Lidoderm patches, Cymbalta, Percocet and Oxycontin), acupuncture, stimulation, and physical therapy. Claimant additionally had diagnostic studies during this time including follow up x-rays, and a follow up EMG study. The EMG study showed signs of a C8 radiculopathy on the right side. Dr. Janssen noted that the C8 radiculopathy would correlate with claimant's report of grip weakness in the right hand.

20. Claimant underwent additional MRI's of the lumbar and cervical spine on February 13, 2007. The cervical MRI showed questionable neural foraminal narrowing, but no high grade central stenosis at C5-6. The lumbar MRI showed evidence of claimant's surgical intervention including scarring that extended anteriorly along the left lateral aspect of the thecal sac to surround the left L5 nerve root as it descends into the lateral recess.

21. Claimant returned to Dr. Price on March 6, 2007 and noted that he had not felt better since his cervical spine surgery. Dr. Price noted the results of the EMG study showing a possible C8 radiculopathy and referred claimant to Dr. Bowen for pain management.

22. Claimant was subsequently evaluated by Dr. McLaughlin on March 29, 2007 for an independent medical evaluation ("IME"). Dr. McLaughlin noted that Dr. Price was recommending ongoing treatment including acupuncture and counseling. Dr. McLaughlin noted that in his opinion, claimant was not yet at MMI and provided claimant with a provisional rating of 45% whole person, with 14% being apportioned to the prior injury. Dr. McLaughlin noted the provision rating for the April 11, 2005 injury would then be 36% whole person. Dr. McLaughlin noted that claimant reported he did well

following his 2003 injury, but had some residual discomfort, although he was able to return to work without restrictions. Dr. McLaughlin recommended claimant continue to treat with Dr. Price.

23. Dr. Price testified at hearing that claimant had changes at the C6-7 level between February 2004 and April 20, 2005. Dr. Price testified that the surgical intervention claimant underwent in May 2005 would also change the condition of claimant's C5-6 disk. Dr. Price subsequently testified after reviewing additional records that the surgery performed by Dr. Janssen only involved the C6-7 disk.

24. Dr. Price testified that she began prescribing Provigil for claimant in 2008 due to claimant's depression. Dr. Price testified the Provigil was to replace other anti-depressant medications. Dr. Price testified she would related claimant's Provigil to the C6-7 work injury in 2005. Dr. Price noted that claimant's prescription for Provigil was now being handled through Dr. Mattox in Durango who had taken over claimant's maintenance medical treatment.

25. Dr. Mattox evaluated claimant on January 14, 2008 as part of his psychiatric treatment. Dr. Mattox noted claimant was reporting that he was limited by pain and fatigue. Dr. Mattox noted claimant's current medications included Gabapentin, Cymbalta and Lunesta. Dr. Mattox diagnosed claimant with major depressive disorder and back and neck pain, among other diagnoses. Dr. Mattox did not prescribe claimant's opiate medications, but did begin providing claimant with a prescription for Provigil. Dr. Mattox consistently diagnosed claimant with a major depressive disorder and chronic pain throughout his treatment that has continued through 2014.

26. Insurer 2 obtained a physician advisor report from Dr. Antonelli on February 27, 2013. Dr. Antonelli reviewed the claimant's medical records and issued a report that opined that the use of Provigil was not reasonable, necessary or related to the April 11, 2005 work injury.

27. Claimant was referred for an independent medical examination ("IME") with Dr. Anderson-Osser on September 25, 2013 at the request of Insurer 2. Dr. Anderson-Osser indicated in her IME report that it was her opinion that the Provigil should be apportioned 1/3 to the November 21, 2003 injury, 1/3 to the April 11, 2005 injury and 1/3 to his non-work related factors, including his low back pain and nocturnal hypoxia. Dr. Anderson-Osser opined that claimant's use of the Provigil was related to multiple factors, including his work injuries, chronic pain and possibly underlying sleep apnea.

28. Dr. Anderson-Osser issued a second IME report on March 10, 2014 after reviewing additional medical records. Dr. Anderson-Osser noted in her report that Dr. Price had indicated that claimant's depression was related to not only the November 21,

2003 injury, but also the April 11, 2005 injury. Dr. Anderson-Osser noted that the apportionment of the Provigil between his two work related injuries and his non-work related conditions was very subjective, but maintained that it should be split up between the three factors by equal 1/3 amounts.

29. Claimant underwent a Division sponsored Independent Medical Evaluation ("DIME") with Dr. Hughes on April 1, 2014. Dr. Hughes provided claimant with a permanent impairment rating of 29% whole person, but apportioned claimant's prior impairment rating of 13% whole person and opined that for the April 11, 2005 injury, claimant's impairment rating was 19% whole person. This rating included a 3% whole person impairment rating for claimant's depression. With regard to the Provigil, Dr. Hughes opined that 25% of claimant's use of the Provigil was related to his work related injury of April 11, 2005 and the rest was related to his non-occupational conditions including his lumbar spine and extremity joints. Dr. Hughes opinion regarding claimant's use of the Provigil references the cervical spine injuries, and in that regard, the ALJ interprets Dr. Hughes opinions as referencing both cervical spine injuries.

30. Dr. Price testified at hearing that she would apportion at least 80% of the need for Provigil to the April 2005 injury and subsequent surgery. Dr. Price testified that she was treating claimant for the C6-7 injury and the C5-6 injury, but the C6-7 injury was more involved. Dr. Price testified that when she initially prescribed claimant Provigil on March 14, 2008, she did so to treat his neck pain only. As of March 14, 2008, Dr. Price provided claimant with samples of Provigil 100 mg to be taken in the morning. By September 10, 2008, claimant was taking Provigil 200 mg twice per day. This was being prescribed by Dr. Mattox. Dr. Price testified that she has tried to wean claimant off the Provigil, but it has not worked.

31. The ALJ notes that while Dr. Price testified that Dr. Stagg indicated that he would not provide treatment to claimant after the April 11, 2005 injury, and indicated in her testimony that this supported the opinion that Dr. Stagg believed claimant's April 11, 2005 injury caused the new symptoms in his neck, the ALJ is not persuaded that this is the case. The ALJ notes that when Dr. Stagg began providing treatment for claimant following the April 11, 2005 injury, he did not provide an opinion regarding the compensable nature of claimant's symptoms. Instead, Dr. Stagg noted that the claim had been denied and stopped treating claimant based on that denial, not based on any opinion expressed by Dr. Stagg.

32. Claimant testified at hearing that he is unable to function without the Provigil. The ALJ credits claimant's testimony and the supporting medical records and determines that claimant has demonstrated that his use of Provigil is reasonable and necessary medical treatment related to his industrial injuries.

33. The ALJ finds that claimant was prescribed Provigil in 2008 and finds that there is insufficient evidence of an intervening injury that would sever the causal connection of the prescription for Provigil to the industrial injuries. While claimant subsequently had surgical intervention involving his low back, Dr. Price, who originally prescribed the Provigil, testified that the basis for his Provigil prescription was due to his neck pain.

34. Insurer 1 obtained an IME from Dr. Scott on July 10, 2014. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant. Dr. Scott noted in his report that Dr. Price's medical records did not explain why she started claimant on Provigil in March 2008. Dr. Scott opined in his September 5, 2014 report that claimant's use of the Provigil was not related to the November 21, 2003 work injury. Dr. Scott based this opinion on the fact that claimant was not prescribed Provigil until after the April 11, 2005 work injury and was used to treat a major depressive disorder that developed after the April 11, 2005 injury.

35. Insurer 1 also argues that the issue of apportionment of the Provigil is barred by issue preclusion based on the prior Order of ALJ Martinez that found claimant suffered a new injury. The ALJ is not persuaded that issue preclusion would apply to the apportionment argument raided by Insurer 2 in this case. Specifically, the ALJ finds that the issue of apportionment of Provigil was not litigated at the prior hearing. Therefore the ALJ determines that the issue of apportionment for maintenance medical benefits is not identical to an issue raised, litigated and decided by the September 8, 2006 Order of ALJ Martinez.

36. The ALJ notes that the issue involving apportionment in this case arises under the law as it existed for the time of the April 11, 2005 and November 21, 2003 work injuries. Insurer 1 argues in their position statement that the court should either refuse to apportion the need for the Provigil or alternatively, find that the use of Provigil is not reasonable, necessary or related to claimant's industrial injuries. Insurer 2 argues that the Provigil should be apportioned 1/3 to the November 21, 2003 work injury, 1/3 to the April 11, 2005 injury and 1/3 to the non-industrial injuries.

37. The ALJ credits the opinion of Dr. Price and the medical records from Dr. Janssen and Dr. Stagg and concludes that claimant's use of the Provigil is related to the April 11, 2005 work injury and not the November 21, 2003 work injury. The ALJ finds that the use of Provigil was originally prescribed by Dr. Price in May 2008 in relation to treatment related to Claimant's April 11, 2005 injury. The ALJ further notes that based on *Resources One, LLC v. Industrial Claim Appeals Office,* 148 P.3d 287 (Colo. App. 2006), it would be improper to apportion the use of Provigil between the work related injury and claimant's non-work related conditions.

38. The ALJ concludes based on the testimony of Dr. Price and claimant's testimony that while claimant's non-work related conditions, including his low back condition, may benefit from claimant's use of the Provigil, the Provigil was originally prescribed and continues to be prescribed as treatment for the effects of claimant's April 11, 2005 work injury. The ALJ further finds and concludes that claimant has demonstrated that it is more probable than not that his continues prescription of Provigil from Dr. Mattox is related to the April 11, 2005 work injury. As such, apportionment is inappropriate in this case.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S, 2008. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

4. As found, claimant has proven by a preponderance of the evidence that the prescription for Provigil is reasonable medical treatment necessary to prevent further deterioration of claimant's condition.

5. For injuries occurring prior to July 1, 2008, medical benefits may be apportioned between successive industrial injuries or between an industrial injury and a subsequent non-industrial injury where both injuries contribute to the need for additional medical treatment. See, e.g., *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001); *State Compensation Insurance Fund v. Industrial Commission*, 697 P.2d 807 (Colo. App. 1985).

6. However, the Court of Appeals noted in *Resources One, L.L.C. v. Industrial Claim Appeals Office*, 148 P.3d 999 (Colo. App. 2006) that there were three main types of apportionment: (1) between employers, where disability results from successive injuries or exposures; (2) between an employer and a Second or Subsequent Injury Fund; and (3) between an employer and the claimant, when a prior injury or condition contributes to the final disabling result. *Resources One, L.L.C. v. Industrial Claim Appeals Office*, 148 P.3d 999 (Colo. App. 2006), citing *Larson's Workers' Compensation Law* § 90.2 at 90-3. The Court of Appeals noted that unlike in the first two types of apportionment, the third type of apportionment may result in a reduction of claimant's benefits. The Court of Appeals went on to note that the apportionment statutes did not authorize the apportionment of medical and temporary disability benefits. The Court of Appeals in *Resources One, L.L.C.* went on to acknowledge that divisions of the court had previously approved the apportionment of medical and temporary disability benefits, but noted that these decisions involved the apportionment of benefits between successive employers. Insofar as the *Duncan* decision supported a finding that would allow for apportionment between a work related injury and a non-work related condition, this division of the Court of Appeals refused to follow it.

7. The ALJ notes that after the decision in *Resources One, L.L.C.*, the legislature went on to amend the statutory provisions involving apportionment to no longer allow an employer to apportion medical and temporary disability benefits between a work related injury and a non-work related condition.

8. The ALJ finds that reasoning expressed by the Court of Appeals in *Resources One, L.L.C. v. Industrial Claim Appeals Office*, *supra.* to be persuasive, especially in light of the amendments that were then made to the Colorado Workers' Compensation Act in 2008. The ALJ therefore determines that apportioning medical benefits between work related injuries and non-work related conditions is inapplicable.

The Court notes that the exception to this rule carved out by the legislature involving *Anderson v. Brinkhoff*¸ 859 P.2d 819 (Colo. 1993), involved an occupational disease, and not a specific injury and is therefore, inapplicable to the analysis in this case.

9. The ALJ notes prior decisions from the Industrial Claim Appeals Panel including *Lancaster v. Arapahoe County Sherriff Department*, W.C. Nos. 4-744-646 and 4-746-515 (May 12, 2010) that have remanded cases in which the ALJ did not consider apportionment of medical benefits where the medical benefits were related to the combination of a work related injury and a non-work related injury. However, this case can be distinguished from *Lancaster* in that the ALJ in *Lancaster* found that claimant's development of the specific condition for which he was receiving medical treatment (CRPS) was related 50% to the claimant's work injury and 50% to a non-work related injury.

10. In this case, claimant's condition for which he was originally prescribed Provigil was the April 11, 2005 work injury. Furthermore, as found, claimant has proven by a preponderance of the evidence that his continued use of Provigil is related to his April 11, 2005 work injury. The mere fact that claimant's use of Provigil may provide him with some relief of symptoms related to non-work related injuries is not sufficient to allow for this court to apportion the cost of his medication between the compensable work related injury and non-work related event based on the facts of this case.

11. The ALJ notes that this leaves the possibility that the cost of the Provigil could be apportioned between the insurance carriers. However, the ALJ credits the testimony of Claimant and Dr. Price along with the supporting medical records and determines that the Provigil was related to Claimant's April 11, 2005 injury and not the November 21, 2003 injury. In support of this conclusion, the ALJ notes that claimant's April 11, 2005 injury involved a different level of his cervical spine than the November 21, 2003 injury and credits Dr. Price's testimony that her initial prescription of the Provigil was designed to treat claimant for the April 11, 2005 injury.

12. Based on the foregoing determination, the court need not consider Insurer 1's argument that issue preclusion would prohibit an Order finding them responsible for a portion of the cost of the Provigil.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that the Provigil is reasonable and necessary medical treatment related to claimant's April 11, 2005 work injury.

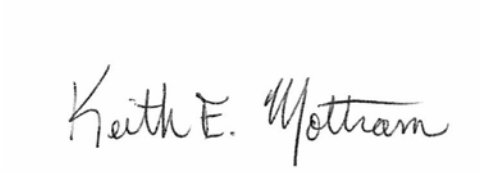
2. Insurer 2 shall pay for claimant's prescription of Provigil being provided by Dr. Mattox.

3. All medical bills shall be paid pursuant to the Colorado Medical Fee Schedule.

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

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

DATED: June 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 she sustained a compensable injury arising out of and in the scope 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 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 benefits for the period of June 18, 2014 until February 2, 2015?

- Whether respondents have proven by a preponderance of the evidence that claimant is an independent contractor pursuant to Section 8-40-202(2)(b)(II), C.R.S.?

- Whether respondents have proven by a preponderance of the evidence that claimant's benefits are subject to a 50% penalty for a willful violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S.?

- At the commencement of the hearing, claimant sought to add the issue of penalties for failure to obtain workers' compensation insurance to the hearing, but the motion was denied by the ALJ. Therefore, whether Respondent properly obtained workers' compensation insurance is not an issue decided by this Order.

FINDINGS OF FACT

1. Claimant testified at hearing that she ran into Mr. Cintron, owner of Respondent, during the summer of 2014. Claimant testified Mr. Cintron told her he may have some work available for her as a painter over the summer. Claimant testified she subsequently had a meeting with Mr. Cintron in which he inquired as to whether she had insurance and she informed him that she had health insurance. Claimant testified that Mr. Cintron informed claimant that if he had enough work to keep claimant busy, she would need to get liability insurance. Claimant testified Mr. Cintron offered to take the money out of her check for the liability insurance. Claimant testified at hearing that she thought she was being hired as a temporary employee, and if Mr. Cintron hired her full time she would be an independent contractor and would need to get her own insurance. Claimant testified at hearing that she did not have her own liability insurance at the time of her injury.

2. Mr. Cintron testified claimant approached him when he came to pick up his daughter from school on the last day of work. Mr. Cintron testified that claimant asked him if he had any work for her as a painter and he informed her that he did not, but took her phone number in case he had extra work. Mr. Cintron testified he subsequently set up two meetings with claimant, one at her house and one at his house. Mr. Cintron testified he inquired at the first meeting if claimant had insurance and she informed him that she had medical insurance through a concurrent employer. Mr. Cintron testified he informed claimant that "all of my guys carry liability insurance".

3. Mr. Cintron testified that at the second interview he again asked claimant if she had insurance and claimant assured him that she had the necessary insurance. Mr. Cintron apparently did not require claimant to present proof of the insurance, however.

4. Claimant began working for Respondent at the Rocky River Resort project on June 11, 2014. Mr. Cintron testified claimant worked two half days on this site. Claimant testified she was paid $15 per hour for her work with Respondent.

5. Mr. Cintron testified that he normally pays his sub-contractors a percentage of the painting contract. Mr. Cintron testified he paid claimant hourly because he was trying to figure out if claimant could paint and complete a job on her own.

6. Mr. Cintron testified that he does not hire any employees and does not oversee the work performed by his painters. Mr. Cintron testified that if a job is not properly performed by one of his painters, he does not call the painter back for the next job.

7. Mr. Cintron testified that he does not provide tools for his painters, but does provide materials, such as paint, stains, thinner, primer, and ladders. Mr. Cintron testified he provides his contractors 1099 forms at the end of the year unless the contractor does not earn the minimum amount for a 1099 form of $600. Mr. Cintron noted that claimant was not provided a 1099 form because she did not earn the minimum amount of $600 in her work with Respondent.

8. Claimant testified that she was instructed by Respondent to work from 9-3 each day. Mr. Cintron testified he did not instruct claimant to show up at a particular time and she had advised him that she could only work until 3:00 p.m. because she had a second job during the evening.

9. Mr. Cintron testified that during their meetings before painting, claimant informed Mr. Cintron that she was afraid of heights. Claimant testified that she informed Mr. Cintron that she would not go above the twelfth rung on the ladder because she was only being paid $12 per hour. Regardless, on the first job that claimant worked with Respondent, Mr. Cintron secured a ladder to a pole so claimant could climb onto the low roof in order to pain the fascia.

10. Conflicting evidence was presented at hearing regarding the amount of work claimant performed at the first job site. Regardless of the amount of painting claimant completed at the job site, the parties agree that claimant was paid for two days working approximately six hours each day.

11. Claimant testified at hearing that she was paid for her first job by check issued to her directly. Copies of the checks were entered into evidence and are issued from Respondent's business account to claimant individually. Claimant was paid $230 for her work on the first painting project which included $180 for 12 hours of work at $15 per hour and $50 for a bonus.

12. Claimant was issued a second check for her work on the second project that was for $140, representing 10 hours at $14 per hour. This check was made out to claimant individually. Claimant kept track of her own hours and submitted the hours to Respondent to be paid.

13. Mr. Cintron testified at hearing that he did not require claimant to work exclusively for his company. This is evidenced by the fact that claimant had concurrent employment while working for Mr. Cintron.

14. Claimant worked on the second project, a painting job at Wild Goose Lane, on June 16, 2014. Claimant testified she worked June 16, 2014 painting areas on the condominium she could reach with 12 rungs on the ladder. Claimant testified Mr. Cintron was present and instructed the painters on what to do. On June 17, 2014, claimant arrived at work and set up a ladder to paint the peak of an awning at the entrance of the condominium when the ladder collapsed and claimant fell fracturing her right wrist and suffering a laceration on her face.

15. Claimant was taken by another painter from the project site to the emergency room ("ER") where she was treated for her injuries. Claimant underwent x-rays of her right hand and wrist along with computed tomography studies of her face, cervical spine, thoracic spine and head. Claimant was diagnosed with a right comminuted fracture of the distal radius.

16. Following her treatment at the ER, claimant followed up with Dr. Griggs. Dr. Griggs performed surgery on her right distal radius fracture on June 17, 2014. Claimant followed up with Dr. Griggs after her surgery and she was given work restrictions as of July 28, 2014 that limited her lifting to no more than 10 pounds. Claimant's work restrictions were increased to 30 pounds as of September 8, 2014 and to 50 pounds on November 16, 2014. Dr. Griggs eventually placed claimant at maximum medical improvement as of February 2, 2015.

17. Mr. Cintron testified that on June 17, 2014 he noticed the ladder laying on the ground and realized it was the top half of a 24' ladder that did not have the bottom half with the feet on it. Mr. Cintron testified he knew the ladder belonged to another painter and had considered using it until he realized the ladder did not have the feet.

Mr. Cintron testified he moved the ladder back to the owner's truck. Mr. Cintron testified he found out later when standing on the other side of the condominium complex of claimant's fall from the ladder.

18. Conflicting testimony was presented as to whether claimant used brushes on the second job provided by Respondent. Claimant testified she used her own brushes on the first job, but because the second job was an oil based job, and she didn't own oil based brushes, she used brushes belonging to Mr. Cintron. Mr. Cintron denied allowing claimant to use his brushes.

19. Respondent presented the testimony of Mr. Brokos, a friend of Mr. Cintron who was present when Mr. Cintron and claimant in June at Mr. Cintron's residence. Mr. Brokos testified he heard Mr. Cintron ask claimant if she had insurance and heard claimant tell Mr. Cintron she did and that she had insurance through her concurrent employer.

20. Respondent presented the testimony of Mr. Hyatt, a painter for Respondent. Mr. Hyatt testified he works as a sub-contractor for employer. Mr. Hyatt testified that he has also worked as an employee of painting companies and testified the work performed as an employee is different than the work performed as an independent contractor. On cross-examination, Mr. Hyatt noted that his current employer provides brushes, paints, shirts and other materials. Mr. Hyatt testified that as an independent contractor, he provides his own brushes, paints and ladders.

21. Respondent presented the testimony of Mr. McDougal who testified he has worked as an independent contractor for Respondent. Mr. McDougal testified he carries his own general liability insurance and completed paperwork for Respondent. Mr. McDougal testified he has requested Respondent hire his friend as painters in years past, but was told his friend could not be hired because his friend did not have insurance.

22. Claimant testified that following the injury, she was unable to continue working for her concurrent employer. Claimant eventually filed a claim for workers' compensation benefits and a hearing was set on the matter.

23. Conflicting testimony was presented at the hearing as to whether claimant represented to Mr. Cintron that she had liability insurance. Nonetheless, the evidence does establish that Mr. Cintron did not require claimant to provide a certificate of insurance prior to hiring claimant to perform work as a painter. Mr. Cintron paid claimant per hour and made checks payable to claimant directly, and not to a trade name. Mr. Cintron provided claimant with the paint and drop cloths and ladders used to perform the painting. While the paint would be considered material and not tools, the ALJ determines the drop cloths and ladders would be considered tools.

24. Conflicting testimony was presented regarding whether Mr. Cintron provided brushes for claimant to use on the second job. The testimony did establish

that claimant provided her own brushes for the first job. Mr. Cintron denied providing claimant with brushes for the second job, but the ALJ finds claimant's testimony that she did not have oil based brushes for the second job to be credible and persuasive. Claimant's testimony regarding the oil based work performed on the second job is supported by the photographs of the condominium entered into evidence and is found to be credible and persuasive. Therefore, the ALJ finds that claimant's testimony that Respondent provided tools consisting of brushes for the second job is accepted by the ALJ.

25. The ALJ notes that the evidence establishes that claimant was paid in a different method than the other painters who identified as independent contractors. While those contractors were paid a percentage of the painting contract, claimant was paid an hourly rate. Mr. Cintron testified that this occurred because he was gauging whether claimant was a capable enough painter to handle the work, but the evidence leads the trier of fact to determine that claimant's different method of payment leads one to the conclusion that claimant was under an employer-employee relationship with Respondent at the time of her injury.

26. The ALJ concludes from a review of the evidence that claimant has established that it is more probable than not that she was an employee of Respondent at the time of her injury. The ALJ finds that claimant was paid an hourly rate, with checks made directly payable to claimant, and that Respondent provided certain tools for claimant, including ladders, drop cloths and brushes for the second job. The ALJ finds that Respondent oversaw claimant's work as evidenced by the fact that he secured the ladder to the pole at the first job site, allowing claimant access to the fascia that was to be painted.

27. The ALJ concludes that Respondent did not require claimant to work particular hours, but arranged for claimant to work six hour days from 9:00 a.m. until 3:00 p.m. so claimant could continue to work for her concurrent employer. These work hours are established by the fact that claimant worked two days at the first job site for a total of 12 hours and worked an additional 1 ½ days at the second job site before she was injured. The ALJ finds Respondent did not provide training for claimant and could terminate her job at any time by virtue of simply asking her to leave the job site. The ALJ further finds that claimant was not required to work exclusively for Respondent.

28. The ALJ credits the testimony of Mr. Hyatt and claimant and finds that the employment of a painter can take different forms, as either an employee or as an independent contractor. While Mr. Cintron testified he only hired independent contractors, the evidence presented established that some painting contractors will hire employees. Therefore, the ALJ credits the testimony of claimant in this case and finds that the claimant in this case, who had performed painting in the past, was not customarily engaged in an independent trade or business.

29. The ALJ credits the testimony at hearing that claimant had performed painting work previously for a different company in Crested Butte, but did not hold

herself out as a painting contractor and performed other work not associated with painting, including that of a substitute teacher, part time bartender and her work with her concurrent employer.

30. Taking the relationship between claimant and Respondent into account, the ALJ finds claimant was an employee of Respondent and was not an independent contractor.

31. The ALJ credits the medical records and determines that claimant has established that it is more likely true than not that the medical treatment she received from the ER and from Dr. Griggs was reasonable and necessary to cure and relieve claimant from the effects of her industrial injury. The ALJ finds that the claimant has proven that it is more likely true than not that the ER treatment was authorized as emergency treatment as claimant was taken directly to the ER following her injury with a broken wrist.

32. The ALJ credits claimant's testimony that she was unable to continue her work with her concurrent employer after her work injury and finds that claimant is entitled to an award of temporary total disability ("TTD") benefits commencing July 18, 2014 and continuing until she was placed at MMI.

33. Respondent argues that claimant's benefits should be reduced by 50% for claimant's violation of a safety rule. The ALJ is not persuaded. Presumably, the safety rule violation involves claimant using the ladder, or using a ladder without feet. However, there was no credible evidence presented that claimant was ever instructed not to use the ladder. In fact, Mr. Cintron testified he helped claimant use a ladder on the first painting job by securing the ladder to the pole allowing claimant to climb on the roof to access the fascia.

34. The ALJ determines that Respondent has failed to demonstrate that the claimant willfully violated a safety rule resulting in her injury. Respondent's request to have claimant's benefits reduced by 50% is therefore denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2009). A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-41-301, 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., 2011. 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 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 P2d 1205 (1936); CJI, Civil 3:16 (2008).

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. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. The ALJ credits the testimony of claimant and finds that claimant has proven that she was in the service of Respondent under an implied contract of hire as of June 17, 2014. The ALJ credits the paychecks establishing that claimant was paid for her work with Respondent as evidence of the contract of hire.

6. Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. In this case, the issue involving claimant's status as an independent contractor requires respondents to meet the appropriate burden of proof. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

7. With regard to claimant's employment status, Respondent argues that Claimant is an independent contractor pursuant to Section 8-40-202. The ALJ is not persuaded.

8. Section 8-40-202(2)(b)(II) sets out a nine part test to establish whether an individual is an independent contractor. Section 8-40-202(2)(b)(II) provides in pertinent part that in order to prove independence it must be shown that the person for whom services are performed does not:

- Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

- Pay a salary or at an hourly rate instead of a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may be supplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

9. Section 8-40-202(2)(b)(II), C.R.S. allows for these provisions to be proven through a written document. Pursuant to Section 8-40-202(2)(b)(IV), C.R.S. the written agreement then creates a rebuttable presumption that an independent contractor relationship between the parties exists. However, the written agreement must be signed by both parties, must contain a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. Section 8-40-202(2)(b)(IV) also requires that all signatures on any such document must be duly notarized.

10. In this case, no written documentation was presented between the parties, and therefore, the burden of proof remained with Respondent to establish that claimant was an independent contractor.

11. The ALJ makes the following findings regarding the employment relationship between claimant and Respondent:

- Claimant was paid at an hourly rate.
- Claimant was issued checks made personally to her as opposed to payable to a trade or business name.
- Respondent provided tools in the form of ladders, drop cloths at the first and second job site and paint brushes for claimant at the second job site.
- Respondent oversaw the work as it was performed as evidenced by Mr. Cintron securing the ladder to the pole to allow claimant the ability to get on the roof and paint the fascia on the first pain job.

12. As found, the ALJ determines that Respondent has failed to prove by a preponderance of the evidence that claimant was an independent contractor of Respondent. As found, while Mr. Cintron may have wanted to hire claimant as an independent contractor, his actions in paying claimant as an hourly worker and providing claimant with tools to perform her work represents a degree of control over claimant's work that results in claimant being considered an employee of Respondent.

13. As found, claimant has proven by a preponderance of the evidence that the injury resulted in the need for medical treatment from the ER and Dr. Griggs that was reasonable and necessary to cure and relieve claimant from the effects of her work injury. As found, Respondent is liable for the cost of the medical treatment provided by the ER and Dr. Griggs.

14. 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).

15. As found, claimant has proven by a preponderance of the evidence that her injury resulted in a wage loss based on the fact that claimant could no longer continue her work for Respondent or for her concurrent employer. As found, claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits for the period of July 18, 2014 through February 2, 2015.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical benefits necessary to cure and relieve claimant from the effects of her work injury including the medical bills from the ER and Dr. Griggs.

2. Respondent shall pay claimant TTD benefits for the period of July 18, 2014 through February 2, 2015.

3. Respondent 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: June 29, 2015

Keith E. Mottram

_____

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that a topical cream containing the drug ketamine constitutes reasonable and necessary post-maximum medical improvement medical treatment designed to relieve ongoing symptoms associated with complex regional pain syndrome?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 through 7 were admitted into evidence. Respondents' Exhibits A through D were admitted into evidence.

2. Claimant sustained a compensable injury to her right ankle in 2007. Subsequently she underwent at least 7 surgical procedures designed to alleviate ongoing ankle and right lower extremity pain.

3. On April 9, 2011 the Insurer filed a Final Admission of Liability including an admission for ongoing medical benefits after maximum medical improvement (MMI).

4. On March 24, 2014 J. Tashof Bernton, M.D., an authorized treating physician, examined Claimant. He assessed "chronic pain in the right foot and ankle following multiple surgeries." Dr. Bernton expressed concern for potential complex regional pain syndrome (CRPS) given the "appearance of the foot."

5. On May 12, 2014 Claimant underwent an Autonomic Testing Battery that demonstrated a "positive diagnostic assessment" for CRPS.

6. On August 25, 2014 Dr. Bernton noted Claimant had a positive diagnostic response to an initial sympathetic nerve block. Dr. Bernton stated that in conjunction with the results of the Autonomic Testing Battery Claimant met the Colorado Medical Treatment Guidelines (MTG) criteria for CRPS.

7. On September 22, 2014 Dr. Bernton stated Claimant had undergone a second sympathetic block. Dr. Bernton noted Claimant experienced transient improvement of her pain but experienced marked coldness of the entire leg with swelling and dramatic color change. Dr. Bernton stated that he did not want to move

forward with further blocks because Claimant "had a paradoxical response to blocks with some overall worsening of her condition, both subjectively and objectively."

8. On September 30, 2014 Dr. Bernton documented discoloration of Claimant's right leg from foot to mid thigh with evident swelling and "some hyperalgesia to light touch."

9. On December 23, 2014 Dr. Bernton noted that Claimant had CRPS of the right leg with evidence of ipsilateral spread to the right upper extremity. He stated Claimant had done poorly with blocks and suggested she return for a trial of topical analgesia. Dr. Bernton observed Claimant had "really shown the most benefit from this approach."

10. On January 8, 2015 Dr. Bernton documented "significant hypersensitivity and allodynia to the plantar aspect of the foot, more in the heel as well as the lateral aspect of the right foot and the medial aspect of the foot."

11. On January 12, 2015 Claimant reported to Dr. Bernton that she had not received the topical analgesic because the "the insurance company won't pay for it."

12. On January 12, 2015 Dr. Bernton wrote a letter to the Insurer stating that CRPS was "clearly a work-related condition" and that he prescribed topical analgesics in accordance with the MTG for CRPS page 79. Dr. Bernton stated that Claimant's condition was "likely to worsen, potentially irreversibly" as a result of the Insurer's failure to meet its obligation to provide care.

13. On January 29, 2015 Claimant reported to Dr. Bernton that she was in horrible pain with increased pain in the right foot and leg as well as in the right arm. She still had not received medications. Dr. Bernton noted Claimant's right foot and leg were discolored and swollen. Dr. Bernton recorded the presence of "mild hyperalgesia." He also observed mild swelling of the right hand. Dr. Bernton emphasized the importance of getting authorization for the medication and prescribed Gralise (long-acting gabapentin) and Vicodin.

14. On February 2, 2015 Dr. Bernton noted discoloration and in the distal right leg and into the foot. He also noted the dorsum of the right hand exhibited swelling and "some hyperalgesia." Similar findings were noted on February 10, 2015.

15. Claimant credibly testified as follows. In June or July, 2014 Dr. Bernton first prescribed a topical cream containing ketamine. She received the cream in the mail and applied it to painful areas of her right ankle and leg. The cream reduced her pain from 8 on a scale of 10 (8/10) to 4/10. She used the cream until the prescription ran out at the end of September or October 2014. The pharmacy then told her that further prescriptions for this compound had been denied by the Insurer. In January or February, 2015 she requested a prescription for Vicodin because she was in severe pain and had nothing to treat it. She did not need Vicodin when she was using the cream. She prefers the cream to Vicodin because the effects of Vicodin last only 3

hours and she wakes up in pain. Also, Vicodin causes Claimant to feel "groggy" and she fears becoming addicted to it.

16. WCRP 17, Exhibit 7, (G) (7) (j) (v.) (b) pp. 79-80, of the MTG for treatment of CRPS, provides that use of ketamine topical cream is a permissible non-operative treatment for CRPS under certain circumstances. This section of the MTG states that although there is good evidence that low dose ketamine cream (1%) does not relieve neuropathic pain, it is "physiologically possible" that higher doses of topical ketamine could have some effect on neuropathic pain. However, "use of … ketamine should be limited to patients with neuritic and/or sympathetically mediated pain with documented supporting objective findings such as allodynia and/or hyperalgesia." Further use of ketamine topical cream "beyond the initial prescription requires documentation of effectiveness, including functional improvement, and/or decreased use of other medications, particularly decreased use of opiates or other habituating medications."

17. Claimant proved it is more probably true than not that topical ketamine cream is a reasonable and necessary treatment for her CRPS.

18. Dr. Bernton credibly and persuasively opined that the use of ketamine based topical cream is a permissible treatment for CRPS under the MTG. Dr. Bernton credibly and persuasively opined that use of ketamine cream is appropriate under the MTG. In this regard Dr. Bernton has documented the presence of both allodynia and hyperalgesia. He has noted that application of topical medication has been the most effective treatment of Claimant's CRPS. Considering the totality of the evidence, the ALJ gives great weight to Dr. Bernton's testimony that use of ketamine cream is appropriate under the MTG.

19. Claimant credibly testified use of topical ketamine cream significantly reduced her pain before the Insurer stopped payment for the drug. She also credibly testified that after ketamine was stopped she had no effective relief from pain and was forced to request a prescription for Vicodin. The medical records corroborate Claimant's testimony. On December 23, 2014 Dr. Bernton noted Claimant had "shown the most benefit" from topical analgesia and suggested another trial. On January 29, 2015 Claimant reported "horrible" pain and Dr. Bernton prescribed Vicodin. The ALJ infers from this evidence that if Claimant is allowed to use topical ketamine cream there is a reasonable chance that she can reduce consumption of other medication, especially Vicodin.

20. The evidence produced by the Respondents, particularly the January 6, 2015 letter authored by Nicole Peck, R.N., is not persuasive insofar as it argues that ketamine topical cream is not a reasonable and appropriate treatment for Claimant's CRPS. First, this letter/report incorrectly states that the Colorado MTG do not address the "issue" of the use of ketamine cream for treatment of CRPS. As found above, and as mentioned by Dr. Bernton, the Colorado MTG for treatment of CRPS do in fact address this issue and indicate that use of ketamine topical cream may be appropriate under the specified conditions. Second, the January 6 report admits that use of

ketamine is “under study” and has shown “encouraging results” in “non-controlled studies for CRPS 1 and post-herpetic neuralgia.”

21. 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.

REASONABLENESS AND NECESSITY OF KETAMINE TOPICAL CREAM

Claimant argues she proved by a preponderance of the evidence that the ketamine topical cream prescribed by Dr. Bernton constitutes reasonable and necessary post-MMI treatment designed to cure and relieve the effects of CRPS. The ALJ agrees with this argument.

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

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

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols 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, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ considering the totality of the evidence may determine the weight to be given evidence of compliance or non-compliance with the MTG. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). *See also*, § 8-43-201(3), C.R.S.

As determined in Findings of Fact 17 through 20, Claimant proved it is more probably true than not that ketamine topical cream constitutes reasonable and necessary medical treatment to relieve the ongoing effects of injury-related CRPS. As found, Dr. Bernton credibly opined that ketamine topical cream has been the most effective treatment for relieving Claimant's CRPS symptoms. Dr. Bernton also credibly and persuasively opined that the MTG for treatment of CRPS authorize the use of topical ketamine cream under the conditions and circumstances present in this case. As determined in Finding of Fact 18, Claimant credibly testified that use of topical ketamine cream significantly reduced the symptoms of her CRPS. She also credibly testified that when ketamine cream was no longer available her symptoms increased and she was forced to request a prescription for Vicodin. As determined in Finding of Fact 18, the ALJ infers that if Claimant is permitted to use topical ketamine cream there is a reasonable prospect that she can reduce the consumption of other medication including Vicodin. Although respondents presented some evidence to the contrary, the ALJ finds this evidence is not credible and persuasive.

ORDER

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

1. Insurer shall provide ketamine topical cream as a form of reasonable and necessary post-MMI medical treatment. Insurer shall continue to provide this treatment as long as it remains reasonable and necessary and causally-related to the injury.

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 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

The sole issue presented for hearing is:

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

Background, Education and Employment History

1. The Claimant was born on August 29, 1963. She is currently 51 years old. The Claimant lives in Aurora, Colorado, and her commutable labor market is the Denver Metropolitan area. The Claimant is currently able to drive herself to medical appointments in Denver, Englewood and Centennial on a regular basis, with round trip commutes of 20-26 miles from her home. Other than these commutes, the Claimant drives locally, within 10-15 miles from her home.

2. The Claimant graduated from high school in Hilliard, Ohio in 1981. The Claimant attended Ohio State College and studied general education courses while working contemporaneously. She did not receive a diploma and is not certain how many college credits she earned.

3. The Claimant began working for the Ohio Division of Wildlife in 1981, working for the Ohio Administrative Code Department, and she assisted with writing rules and laws, performing secretarial and administrative work and scheduling meetings. The Claimant continued to work for the Ohio Division of Wildlife for 18 years, until 1999. She testified that she held various jobs. The last position she held with this employer was as an administrative assistant in the law enforcement/administrative offices. She typed, filed, helped write the Ohio Wildlife Code, wrote and administered the budget, managed the office, placed orders, paid bills and helped with the undercover office to provide the officers what they needed to do their jobs.

4. While working for the Ohio Division of Wildlife, the Claimant also served in the National Guard from 1985 until 1993, which was a part-time program requiring service for two weeks a year and some weekends. She worked on electrical equipment and was responsible for installing cameras and working on radars.

5. The Claimant worked in a sales position at Radio Shack approximately 25 years prior to the hearing. She was hired by her best friend Annette Gordon, who was the manager of the store, and she worked there for one year. Ms. Gordon testified that

she was an excellent employee who was enthusiastic, punctual and excellent with customers. Ms. Gordon has not worked with the Claimant since both of them left that job approximately 24 years prior to the hearing.

6. From approximately 1999 to 2006, the Claimant did not work outside the home, but rather stayed at home with her children. During this time period, the Claimant did study for and receive an Ohio real estate license. The Claimant does not have a Colorado real estate license.

7. The Claimant was employed as an administrative assistant/paralegal in the Colorado Attorney General's Office between 2006 and 2007. The Claimant's former supervisor, Pamela Ponder, testified credibly that the Claimant was a good employee and a reliable team player who was good at communicating, researching, drafting documents, working on the computer and finding solutions. The Claimant left this position to take a job with the Department of Education.

8. The Claimant worked at the State Board of Education as an administrative assistant to the Director from 2007 until the date of her accident on October 15, 2008. Her job duties included making travel arrangements, scheduling monthly meetings, coordinating conventions, setting up legal files, filing briefs, answering phones, answering correspondence, filing court documents and proofreading legal documents.

The Claimant's October 15, 2008 Injury and Initial Emergency Response

9. The Claimant sustained an admitted injury on October 15, 2008 when she was employed as an administrative assistant for the Director of the Colorado State Board of Education. She was performing her normal job duties, filing paperwork at the office of the Colorado Secretary of State, when she was involved in an accident walking across the street in the crosswalk at the intersection of Broadway and 17th Street.

10. During the course of the hearing, there was conflicting evidence presented regarding the details of the Claimant's injury in the various medical records, in discovery and from the Claimant's testimony.

11. At the hearing, the Claimant testified that she came out of the building and started to cross the street near an intersection. She saw the pedestrian light and started across the street and, while in the crosswalk, the light started to flash red with numbers counting down. The Claimant recalled seeing the light flash to 10, but before it flashed to 9, she felt the impact of a vehicle hitting her. She testified that her head hit the windshield of the car. The Claimant testified that she did not entirely realize what was happening at the time, and she was dazed and hazy. She testified that she next recalls lying in the street with people calling her name (from her work name badge). She testified that her clothes were "scrapped up" and that the force of the impact had knocked off her "tie up" tennis shoes. According to the Claimant, "some lady had collected all my stuff, my sunglass, my cell phone, my tennis shoes …." It is not entirely clear what the Claimant means by "scrapped up" clothing, however, the medical records

show that the Claimant had no bruises, bumps, contusions, or outward signs of an injury. The Claimant testified that she could also hear sirens of an approaching ambulance. When the EMTs arrived, she recalls an EMT telling her to control her breathing and she remembers losing control of her hands. The Claimant testified that they strapped her to a board and as they lifted her on the board, she saw the front of the car that struck her and that is how she knows it was a Cadillac. One of her running shoes had come off and someone collected her shoe, briefcase and purse and gave it to the EMTs to put into the ambulance. The Claimant testified that she does not recall talking to the EMTs or early medical providers and does not recall what she said to them about her level of consciousness at the time of the injury. The Claimant testified that she does not remember arriving and unloading at the emergency department. She testified that she does remember that when they entered, they were stopped and her bags were searched. She recalls that she underwent an ultrasound and she was wheeled into an area and left there. She testified that at some point, they put in an IV and she was told she'd be given medicine for pain. She doesn't remember exactly when her husband arrived, but testified that it took some time. She testified that she was not examined and she was not put into a gown until they performed x-rays. The Claimant testified that she does not remember if she was monitored the entire time by hospital personnel or if they asked her questions about her condition. She testified that she did not get up for any balance test and she was not checked for double vision. The Claimant denied being given any type of a motor exam in the ER. She testified that she never got off the gurney or bed until she left the ER. The Claimant testified that she did not receive a mental status examine. She denied having her balance tested. This testimony is inconsistent with her testimony that she was in a daze and she was not clear about the events in the emergency room, and it is not consistent with the emergency room records.

12. In answers to Interrogatories provided on March 19, 2013, the Claimant stated that she hit the driver's windshield with the right side of her head and the rear of her head hit the pavement after she was thrown from the hood of the car. She stated that she was struck by the vehicle on the right rear side and landed on the pavement on her back.

13. A Denver Police report confirms that the Claimant was struck by a car in the left turn lane of southbound Broadway as it was turning onto 17th Street and the Claimant was hit in the crosswalk. The driver of the vehicle stated that the light was green, there was a lot of sun glare, and the driver just didn't see the Claimant.

14. The EMT responding to the auto-pedestrian accident noted that the Claimant's chief complaint was right thigh pain. The EMT reported that the Claimant was struck at less than 5 miles per hour by a full-size sedan that struck the Claimant in her legs, knocking her onto the hood of the car. The EMT noted that the Claimant denied drugs or alcohol, loss of consciousness, vision difficulty, dizziness, abdomen pain, and nausea or vomiting. The Claimant was described as awake and alert, answering questions appropriately, speaking in full sentences without slurred speech, and no facial droop or odor of alcohol on her breath. The EMT also reported that, en

route to the hospital, the Claimant stated that she was having numbness in both of her hands. Her initial trauma score was listed as 14 and her initial GCS (Glasgow Coma Score) was listed as 15 and the severity impression was described as mild.

15. Upon arrival at the emergency department, the initial physician's note reports that the Claimant was involved in a low speed pedestrian vs. motor vehicle accident as the Claimant was crossing the street in a crosswalk. The note states the Claimant remembered being airborne and she rolled or landed on the hood of the car. Per the paramedic, there was no evidence of external trauma. The Claimant had thigh pain and generalized back pain to palpation but no focal points of pain. The Claimant arrived at the emergency department at 16:13 and she was discharged at 21:40 in good condition with prescriptions for Vicodin and Valium. A nursing note at 16:15, shortly after the Claimant's arrival, notes knee, hip and back pain with spasms. The note states the Claimant hit the pavement, but denied loss of consciousness. Another note taken at 16:15 states that the Claimant was hit by an automobile on her right side and fell to the pavement, but she denied hitting her head and there was no trauma. The emergency trauma flow sheet lists the Claimant's pain level at 7/10 as of 16:30 and her mental status was listed as alert, conscious and cooperative. There was no visible trauma to her face or head. By 18:10, the Claimant's pain score was reported as 3/10, per nursing notes, and her GCS remained 15. The Claimant's discharge instructions were to wear a cervical collar for comfort, follow up with her primary care doctor, and return to the emergency department if her condition worsened.

16. On October 16, 2008, the Claimant reported to Dr. Erin Woessner that she was hit from behind by a turning vehicle as she crossed the street. It was noted that the vehicle was "turning left on red after complete stop" which supports that the Claimant was likely hit by a vehicle travelling at a lower speed. Dr. Woessner's note stated that the Claimant had, "a direct hit on her right hip and behind, fell back onto car, brakes slammed, then pt was airborne and fell on the street." The Claimant told Dr. Woessner that she does not think she hit her head and that any loss of consciousness would have been brief.

17. On October 17, 2008, the Claimant reported to Dr. Rick Artist that she was hit by a car and knocked up onto the hood and then slid to the ground. The Claimant denied any loss of consciousness and denied numbness or tingling in her upper extremities. At that point, the Claimant advised that her neck and her back were the most bothersome. She reported that she had a headache at the time of the examination, but not a "migraine type."

18. On December 8, 2008, the Claimant described her injury to Dr. Caroline Gellrick. The Claimant reported that, "she does not remember if she lost consciousness or not. She remembers being hit and she remembers then the ambulance taking her to the hospital. She remembers the ambulance itself, but there is a period of time where she does not recollect what exactly happened. She stated that the vehicle was at a stop and then accelerated and that is when she got hit. She feels it was about 20 miles per hour."

19. On December 30, 2008, the Claimant reported her injury to Walter Torres, Ph.D, as follows:

> She began to walk across the street upon seeing the 10 second pedestrian right-of-way signal, while talking on her cell phone with her husband. She stated that before the countdown hit 9, she was hit. She stated that the individual who struck her had the sun in his eyes and did not see her. She described the incident as feeling that she was being lifted up. She stated that she was struck on the right, rear side of her body, was lifted up onto the car's hood and windshield. She believes that when the driver applied the brakes she went flying and hit the pavement. She remembers people on either side of her yelling at her, asking questions. She stated that she does not know if she incurred any period of consciousness [sic], but that if she did, it would have been brief to momentary. As noted in the neuropsychological testing report she experienced a dazed mental state in the immediate aftermath of the impact and was unsure of what happened. She stated that in the impact's immediate aftermath she could not move her right side, had no control of her legs, and that she felt her body "going into shock," a sense that her arms were drawing into her body. She voiced a complaint about the emergency medical technician in the ambulance as having shown a "nasty disposition" toward her and complained that at Denver Health her injury was not taken very seriously because she was not bleeding and had no fractures.

20. On July 1, 2009, Dr. Torres notes that he conducted EMDR with the Claimant and that "recall of the accident elicited intense anxiety, but she was able to tolerate it and appeared to be processing the traumatic memories. She reached a memory of her head striking the vehicle's windshield, experiencing a sense of bright light and colors, intense pain developing on the right side of her head, followed by darkness and confusion. Her reaching this memory elicited a very intense pain on the right side of her head, which she was not able to free herself of during the course of the procedure."

21. During September 15 and 17, 2009 exams with Dr. Suzanne Kenneally, the Claimant described the accident and remembered "being hit on her right side, rolling up onto the hood of the car and then rolling down onto the street. [The Claimant] reports no loss of consciousness, retrograde amnesia or anterograde amnesia associated with the incident. She stated that she 'felt foggy and could hear people around her yelling.' She was transported to the emergency room where she was examined and released the same evening."

22. On September 12, 2011, the Claimant described her accident to Dr. Judith Weingarten as follows:

> While she was crossing the street, a car went through a red light and she got hit. She stated that she didn't break anything but if she didn't turn at the right time she could have lost both of her legs. She stated that she got hit from the right rear and the right side of her head smashed against the windshield and she went unconscious. She stated that the driver hit the brakes and she went flying off the car and landed on her back and the back of her head smashed on the pavement so that she struck her head twice. She stated that she had a loss of consciousness for a few minutes and remembered that there were a few people calling her name. She states that she remembers parts of the accident. She stated that she would not suggest going to Denver Health for anything because they didn't do anything. She stated that they didn't even do a CAT scan and released her in good condition and tossed a neck brace and a bottle of Vicodin at her and said that she should check with her doctor. She stated that in the first few weeks she was in such pain, that she didn't do a lot of thinking. She states that she has severe injuries to her neck, back and shoulder and pretty much screwed up everything. She states that she had severe whiplash and that the muscles healed in a protective mode. She states that as the initial pain started to wear off, she realized that she also had cognitive problems.

23. The Claimant was evaluated by David W. Zierk, PsyD on January 30, 2013 and March 13, 2013. The Claimant reported her accident to Dr. Zierk as follows:

> The accident involved [the Claimant] crossing the street in a crosswalk and being struck unexpectedly by a vehicle, a black Cadillac, travelling between 5-20 miles per hour. Secondary to this accident, which impacted [the Claimant] on the right rear aspect of her body, she was knocked onto the hood, striking her head against the vehicles windshield and then sliding to the ground, possibly striking her head again. According to the paramedic report at the time of the index event, [the Claimant] did not experience a loss of consciousness. Upon arrival at Denver Health Medical Center, [the Claimant] was examined on an emergent basis, diagnosed with multiple musculoskeletal sprains and contusions along with cervical, thoracic, and lumbar strain, provided medication, given a Glasgow Coma Scale of 15 with no CT scan of the brain being completed (normal CT findings on 10-24-08), and eventually discharged with after-care instructions.

24. The Claimant's report of her accident to Dr. Thwaites on March 8, 2013 contains some significant variations from some of her other reports. Dr. Thwaites' notes state:

> She was walking back to work, crossing what she remembers as being 17th street. She noted that a car turned left on a red light and struck her. She believes that she hit the windshield and then went flying. She recalls impact and all of the events leading up to it. She recalls the vehicle hit her

> in the right rear lower extremity and she recalls striking the right side of her head against the windshield. She saw a flash of colors and then everything went black. Her next personal recollection is of being on somebody's lap and people calling her name (she was wearing her employee badge with her name listed on it). She recalls hearing sirens and knowing they were for her and she recalls the arrival of the Denver Health Medical Center ambulance crew. She recalls being boarded for spinal precautions and seeing the front of the vehicle that hit her. She does appear to have patchy recall of the accident scene after she regained memory/consciousness and she also has patchy recall of the transport.

25. At the hearing, the Claimant testified that her recollection of the accident as of the hearing date is different than what she previously told doctors since she has been through EMDR therapy with Dr. Torres in an effort to more clearly remember details about the accident.

26. The Claimant's husband testified that at the time of the accident, he was speaking to his wife on the telephone. Her husband heard a yell, and the Claimant's phone shut off. The Claimant's husband called back but was unable to get an answer. He called back a second time and was told by the person who answered the phone that the Claimant had been hit by a car. The Claimant's husband stated that the lady who answered the phone stayed on the line until the paramedics arrived, and the paramedics then told the Claimant's husband that they would transport the Claimant to Denver Health. The Claimant's husband testified that he arrived at Denver Health Hospital between 4:45 and 5:00 PM on October 15, 2008. He was permitted to see the Claimant at approximately 6:30 or 7:00 PM. The Claimant's husband testified that the Claimant was crying, confused, slurring her words, and experiencing extreme pain to her head, neck, right arm, right hip, and right leg. He testified that, while at Denver Health, the Claimant recalled being hit and thrown onto the vehicle, hitting the back of her head on the windshield, and ultimately hitting the ground. The Claimant's husband also testified that Claimant could not recall much else. The Claimant's husband testified that Claimant was confused and "[a]t one point she thought it was earlier in the day, and it was probably dark outside." He testified that, while he was present at Denver Health, no medical personnel asked the Claimant about the circumstances of the accident, and she was not asked about being thrown upon the hood of a Cadillac and then being thrown to the street.

Medical Treatment Subsequent to Initial Emergency Response

27. On October 16, 2008, the Claimant was examined by Dr. Erin Woessner, her primary care physician at Kaiser. The diagnoses included a whiplash injury to the neck, headache, hip pain and leg pain. The cause of the injury was noted to be an MVA. Dr. Woessner noted that the Claimant reported that she was hit from behind by a turning vehicle as she crossed the street. The Claimant reported:

> direct hit right hip and behind, fell back onto car, brakes slammed, then pt was airborn [sic] and fell on street. Doesn't think she hit head, may have had LOS [sic], but would have been brief. No head bumps open sores or lacs. Started HA at 7am today; has h/o migraines, this is worse than her normal migraine, more shooting pains in temples, nausea, no emesis, vision: maybe more blurry, but can focus, hearing: no change, no localized weakness/N/T in extremities, denies confusion, memory problems. Now: feels achy everywhere, most severly [sic] in ant neck.

Dr. Woessner noted that the Claimant was provided with a handout on head trauma and "strongly precautioned on signs/symptoms of intracranial bleed." Dr. Woessner also noted that she recommended a head CT non-contrast scan to evaluate for a bleed, but that the Claimant and her husband refused and preferred to monitor closely. The Claimant was advised to return to the emergency department "if N/V/confusion/weakness/numbness/tingling or other worsening in condition."

28. The Claimant saw Dr. Rick Artist at Exempla on October 17, 2008. Dr. Artist described the Claimant as an "alert, pleasant, healthy appearing female who appears to be fairly uncomfortable, sitting very stiffly and not moving all that much." The Claimant's main complaints were her neck and back and her right hip was not as painful. Dr. Artist also noted that the Claimant's right knee and ankle were stiff and sore. There was no bruising. The Claimant denied numbness or tingling in her hands and upper extremities. Her range of motion was somewhat restricted for her neck, back and ankle. Dr. Artist assessed the Claimant with: "sprain right ankle, contusion and sprain right knee, contusion of ribs and low back, strain of the neck, strain of the back." At this initial Worker's Compensation medical evaluation, Dr. Artist advised that her symptoms were likely to resolve but "whether a couple more days, a couple weeks or a couple months is difficult to tell at this point." The Claimant was encouraged to engage in activity as tolerated to a modest degree. He referred the Claimant for physical therapy.

29. On October 20, 2008, the Claimant saw PA Marion Bauer at Exempla. Ms. Bauer noted that the Claimant reported "feeling a little bit better after the weekend." The Claimant reported that she was taking Motrin, Vicodin and Valium in order to resolve her headaches. The Claimant stated that she could not drive while taking the medication and was wondering about work, but otherwise, she was doing well.

30. On October 22, 2008, the Claimant saw Dr. Dave Hnida at Exempla after a physical therapy appointment. The Claimant reported dizziness, difficulty finding words and difficulty processing thoughts. She also reported that she still had neck and lumbar pain. The Claimant reported that she was off medication, except for Ibuprofen. She stated that all of her symptoms were worse and that she now had cognitive symptoms. Dr. Hnida noted that the Claimant moved slowly and changed positions slowly. He noted that the Claimant's mini mental status exam was normal but at times slow. Although, he also reported that the Claimant responded to questions such as her job description and what was performed physical therapy. Dr. Hnida assessed the Claimant with a closed head injury and noted she should be off work. He referred her for a non-contrast CT scan of the head.

31. On October 24, 2008, the Claimant underwent a head CT scan without contrast. The impression was that there was “no traumatic or focal abnormality.” There was no fracture, bleed or discrete brain lesion noted.

32. On October 27, 2008, the Claimant reported her overall symptoms improved, but her dizziness was worse. Dr. Artist recommended a neuropsychological evaluation, continued physical therapy and continued medications.

33. On November 10, 2008, the Claimant reported to Dr. Artist that she was trying to be more active but that she fatigued extremely easily. The Claimant’s husband accompanied the Claimant to the visit, and he reported that her reflexes and reaction time were markedly slowed and that the Claimant was having difficulty with speech and memory. The Claimant’s headaches were better, not as severe, nor as often. The Claimant reported that she was not using Vicodin or Flexeril at all because they made her feel “weird.” The Claimant also reported dizziness at times for no good reason. Dr. Artist assessed the Claimant with a closed head injury, concussion, persistent symptoms and poor short term memory, neck and back strain-modestly improved and insomnia and headaches-improved. The Claimant’s husband indicated that he would like the Claimant to see more specialists, as it did not seem to him that the Claimant was getting better rapidly. Dr. Artist cautioned that the Claimant’s issues required time to resolve and perhaps some neuropsychological cognitive therapy and continued physical therapy would be beneficial.

34. The Claimant was initially referred by Dr. Artist for physical therapy Colorado Athletic Conditioning Clinic (CACC) on October 22, 2008. CACC records demonstrate that the Claimant was compliant with care and did not miss any sessions. Dr. Artist reported on November 10, 2008 that the Claimant showed “modest improvement” with physical therapy and he added massage therapy to the Claimant’s treatment regimen.

35. Dr. Artist last saw the Claimant on November 25, 2008. He reported that he had spoken to Dr. Broadhurst who stated that the Claimant should recover completely from her injuries, and that it would likely take sixty to ninety days, possibly longer. He noted that the Claimant was still having sleep interrupted most nights and she still has headaches every day. However, he noted her “speech is a little more clean that the last time she was here.” He noted she continued to have memory issues. He reported that the Claimant was “unable to drive motor vehicles.”

36. In advance of an evaluation of the Claimant, Dr. Caroline Gellrick was asked to review the Claimant’s medical records. She reviewed the initial emergency response records and the records of Dr. Artist. Based on this review, Dr. Gellrick concluded:

> Status post pedestrian motor vehicle accident, right-sided body contusion with closed head injury, concussion with cervical/thoracic/lumbar strain,

cephalagia, mild traumatic brain injury (TBI) with concussion with x-rays showing some degenerative change thoracic spine, computed tomography (CT) of the brain normal with little response to physical therapy seen in the records with issues of insomnia continuing and altered memory processes.

37. The Claimant was initially seen by Dr. Gellrick on December 8, 2008. She reported that she did not have an exact recollection of what occurred at the time of the accident, but that the vehicle that struck her was at a stop and then accelerated and hit her. The Claimant reported that seeing Cadillac commercials on TV caused her distress. The Claimant reported that her appetite was poor, her sleep was disturbed by neck and back pain and she has nonstop headaches. She reported vertigo problems and memory problems, and she stated that she was not driving. Dr. Gellrick noted that the Claimant had a visual acuity of 20/20, together with 20/20 on the right and 20/50 on the left. The Claimant reported to Dr. Gellrick that she had been to her eye doctor and had exams before and since the accident and that, "ophthalmology is not concerned about problems with the vision as a result of the accident at this point in time." Dr. Gellrick assessed the Claimant with, "concussion, mild traumatic brain injury with cervical/thoracic/lumbar strain with vertigo and cephalalgia with evidence of mild depression/some post traumatic stress disorder." Dr. Gellrick referred the Claimant for an MRI of the brain, cervical, thoracic and lumbar spine and to Dr. Torres for psychological evaluation. Dr. Gellrick restricted the claimant to "no driving" and discontinued physical therapy. Dr. Gellrick's December 15, 2008 restrictions continued to include "no driving."

38. The Claimant's December 18, 2008 brain MRI report demonstrated an incidental finding of little or no clinical significance, but was an otherwise normal brain MRI. A cervical spine MRI of the same date showed mild degenerative changes of the cervical spine with mild left-sided foraminal narrowing at C4-C5 and C5-C6. A December 19, 2008 lumbar MRI showed mild degenerative changes at the mid to lower spine without central canal stenosis or nerve root contact at any level. A December 31, 2008 CT guided right shoulder arthrogram was reported to be unremarkable. These results were reviewed with the Claimant by Dr. Gellrick on December 29, 2008 and Dr. Gellrick noted "patient is relieved that the MRIs are essentially normal." Dr. Gellrick also noted that the Claimant was again seen with a family member as "she is afraid to drive long distances." Dr. Gellrick referred the Claimant to Dr. Sheldon Goldberg to consult about the potential traumatic brain injury and to Dr. Eric Hammerberg on the persistence of cephalalgia in a background of migraine headaches. Physical therapy was reinstated twice a week at CACC as the Claimant's spine was determined to be "essentially intact."

39. A December 31, 2008 right shoulder MRI showed infraspinatus tendonitis, mild AC joint fusion, synovitis and a possible Grade 1 slap tear.

40. On January 14, 2009, the Claimant was referred by Dr. Gellrick to Dr. Eric Hammerberg for evaluation of neurological symptoms. The Claimant advised that she

developed daily headaches and vertigo, described as a spinning sensation lasting one to two minutes and aggravated by head movement. Dr. Hammerberg noted that her mental status was intact "scoring 27/30" on the Mini Mental Status Examination. He found her verbal fluency to be "mildly diminished: with a score of 31 on the FAS Task." Her speech was described as "normal with no dysarthria and no aphasia." Dr. Hammerberg assessed "post-concussion syndrome, mild, with post-traumatic vertigo, resolving, and post-traumatic headache, mild and cervical strain." He recommended the Claimant start on a progressively increasing dose of Gabapentin with the objective of weaning her off Ibuprofen and Tylenol. He noted that neuropsychological testing may be indicated in a few months.

41. On January 30, 2009, the Claimant had a follow up appointment with Dr. Gellrick. Dr. Gellrick discussed information received from consulting providers Drs. Hammerberg and Torres. Based on the physical examination, as well as consultation with the other providers, Dr. Gellrick assessed the Claimant with traumatic brain injury, post traumatic stress disorder, depression, cervical strain, cephalalgia, some cognitive dysfunction, thoracic strain, lumbar strain, and symptoms of vertigo.

42. The Claimant saw Dr. Gellrick again on February 13, 2009. The Claimant reported that she felt unsteady and was having some problems sleeping. She reported feeling better in the mornings, but still having problems with concentration. Dr. Gellrick observed, "the patient's speech is belabored. She is having trouble finding words today and it is particularly noticeable today more than other days."

43. On February 13, 2009, Dr. Gellrick completed a form for Nancy Mohler, a Pinnacol return-to-work specialist, stating that the Claimant would be off work for 2 months, per Dr. Torres recommendations.

44. Dr. Gellrick reported on February 26, 2009 that she received two video surveillance DVDs which showed among other things, the Claimant driving. She reported that, "Patient goes on to tell me it shows her driving at times and she drives short distances back and forth from the house. She no longer has dizziness and with her headaches clearing she has been able to tolerate driving. She avoids heavy traffic and freeway driving and when she does not feel safe to drive she asks family members to do so." Dr. Gellrick reported that the Claimant had been to physical therapy 29 times and was making progress with range of motion and that she tracked her dates of appointments correctly. Prior to this appointment and the receipt of the video surveillance, the Claimant had not disclosed to Dr. Gellrick that she had been driving, nor had Dr. Gellrick cleared the Claimant to drive. After the appointment, Dr. Gellrick spent an hour reviewing video surveillance and prepared a written report dated February 28, 2009. Dr. Gellrick essentially noted that the video surveillance confirmed that the Claimant could drive herself short distances and could lift lighter items under 15 pounds. However, as of February 28, 2009, Dr. Gellrick still opined, "I do not want her driving on the freeway quite yet. She is too scared to do that. This will need to be processed more with psychology with Dr. Walter Torres before she attempts this."

45. On March 19, 2009, Dr. Gellrick noted that speech therapy had previously been ordered for the Claimant. Dr. Gellrick spoke with the Claimant's case manager about this, but the speech therapy had not yet started. The Claimant continued in physical therapy with CACC and was working with foam rolls.

46. On March 24, 2009, Dr. Gellrick referred the Claimant to Dr. B. Andrew Castro. The Claimant reported back spasms that were significant but somewhat improved. The Claimant had received a series of trigger point injections with Dr. Gellrick which provided some short-term diagnostic relief, but no sustained relief. Dr. Castro advised the Claimant that "her symptoms likely will resolve with time" and recommended continued conservative management. He did not see the need for a surgical intervention, but noted that the Claimant may consider an injection at T1 as this might be the area causing some spasm in the upper thoracic and shoulder girdle areas.

47. On March 25, 2009, the Claimant was initially assessed for speech-language cognitive issues by Ms. Judith Haddow, a Speech-Language Pathologist. Ms. Haddow noted that the Claimant "exhibits moderate dysfluency in spontaneous speech," but had not experienced any problems with fluency in childhood or as an adult. Ms. Haddow noted that the Claimant reported dizziness with postural changes and recommended a visual-vestibular evaluation. The Claimant also reported functional problems with memory and attention. The Claimant reported feeling overwhelmed by keeping track of her appointments. Ms. Haddow provided a planner system as an external memory aid and to assist with planning to avoid cognitive fatigue. Ms. Haddow noted that the Claimant reported receiving a letter from her employer offering light duty, part time work, but Ms. Haddow opined that the Claimant did not appear ready to return to work in the capacity outlined in the letter because of on-going cognitive deficits, pain complaints and problems with anxiety. Ms. Haddow noted that six sessions were authorized for home-based speech-language treatment addressing fluency, word retrieval, memory, executive control and attention skills.

48. The Claimant saw Dr. Hammerberg for reevaluation on March 31, 2009, reporting the same symptoms, but he noted that the Claimant felt "the symptoms are less troublesome at the present time." He recommended an increase in the dose of Gabapentin to decrease the headache and the Claimant's neck and shoulder pain.

49. On April 1, 2009, Ms. Haddow noted that the Claimant reported that it took her all week to organize tax information that, prior to her injury, would have been completed in one evening. The Claimant was provided with ear filters and printed information on cognitive fatigue. Ms. Haddow also provided the Claimant with simple Sudoku puzzles and simple exercises for word retrieval and fluency that appeared to overwhelm the Claimant, per Ms. Haddow. On April 13, 2009, Ms. Haddow noted that the Claimant had a migraine one afternoon the prior week, and incurred household situations that required repairs. Ms. Haddow stated that the Claimant exhibited "slow but accurate word retrieval skills" and only noted one incidence of fluency problems in conversational speech towards the end of the session. Ms. Haddow opined that the Claimant's fluency difficulties were related to cognitive fatigue and the speed of word

retrieval, as opposed to true stuttering. The Claimant had difficulty following simple procedures that were trained the prior week and consistently required reminders to attend to the procedures. Ms. Haddow recommended referral to a behavioral optometrist familiar with evaluation after TBI. She indicated that Dr. Thomas Politzer would be an appropriate referral.

50. On April 2, 2009, Dr. Gellrick noted that the Claimant had seen, or was scheduled to see, a number of specialists to address the Claimant's various conditions. By this point, Dr. Gellrick noted that she had reports from the Claimant for evaluations by Dr. Castro for her spine, Dr. Morales for her esophageal/swallowing issue, Judith Haddow for speech therapy, Dr. Hammerberg for neurology and cephalalgia, and Dr. Torres for psychological issues. In addition, Dr. Gellrick wanted the Claimant to see Dr. Lipkin for her dizziness and vestibular issues, and noted that follow up with Dr. Kenneally was also scheduled. At this point, Dr. Gellrick noted that the Claimant was experiencing negative side effects from some of her medications, and some were not effective, so she anticipated a period of medication adjustment involving evaluation by several of the Claimant's treating physicians.

51. Dr. Gellrick referred the Claimant to Dr. Alan Lipkin, an otolaryngologist, who initially evaluated the Claimant on April 20, 2009. Dr. Lipkin diagnosed the Claimant with moderate vertigo, tinnitus, lightheadedness, dizziness and headache. Dr. Lipkin recommended additional testing.

52. On May 4, 2009, following an ENG test (electronystagmography), which showed bilateral vestibular weakness plus central findings, Dr. Lipkin opined that the Claimant was likely suffering from post-traumatic vestibular dysfunction and was a candidate for vestibular rehabilitation. Dr. Lipkin recommended that the Claimant avoid muscle relaxants and sedating medications in order to expedite recovery.

53. On her return from the appointment with Dr. Lipkin on May 4, 2009, the Claimant met with Ms. Haddow. The Claimant advised Ms. Haddow that she had borrowed her father's RV and went camping with the family the prior weekend. The Claimant reported that preparation for the trip was overwhelming and she had trouble getting started, so she began with laundry, which is something she knows how to do, and then gradually started to do more tasks related to the trip. Ms. Haddow built on this and encouraged the Claimant to work on breaking larger tasks into smaller components and start with the components she was comfortable performing.

54. Dr. Gellrick referred the Claimant to Dr. Chester Roe, an ophthalmologist. The Claimant completed a Medical History Questionnaire dated May 6, 2009, denying that she was currently having problems with double vision, loss of side vision, and glare/light sensitivity. She did check "yes" to flashes or floaters and dryness, and she placed a question mark in the "yes" box under fluctuation vision. The Claimant reported that she was doing a limited amount of driving and did not have visual difficulties when driving. She did report "having trouble focusing, difficulty reading, constant headaches – sometimes right over eyes." At a May 12, 2009 visit (and in an addendum dated May

13, 2009), Dr. Roe noted that the Claimant was light sensitive even though this was checked negative in the questionnaire. Dr. Roe did not impose any limitations/restrictions for the Claimant and opined that this was a "grossly normal eye exam" which was age appropriate. The Claimant had no convergence insufficiency, no strabismus and no focusing issues related to her injury of October 15, 2008. He reported that the Claimant did not need any eye-related treatment due to her October 15, 2008 injury and that the Claimant did not need eye exercises or vision therapy. After evaluating the Claimant, Dr. Roe reported that he phoned Dr. Gellrick and reviewed his findings with her.

55. On May 14, 2009, Dr. Gellrick provided a written response to a prior request for psychiatric services. Dr. Gellrick explained to the Claimant's nurse case manager that the Claimant "has not responded to psychotropics provided by this examiner at the recommendations of Walter Torres, Ph.D. Therefore, we need further intensive M.D. psychiatry to further evaluate this. Request has been made for referral to Howard Entin, M.D. to review medication management and treatment goals."

56. Dr. Howard Entin began to treat the Claimant on June 9, 2009, per the referral of Dr. Gellrick. The Claimant was still treating with Dr. Entin as of the time of his deposition on May 6, 2013. During his initial evaluation, Dr. Entin diagnosed the Claimant with major depressive disorder, post-concussive syndrome, post-concussive headaches, and a cognitive disorder. Dr. Entin also conducted a mental status examination from which he determined that the Claimant had problems with speech, including stuttering often; difficulty word-finding; and difficulty finishing sentences. Dr. Entin also reported that the Claimant had high levels of anxiety, trouble reading/retaining information, and difficulty with concentration, focus, and memory.

57. On June 17, 2009, Dr. Gellrick reported that the Claimant was receiving therapy at Exempla Wheat Ridge with a vestibular therapist who was also evaluating the Claimant's cervical spine. Dr. Gellrick reported that these therapy sessions were being extended to almost double the length of time because the Claimant traveled from a distance away and that it would be easier for the Claimant to extend her appointments to give her maximum benefit on site. Dr. Gellrick also noted the Claimant was experiencing difficulty during this transition period of medication adjustments and the Claimant "finds that she is angry and irritable…at times she loses it so to speak and breaks down." Dr. Gellrick continued to note that the Claimant "cannot drive with oncoming traffic, as it precipitates problems and is dangerous to the patient."

58. The Claimant saw Dr. Barton Goldman on referral from Dr. Gellrick for an electrodiagnostic evaluation on August 4, 2009. Dr. Goldman noted that the Claimant was "very anxious with strong tendency for inhalation retention, gasping, startle response and hyperventilation…." Dr. Goldman concluded it was an abnormal study, but due to the complexity of the case and the extensive time needed to complete the test and the Claimant's presentation, he was "unable to opine within medical probability if any of the above findings are OJI related," and his impression was that the Claimant had a "pseudothoracic outlet syndrome."

59. On August 4, 2009, the Claimant also had a home therapy session with Ms. Haddow. Ms. Haddow related phone contact with the adjuster for the Insurer who requested an updated treatment plan and had questions about why the Claimant "wasn't making any progress." Ms. Haddow disagreed that the Claimant wasn't making progress and opined that the Claimant was "making significant gains in her ability to apply compensatory strategies to help her manage life demands" and that the Claimant was "extremely cooperative with treatment recommendations but she presented with pain, vestibular problems, headaches and sleep disturbances which can exacerbate cognitive problems in 'real world' settings." Ms. Haddow then outlined the Claimant's short term goals for the next 60 days, with treatment once per week. These goals were:

- Recall 3 tasks she intends to perform in a period of 3 hours
- Recall the topic of a 15 minute conversation after a 45 minute delay
- Successfully develop and follow through with menu planning and meal preparation for her family 4 nights per week
- Sustain attention to cognitive stimuli for 60 minutes without excessive mental fatigue
- Improve speed with basic computer activities by 40%

60. On August 10, 2009, Dr. Gellrick noted that the Claimant was making slow progress with physical therapy for her back and very slow progress with her OT Plus rehabilitation services. The Claimant reported that she tried to do the computer exercises that were given to her but with fast moving objects on the screen, she experienced vertigo. Dr. Gellrick also noted that the Claimant had started EMDR with Dr. Torres and these sessions were very anxiety-producing and draining for the Claimant. As of an August 26, 2009 office visit with Dr. Gellrick, the Claimant reported that she was making slow progress on her physical complaints, but felt stale-mated and overwhelmed regarding the mental issues. On review of OT notes from Judith Haddow, Dr. Gellrick reported that the Claimant's abilities for reading instructions had improved 80% and her word retrieval skills had improved by 50% with a corresponding reduction in stuttering. Per Ms. Haddow's recommendation, Dr. Gellrick reduced the speech therapy from twice a week to once a week for the following 2 – 3 months. Dr. Gellrick also specifically noted the Claimant's frustration with the speed of her progress in achieving her goals, but counseled the Claimant that it is not unusual for closed-head/brain injuries to take a year or two years to resolve. However, Dr. Gellrick opined that the Claimant's prognosis was good.

61. On September 23, 2009, the Claimant reported to Ms. Haddow that she was experiencing increased tension with her family and she was going to visit a friend in Kansas for two weeks to have a break. The Claimant attributed the increase in tension to her frequent headaches, emotional volatility and current difficulty coping with life's demands. In preparation for the trip, Ms. Haddow noted that the Claimant "planned ahead to make sure she has an adequate supply of prescription medications and has made lists of things to pack for the trip. She is attempting to make lists for her family of household chores, so they can help her with chores on a regular basis." Additionally,

Ms. Haddow noted that the Claimant "exhibited improved performance on reasoning tasks that require complex attention to detail."

62. The Claimant also had an office appointment with Dr. Gellrick on September 23, 2009. Dr. Gellrick noted that the testing with Dr. Kenneally was completed, although Dr. Gellrick did not yet have the report. Therapy and medical records were reviewed and, overall, there was very slow progress in all areas. Dr. Gellrick noted that Dr. Entin and Dr. Torres remarked on the Claimant's anxiety levels. There is discussion about the Claimant leaving town to visit a friend in the Midwest for 2 weeks. At this appointment, Dr. Gellrick specifically noted the Claimant's "mood and affect is one of anxiety. She is clinging to a soft object in her hand when this examiner first comes in and repetitively fingering it, but she does let go as we have continued with the exam."

63. On October 21, 2009, the Claimant was seen by Dr. Gellrick who was now in possession of Dr. Kenneally's report, which had also been reviewed by Dr. Entin, who saw the Claimant on October 7, 2009. In this medical note, Dr. Gellrick states, that neuropsychiatric testing shows conscious attempt to fake injury and all interpretation of Dr. Kenneally's data is "suspicious and indicates a minimal level of performance." Dr. Gellrick went on to note that the testing results showed the Claimant "has had a decline in performance since prior history of 11/2008 testing, which is inconsistent with head injury, but more consistent with psychiatric factors or malingering. Testing indicates above. These findings are inconsistent with mild TBI. Psychiatric history indicates increased somatization and histrionic tendencies. Conclusion: no evidence to support traumatic brain injury." Dr. Gellrick also noted that "Dr. Entin is recommending beginning to wind down treatment and indicated he would discuss this with Dr. Torres. Dr. Gellrick noted that the Claimant has not seen Dr. Kenneally yet to review the results of the neuropsychiatric assessment and that the Claimant told her that Dr. Entin did not mention much at all about it when she saw him earlier.

64. On November 4, 2009, Dr. Gellrick again referred the Claimant to Dr. Goldman, this time for a consultation regarding the Claimant's cervical brachial dysfunction and a rehabilitation consultation. Dr. Goldman noted that it was "rather challenging to get a cohesive history from [the Claimant]." Dr. Goldman noted that the Claimant expressed frustration that she has not made much progress and "her number one problem are headaches and neck pain and secondarily bilateral hip pain, sacroiliac joint and low back pain." The Claimant reported that most of her treatments at this point were of a passive nature and that she was not enthusiastic about more active treatment options because they caused her pain. After going over a history with the Claimant and an extensive and thorough record review, along with a physical examination, Dr. Goldman's impression was that that right cervical and shoulder girdle myofascial pain was secondary to the work injury. He found that the Claimant had probable mild to very mild cognitive dysfunction and vestibular dysfunction secondary to her work injury. He deferred to Drs. Entin and Torres as to specific diagnoses, but found the Claimant had anxiety and depressive disorder. Dr. Goldman felt the Claimant had a pain disorder and recommended ruling out factitious disorder, and vascular and tension headaches of

myofascial origin. He noted the Claimant had a positive fibromyalgia screen that was most likely associated with sleep dysfunction and somatization disorders. Dr. Goldman expressed concern that the Claimant had "extensive treatment over at least the last six months with highly qualified professionals….but is noting minimal progress." He opined that there is a "likelihood that overall treatment at this time is inadvertently and iatrogenically re-enforcing some of the patient's dysfunction and identification with the victim role." He found that the Claimant would be a very poor candidate for injections, and recommended winding down the vestibular, physical and speech therapies." In an addendum to this medical note, Dr. Goldman advised against an FCE for the Claimant as it would be unlikely to be helpful or necessary with her type of biopsychosocial presentation, and due to the fact that based on his examination, she would most likely remain in the sedentary to light work category.

65. On November 9, 2009, Dr. Gellrick noted that "the patient is seen to obsess and perseverate on the findings of Dr. Kenneally in her report. The patient essentially feels Dr. Kenneally did not consider all factors presented and that the neuropsychiatric results are not an accurate representation of what she is feeling." The Claimant asked Dr. Gellrick for a handicap sticker for driving. Dr. Gellrick denied the Claimant's request for a handicapped sticker, explaining to the Claimant that she had no problems walking and so does not need a handicap sticker. Dr. Gellrick further noted that with her dizziness, the Claimant should not be driving.

66. Also on November 9, 2009, Ms. Haddow noted that she communicated with Dr. Gellrick about the Claimant's visual skills, which may have been linked to her vestibular problems and dizziness, and recommended an evaluation by a neuro-optometrist or an occupational therapist for visual perception screening. Ms. Haddow noted concern for the Claimant's ability to cope with current life demands and her expression of hopelessness regarding her injury.

67. Dr. Gellrick referred the Claimant to Dr. W. Bruce Wilson, a neuro-ophthalmologist, who evaluated the Claimant on December 1, 2009. Dr. Wilson's evaluation included validity testing, and Dr. Wilson noted that, "she said she is having trouble with her vision in the way of not being able to either hold concentration on what she is reading so that she can read it accurately or is having trouble assimilating information accurately or forgetting it or all three. It is very difficult to get a definite feeling from her in trying to sort this out." While Dr. Wilson noted that the eye examination showed 20/20 vision in soft contacts, he reported that, when changing distances to two meters and using a double sized target and doing a tangent visual field, there was no enlargement, so there was some functional component in regard to visual fields. There was no abnormality to her nerves and retinas or pupil abnormality and the examination of her ocular movements was normal. He ultimately opined that, "it is not convincing that [the Claimant] had any brain damage and probably definitely had no visual system damage that is demonstrable and that some of the visual field examination techniques suggest the possibility that this is functional, although it does not suggest malingering necessarily."

68. On December 8, 2009, Dr. Entin issued a psychiatric report. In his report, he specifically stated that the Claimant had a cognitive disorder. Dr. Entin also noted that reports from family members, friends, and employers were consistent with the doctor's observations, which indicated a dramatic change in the Claimant's functioning from her pre-injury levels.

69. The Claimant was examined by Dr. Gellrick again on December 21, 2009. The Claimant reported that she was still unable to drive due to dizziness and vertigo which continue. In reviewing the recent evaluation reports of Dr. Kenneally, Dr. Goldman and Dr. Entin, Dr. Gellrick clarified that Dr. Entin was on record stating that he did not believe the Claimant was consciously exaggerating her symptoms, nor malingering, but that she is anxious and her psychological state interfered with her function. Dr. Gellrick noted that Dr. Goldman found that the Claimant's worsening of symptoms was not consistent with a head injury, but "more consistent with the emotional sequelae of the same." Dr. Gellrick noted that both Dr. Goldman and Dr. Entin agreed that passive modalities should be discontinued but that the Claimant should continue to receive ongoing psychological support from Dr. Torres and Dr. Entin. Per Dr. Entin's recommendations, Dr. Gellrick recommended that the Claimant be seen by Dr. Schmitz for review of the neuropsychological testing data. The Claimant was also to continue be treated by seeing Dr. Lipkin for the vestibular issues.

70. On December 23, 2009, Dr. Goldman issued another written report based on the review of additional medical records. He pointed out that he had not seen the Claimant since November 4, 2009, but that the Claimant's attorney believed that his report from November 4, 2009 conflicted with some of the additional information that she provided to Dr. Goldman. Therefore, the attorney requested an updated report. In addition to the record review, Dr. Goldman also had an opportunity to consult with Dr. Gellrick and discuss the case again. Dr. Goldman clarified that he did find the Claimant's presentation to him to date to be consistent, nor was it consistent with her presentation to Dr. Torres and Dr. Entin. However, his "chief concern" relative to the Claimant "is whether various aspects of her present temporary disability are being overly emphasized or potentially misunderstood leading to a less than optimal functional recovery." Dr. Goldman still considered that "the psychological and emotional issues the greatest obstacle to recovery for [the Claimant]." He points out that the invalidation of the neuropsychological testing, for whatever reason, prevents objective categorization of what, if any, residual cognitive dysfunction remains for the Claimant, and how that might have been impacting her vocational reentry prognosis. Dr. Goldman noted that, having specifically considered the subjective feedback from associates, co-worker's, friends and family of the Claimant, as well as the medical opinions, his overall opinion remained unchanged from his prior report. Dr. Goldman went on to opine that "from a pain management and rehabilitation perspective, my chief concern is that if in fact [the Claimant's] primary rate-limiting issues are more in the psychosocial than cognitive realm, that if we and the patient overly endorse cognitive issues as being the primary rate-limiting rehabilitation factor to future recover, then in my experience the patient will have a great deal of difficulty in making any further progress relative to cognitive and behavioral interventions that might bear the greatest fruit in terms of facilitating both

physical and cognitive recovery." Dr. Goldman also continued to opine that "there remains subjective aspects (which are certainly quite consistent in presentation) that suggest a much stronger emotional component to the patient's present pain, suffering and disability than there are objective and physical conditions."

71. Dr. Lipkin determined that the Claimant was at MMI for her vestibular condition on January 6, 2010. He assigned an 8% whole person impairment rating from an ENT standpoint. At that visit, the Claimant reported to Dr. Lipkin that she had continued short episodes, seconds to minutes, of dizziness and unsteadiness, that she was unable to drive, and she continued to run into walls and had trouble walking straight. In arriving at the 8% whole person impairment rating, Dr. Lipkin found that the Claimant "is at the more severe end of Class 2 vestibular impairment with objective signs of impairment," although he noted "she has no problems with basic self care." Dr. Lipkin opined that there was no other specific treatment recommended at that point.

72. On January 6, 2010, the Claimant was discharged from speech therapy/cognitive intervention. Ms. Haddow provided final modifications for cognitive strategies to meet daily life demands. Ms. Haddow noted that the Claimant might benefit from short term cognitive intervention (3 to 5 sessions).

73. The Claimant participated in a Functional Capacity Evaluation (FCE) on January 25, 2010 for 7 hours and 30 minutes. In summary, the evaluator, Patrick Coughlan, found that the Claimant demonstrated work tolerance consistent with the "Below Sedentary" PDC level. Although, it was noted that the Claimant's effort was "variable," based on effort measures and clinical observations. Thus, the report should be considered to establish the Claimant's "minimal capabilities." Mr. Coughlan noted that the Claimant's "discomfort seemed to be related to anxiety with lifting and fear of falling more so than pain or strength." Over the course of the testing, the Claimant rated her pain at 8/10. The day following the FCE, the Claimant was instructed to contact the clinic to report her condition. The Claimant reported experiencing "a full blown migraine" and that she slept for 15 hours following the testing.

74. On February 3, 2010, Dr. Gellrick noted that the Claimant had seen Dr. Lindberg on January 8, 2010 for evaluation of her shoulder. Per Dr. Gellrick, Dr. Lindberg did not anticipate surgical intervention but he wanted a physiatry consult. It was also noted that Dr. Lipkin found the Claimant at MMI for the vestibular condition and rated the Claimant's impairment at 8% whole person. Dr. Gellrick also noted that the Claimant had completed an FCE on January 25, 2010 and reviewed the report with the Claimant.

75. The Claimant saw Dr. Gellrick on March 11, 2010 expressing that she was anxious to be able to drive to close places in her neighborhood. She told Dr. Gellrick that she had not been able to engage in her home exercise program at the local gym because she did not have a way to get there. So, she wanted to pass the driving evaluation so she could start driving, although the Claimant did express that she knew that she was not stable to drive on the freeway. Dr. Gellrick noted that her office was

attempting to obtain clearance from Dr. Lipkin's office so that the Claimant could participate in the driving evaluation. Dr. Gellrick noted that the Claimant continues to express "disgruntlement" and "is seen to obsess" about Dr. Kenneally. The Claimant was more satisfied with her contact with Dr. Schmitz.

76. Dr. Gellrick referred the Claimant to Dr. Zimmerman, who initially saw the Claimant for osteopathic manipulation and injections on March 31, 2010. The Claimant reported "constant headaches since the accident" and pain that seemed to originate from the occipitocervical junction that radiated over the top of her head and included bilateral temporal pain. The Claimant also reported neck pain in the cervicothoracic region, radiating into the trapezius and shoulder regions with associated numbness and tingling down the right upper extremity when the shoulder and neck pain was severe. She also reported low back pain that radiated into the upper buttock pain. Dr. Zimmerman diagnosed the Claimant with general myofascial pain of the cervical, thoracic, and lumbar spine with positive fibromyalgia screen; segmental dysfunction of the cervical spine with associated headaches; a history of postconcussive syndrome, anxiety and PTSD with a history of cervical spinous process fractures, stable and a right shoulder injury with evidence of a possible SLAP lesion. Dr. Zimmerman began osteopathic manipulative therapy on the initial visit.

77. At an April 6, 2010 visit with Dr. Zimmerman, the Claimant reported she was mildly sore after her initial manual treatments but that she was fine the following day. She continued to treat with Dr. Zimmerman through April 2010 with no change in her daily headaches or upper cervical pain. Although there was improvement noted on April 27, 2010 to her thoracic, shoulder, hip and lumbar spine, and the Claimant reported increased tolerance for activity such as shopping and being comfortable in a car. On May 3, 2010, the Claimant's level of activity further increased, with the Claimant reporting that she did some mild hiking over the weekend and she "tolerated the uneven terrain and hiking that lasted several hours without difficulty." On May 24, 2010, the Claimant reported that she went hiking over the weekend for a one-hour duration on uneven terrain in Rocky Mountain National Park. Dr. Zimmerman also noted that Dr. Entin was reducing several of the Claimant's medications on a tapering schedule over the next several weeks.

78. On April 29, 2010, Dr. Gellrick noted that the Claimant underwent a driving evaluation and was able to drive short distances, although Dr. Gellrick opined that the Claimant should avoid freeway driving. Dr. Gellrick noted that, per Dr. Schmidt, although the Claimant's performance on his testing was "clearly internally inconsistent" and indicative of nonorganic factors impacting her test behavior, it fell short of a supportable finding of conscious exaggeration. Dr. Gellrick opined that the Claimant was not yet at MMI.

79. On June 2, 2010, Dr. Zimmerman performed medial branch block procedures on the left side at C2-C3, C3-C4, C4-C5 and the third occipital nerve. There was a diagnostic response for the left-sided medial branch blocks with 60-75% relief reported on the left side and no change on the right side, which was not treated. On

June 7, 2010, the Claimant reported her relief lasted two to three hours with soreness the following day and a return to a baseline level of discomfort after. Bilateral medial branch blocks were performed by Dr. Zimmerman on June 9, 2010. In the recovery room, the Claimant reported a 50-75% relief in her headache and a 50% relief in neck pain. On June 14, 2010, the Claimant reported that the relief lasted a couple of days and she demonstrated improved cervical range of motion on examination. On June 21, 2010, Dr. Zimmerman reported that the Claimant "tolerated camping activity over the weekend including collecting firewood and doing short hikes as well as cooking outside. No increase in symptoms. She states her neck pain seems to be improving and the intensity of her headaches is also slowly decreasing, although they are still constant in nature."

80. On June 23, 2010, the Claimant underwent radiofrequency neurotomy at right C2-3, C3-4, C4-5 and right occipital nerve. Dr. Zimmerman noted a diagnostic response in the recovery room and some, although lessening, continued relief. On July 19, 2010, the Claimant reported increased outside stressors to Dr. Zimmerman, including her son getting married in another state. Dr. Zimmerman opined that "[the Claimant] has recently undergone medication changes by Dr. Howard Entin and she is experiencing increased anxiety due to psychosocial stressors at home. This in combination with the complexity of her post concussive syndrome, anxiety, and PTSD disorder. I do not recommend proceeding with RF neurotomy at this time. [The Claimant] is experiencing somatization response and I am concerned that additional RF treatment may not provide net benefit at this time." On July 26, 2010, it was noted that the Claimant was leaving town for a week and she would be driving to Mississippi for her son's wedding. At the next appointment on August 5, 2010, Dr. Zimmerman noted that the Claimant reported that she tolerated the road trip to Mississippi "without any exacerbation in pain," and further reported that "her headaches have been reducing in frequency and are no longer constant." On August 9, 2010, Dr. Zimmerman noted that the Claimant reported her headache frequency and intensity continued to reduce, although the Claimant was active over the past weekend, going camping, although she did not tolerate wearing a camel back with water longer than 15-20 minutes before spasms occurred.

81. On June 29, 2010, the Claimant followed up with Dr. Gellrick, who was then at a new office in Denver, having left the Exempla office in Wheat Ridge since the Claimant's last appointment. The Claimant's symptoms flared since the rhizotomy with Dr. Zimmerman, which was not unanticipated. Overall, the Claimant reported that she trusted the procedure and felt that her headache condition was improving and that the treatment by Dr. Zimmerman had made a big difference in her physical presentation. The Claimant reported that she was driving more and tolerated back streets and side roads for trips of 30-45 minutes, depending on her level of headache. The Claimant reported that she was staying off freeways. The Claimant complained of continued symptoms of photophobia, headaches and memory problems, and tenderness in the thoracic region. Dr. Gellrick noted that the Claimant was "actually upbeat" on the day of the appointment and "very well organized" with a day-keeper with all of her dates and that the Claimant was able to track things well.

82. Dr. Gellrick referred the Claimant to Thomas Politzer, O.D., because, per Dr. Gellrick, the Claimant continued to have complaints of visual problems when she came in to Dr. Gellrick's office and at the OT Plus appointments. The Claimant was initially seen by Dr. Politzer on September 7, 2010. Dr. Politzer noted that the Claimant had visual motion hypersensitivity, convergence insufficiency with episodic double vision, and oculomotor dysfunction. He recommended that the Claimant be refit for both of her contact lenses for distance vision and to help reduce her dizziness symptoms. He also recommended oculomotor therapy with her occupational therapist Judy Haddow.

83. At a follow up visit on September 21, 2010, Dr. Politzer noted that the Claimant reported some improvement with her new lenses with regards to visual motion hypersensitivity. The lenses were further evaluated and modified with a prescription to give enhanced acuity and improvement in visual motion hypersensitivity.

84. On October 14, 2010, the Claimant began to see Shari Barta for occupational therapy, with goals related to visual retraining, cognitive retraining and perception retraining until discharge from O/T services on March 9, 2011.

85. By October 14, 2010, Dr. Zimmerman noted that, "subjectively, [the Claimant's] symptoms seem to have stabilized and she continues to report temporary partial relief from manual medicine from myself, chiropractic/accupuncture treatments, and massage treatments. However by October 25, 2010, the Claimant is reporting to Dr. Zimmerman that she is overall the same with her headache, cervical, thoracic and lumbar pain unchanged and occurring unpredictably." The Claimant felt Dr. Zimmerman's treatments were maintaining her current condition, as opposed to continuing to improve her condition.

86. On October 19, 2010, the Claimant saw Dr. Gellrick for a follow up appointment. The Claimant was seeing Dr. Politzer and Shari Barta for vision therapy, and seeing Dr. Zimmerman and Dr. Gridley for alternating OMT and acupuncture every other week. The Claimant also reported that she was set up at the gym for her home exercise program. Dr. Gellrick noted that the Claimant was not yet at MMI for all conditions, but expected MMI by the end of November. Dr. Gellrick noted that she was going to ask Dr. Entin to do the psychiatric impairment rating, as it appeared that the Claimant was at MMI for this.

87. On November 16, 2010, Dr. Entin issued a Neuropsychiatric MMI/Impairment Report. In that report, Dr. Entin again opined that the Claimant's pedestrian/motor vehicle accident had caused emotional reactions and post-concussive syndrome that affected her cognitive functioning. In the November 16, 2010 report, Dr. Entin gave the Claimant a 10% neurological impairment rating using the AMA Guides 3rd edition for impairment of cerebral function. The doctor stated in his report that the Claimant continued to have trouble with cognitive fatigue, memory problems, difficulty multitasking, organization, etc. He also stated the Claimant "could not return to her previous level of functioning." Dr. Entin stated that it was unclear if the Claimant could

do even fairly simple repetitive jobs on a consistent basis due to cognitive fatigue, disorganization, and chronic pain.

88. On December 6, 2010, the Claimant reported to Dr. Zimmerman that her symptoms were essentially unchanged. She was trying new medications. Her underlying headache was persistent but she noted decreased frequency and intensity of the severe migraines. At this point, the Claimant was alternating chiropractic and acupuncture every other week with OMT/manual medicine. On December 20, 2010, Dr. Zimmerman noted that the Claimant reported a difficult last two weeks due to nausea that she thought was related to Topamax and she has lost 10-pounds. She also reported a cold and upper respiratory viral infection. With respect to musculoskeletal issues, the Claimant reported decreased severe migraines with no change to her underlying headache. Her cervical and thoracic discomfort were better controlled.

89. On December 20, 2010, Dr. Politzer reported that the Claimant was, "improving with regards to her vision" and that vision therapies with Sherry at OT Plus were helping. On January 20, 2011, Dr. Politzer and the Claimant discussed the option of evaluating for Botox because the Claimant was not happy with the side effects of Topamax, even at a reduced dosage.

90. On January 10, 2011, the Claimant participated in a Functional Capacity Evaluation (FCE) administered by Vickie Mallon, OTR. At the time of the testing, the Claimant reported to Ms. Mallon that her pain level that day was a 7/10, which was described as a typical day, at the beginning of the FCE and it was reported to be 9.5/10 at the end of the evaluation. The Claimant's main complaints were headache, neck tightness with muscle spasms, achiness throughout her cervical, thoracic and lumbar spine, tingling in both arms and hands, and a feeling of extreme anxiety. Ms. Mallon noted that the Claimant's job at the time of her injury was administrative assistant to the State Board of Education. The job was identified as most consistent with Dictionary of Occupational Titles job DOT 169.167-010, and is classified in the sedentary work category. The FCE was performed over 4 hours, and the Claimant demonstrated an ability for sustained sitting of approximately 20 minutes with frequent change of positions from sit to stand. Her sustained standing/walking was demonstrated to be 45 minutes. The validity measures indicated that the Claimant may not have put forth consistent effort during the testing. Ms. Mallon concluded that, "the [Claimant] appears to have a hesitant and frustrated perception of her ability to work." With respect to testing for lifting, carrying, pushing and pulling, the Claimant's overall demonstrated abilities were "most consistent with the light work category at this time." It was also noted that, with respect to dexterity testing, the Claimant exhibited decreased manipulative ability with both hands, working at a very slow, noncompetitive rate of speed. The evaluator noted that the Claimant contacted her the day following the FCE to describe her pain and symptoms following testing. The Claimant reported that she took a hot bath following the test and slept most of the afternoon. She reported a strong headache, but not a migraine, and increased cervical pain and right upper extremity pain.

91. On January 17, 2011, the Claimant reported to Dr. Zimmerman that the Topamax did seem to significantly decrease the frequency and severity of her acute migraine headaches. However, the Topamax interferes with her appetite and she continued to have weight loss and was down to about 106 pounds. The Claimant also reported that she had an FCE one week prior and she had "a slight flare-up in left-sided neck pain from a certain activity during the test, and those symptoms are slowly returning to baseline." On January 31, 2011, Dr. Zimmerman noted that, while the Topamax was effective at reducing the Claimant's migraines, the appetite suppressant side-effect persisted, and so, he recommended a nutrition consult, as well as consideration of Botox for migraine treatment to reduce the Topamax needs.

92. Dr. Gellrick evaluated the Claimant on February 8, 2011, and determined MMI. She provided an impairment rating for those conditions not already rated by other treating physicians. Dr. Gellrick assigned a 26% whole person rating for the cervical, thoracic and lumbar spine and a 7% upper extremity rating for the right shoulder. Dr. Gellrick combined this 26% spine impairment rating with the cognitive impairment rating of Dr. Entin of 10% for 33%. The 33% rating was then combined with the 8% vestibular impairment resulting in a 38% whole person. This 38% was then combined with a 4% right shoulder impairment, resulting in a 40% whole person impairment for all conditions rated. Dr. Gellrick's impairment rating report contained an extensive and thorough review of the Claimant's history of present illness and subsequent medical treatment. Dr. Gellrick listed the following final diagnoses for the Claimant: MTBI with cognitive dysfunction; post-concussion syndrome with cephalalgia (headache); cervical strain; thoracic strain; lumbar strain; persistent vertigo; major depressive disorder with generalized anxiety disorder; pain disorder associated with psychological factors and medical conditions; right shoulder impingement; deconditioning; and ongoing emotional dysfunction. In conclusion, Dr. Gellrick noted that although the findings of the most recent Functional Capacity Evaluation put the Claimant in a sedentary work category, "mentally the patient will have good and bad days where she is unable to track her task and be consistent with her performance."

93. On February 28, 2011, the Claimant reported to Dr. Zimmerman that "her overall migraine severity has remained stable, which is significantly improved for the past several months." She completed her Topamax taper and was off this medication.

94. On March 10, 2011, Dr. Gary Zuehlsdorff issued a written opinion after being asked to review the IME of the Claimant and the final impairment rating from Dr. Gellrick provided in February of 2011. Dr. Zuehlsdorff opined that "in reviewing her report and Dr. Howard Entin, the psychiatrist's report, I would concur that the numbers obtained seem to be reasonable, given the gravity of the injury." Dr. Zuehlsdorff did not have disputes with the impairment ratings for the cervical, thoracic, and lumbar spine and the right shoulder or vertigo ratings. Dr. Zuehlsdorff also opined that the 10% rating from Dr. Entin for primarily TBI symptoms with minimal psychiatric components of 10% made sense from a medical standpoint.

95. On March 15, 2011, Dr. Gellrick saw the Claimant for maintenance treatment and, with the Claimant present, completed a 7-page form "courtesy of Barbara Furutani, Esq. regarding permanent needs and set-asides for the patient, …" Dr. Gellrick assigned permanent restrictions via this form, which she later changed. However, in the form, Dr. Gellrick gave the Claimant the following permanent work restrictions after MMI: sitting limited to 20 minutes per episode; walking and standing limited to 20 minutes per episode; with typical breaks where she could sit, stand, and walk. These activities were limited to about 4 hours per episode.

96. Respondents filed a Final Admission of Liability on March 16, 2011, admitting for a 38% whole person rating and a 7% scheduled rating for the shoulder. The Respondents' final admission incorporated the ratings of Drs. Gellrick, Entin and Lipkin, as set out in Dr. Gellrick's February 8, 2011 report.

97. On April 25, 2011, the Claimant reported to Dr. Zimmerman that she hurt everywhere, and was very non-specific in her pain description. She could not clearly articulate the location, timing, intensity or triggers that brought on symptoms in her hips, cervical, thoracic and lumbar spine.

98. The Claimant saw Dr. Adam Wolff on June 21, 2011 for a neurology consultation to consider alternatives for headache relief such as Topamax, which provided benefit for her severe headaches, but also caused side effects at increased dosages for the Claimant. At the first visit, Dr. Wolff recommended Depakote and a trial of Botox. After five days on Depakote, Dr. Wolff reported on June 29, 2011, that the Claimant was tired. The initial treatment with Botulinum Toxin was tried on June 29, 2011. As of August 3, 2011, the Claimant reported to Dr. Wolff that the Botox injection helped but the Claimant was still getting chronic headaches, although they were a little less severe. On September 1, 2011, the Claimant was started on Topamax again. By September 21, 2011, the Claimant received a repeat injection of Botox and was also doing better with her migraines on the Topamax. By October 19, 2011, the Claimant was reporting improvement in her headaches to Dr. Wolff. Dr. Wolff noted She is still getting a headache most days, but they are coming on in the evening. She is feeling somewhat better during the day and she is not getting as many migraines. She describes perhaps 3 or 4 significant migraines over the last month."

99. On November 2, 2011, following a phone call from the Claimant's counsel, Dr. Politzer reported a diagnosis of visual motion sensitivity, for which the Claimant was receiving therapy. He noted that his other initial diagnoses of convergence insufficiency with episodic double vision and oculomotor dysfunction were problematic only because of the motion sensitivity. Dr. Politzer noted that, by taking a conservative approach with regards to equalizing her contact lenses and through occupational therapy, the Claimant's "visual dominance" and "visual motion sensitivity" were reduced.

100. Dr. Gellrick issued a Medical Record Review Special Report and Video Surveillance Review on November 5, 201,1 at which time she updated her opinion of the Claimant's restrictions. In preparation for this report, Dr. Gellrick reviewed IMEs

performed by Dr. Tashof Bernton, Dr. Judith Weingarten and Dr. Armin Feldman, along with video surveillance from August and September of 2011. With respect to the reports of Dr. Bernton, Dr. Gellrick noted that Dr. Bernton found that the Claimant's conditions were consistent with those initially identified by Dr. Rick Artist and ultimately determined that the Claimant was capable of performing in an administrative position and she should not be placed on a disabled status, as she was physically capable of performing vocational activity. Dr. Gellrick also took note of the IME of Dr. Weingarten which took place for 3 hours on September 22, 2011, and was attended by Dr. Armine Feldman (although he did not participate). Dr. Gellrick noted that Dr. Weingarten ultimately concluded that the Claimant's symptoms were consistent with pain disorder, and histrionic personality disorder and that her symptoms were not caused or aggravated by her work injury. Dr. Weingarten found no reason the Claimant could not work and encouraged the Claimant to return to work to help build confidence. Dr. Gellrick noted that Dr. Feldman disagreed with and refuted some of Dr. Weingarten's statements. Dr. Gellrick noted that Dr. Feldman concluded that the Claimant's current medical condition included postconcussion syndrome with cognitive loss, depression and headaches and was a direct result of the auto-pedestrian work injury. Dr. Gellrick generally disagreed with the opinions of Drs. Bernton and Weingarten and agreed with Dr. Feldman. Dr. Gellrick also chronicled her review of portions of the surveillance video. Dr. Gellrick noted that on September 10 and 11 of 2011, the Claimant was able to pick up two one-gallon buckets of paint and carry them to check out and then load them into her vehicle. Dr. Gellrick also reviewed the August 20, 2011 video from the Peach Festival. She notes that the Claimant was basically seen walking for 2 ½ hours with a break of approximately 30 minutes sitting on the ground and then stood and walked again from 1:45 p.m. until leaving at 2:30 p.m. She noted that the Claimant was able to bend at the waist with more range of motion than had been seen at the time of the closure of her claim. She noted that the Claimant was able to lift boxes of Peaches which presumably weighed 15-20 pounds and was able to lift and carry them and that from her prospective, the Claimant's function had improved in terms of the Claimant's ability to lift and carry 15-20 pounds for at least brief periods and able to stand and walk for more time that she was able to do previously. Dr. Gellrick ultimately translated this to a best case scenario where "with improvement in function this patient would function for 3 maybe 4 hours on a job with the ability to sit at will and stand and walk and lift up to 10 to 15 pounds on and occasional basis." However, Dr. Gellrick cautioned that "beyond a 4 hour period though it is doubtful what the patient's function would be based on video surveillance. The patient is anticipated to have good days and bad days. There will be days when the headaches she has experienced will preclude her activity."

101. On November 17, 2011 the Claimant saw Dr. Wolff for follow up and reported that the Botox was wearing off and she was getting more headaches. Dr. Wolf reported that the Claimant was also under increased stress over the last month due to the death of a friend. Dr. Wolf recommended repeating the Botox injections in the facial musculature and avoiding the neck so she would tolerate it better. Then the Claimant would follow up with Dr. Zimmerman for neck injections and treatment.

102. On November 23, 2011, Dr. Lipkin responded to an inquiry from Respondents' counsel regarding the Claimant's vestibular conditions. He noted that, as of her last visit to his office on January 6, 2010, the Claimant was reporting that her balance was improving but she still had difficulty walking in a straight line and she felt unsteady and unable to drive. After communication with Dr. Gellrick's office at a later date, the Claimant was reevaluated to see if she could drive. Dr. Lipkin stated that he had not seen the patient in the office since that time. In response to questioning about her level of functioning (after reviewing surveillance video from the summer of 2011), Dr. Lipkin opined that, "she is capable of a level of functioning that clearly has improved since her January 6, 2010 visit in that she does not have any obvious instability when walking and is capable of driving. Patients with vestibular injuries can have intermittent symptoms, but at least some of the time she appeared to be capable of both sedentary and moderate levels of activity. There would be no otolaryngology contraindication towards her being employed at sedentary or light work, with the understanding that if she does have fluctuating symptoms, periodic breaks could be medically necessary."

103. On December 13, 2011, the Claimant returned to Dr. Zimmerman for medical maintenance treatment. Specifically, Dr. Gellrick requested consideration for a repeat third occipital nerve and cervical RF neurotomy to treat recurrent headache pain. Dr. Zimmerman noted that the Botox injections provided some relief but the Claimant did not tolerate the neck injections due to neck weakness sensation. She is scheduled for repeat face and head injections with Dr. Wolff on 12/20/2011. Dr. Zimmerman notes pain behaviors with full flexion and extension of the shoulder and diffuse shoulder pain. After performing a medical record review, Dr. Zimmerman opined that "the majority of headache relief and increased function came from manual medicine treatments on the left side of her neck and reduced stress in her life. It appears the RF neurotomy treatment on the right side of her neck did not provide any lasting benefit or any increase in function." So, Dr. Zimmerman did not recommend a repeat RF neurotomy as he found no clinical indication that it improved overall headache relief or improved level of function.

104. On January 6, 2012, the Claimant reported to Dr. Gellrick that Botox injections had helped control the headaches overall by 50%. The Claimant was getting headaches almost every week before, and at that point she was getting them every 2 to 2 1/2 weeks. So, Dr. Gellrick found that the Botox appears to have helped along with the concurrent use of Topamax.

105. On February 29, 2012, at an annual comprehensive vision exam, Dr. Politzer reported an improvement in the Claimant's ongoing headaches with the Botox treatment and a lower dose of Topamax. The Claimant reported some deficits with visual tracking but her "double vision has resolved." He reported improvement with headaches and the visual system overall.

106. On April 2, 2012, Dr. Zimmerman reported that the Claimant returned for osteopathic manipulation for the first time in four months. The Claimant reported that her father had recently passed away and she commuted by car to Ohio and back (20

hours each way) which made her cervical, thoracic and lumbar spine sore and there was stress due to the loss of her family member. Dr. Zimmerman noted that the Claimant appeared fatigued and that she lost some weight. However, he also noted that the Claimant showed no signs of sedation, withdrawal or anxiety.

107. The Claimant treated with Dr. Zimmerman for osteopathic manipulations on September 7, 2012 and again on September 24, 2012. On September 24, 2012, the Claimant reported that she was sore after the OMT treatment on September 7, 2012, but experienced significant benefit with the loosening of the cervicothoracic junction and relief in the low back and anterior hip. The Claimant reported that "her tolerance for activity is increased with activities of daily living, and she is starting a walking program one-half mile two times per week" and she was tolerating stairs better at home." Dr. Zimmerman also noted that she only stuttered one time during the visit that day and her speech pattern appeared more relaxed. She was also able to get on and off the examination table with minimal hesitation and stiffness.

108. On September 7, 2012, Dr. Wolf prepared a letter summarizing his treatment of the Claimant for chronic headaches. Dr. Wolf stated that the Claimant had been effectively treated with Imitrex and Botox. He opined that, due to the 3+ years chronicity of the headaches, it was likely these therapies would need to continue indefinitely. He further opined that there was a reasonable degree of medical probability that the Claimant would have chronic headaches as a result of her head trauma.

109. On September 20, 2012, the Claimant saw Dr. Gellrick again for maintenance medical treatment. Dr. Gellrick also noted that after the visit, she was provided with a medical record review prepared by Dr. David Reinhard dated April 16, 2012. She noted that Dr. Reinhard ultimately concluded that based on the lack of objective information regarding reported cognitive deficits, the amount of cognitive impairment would not produce any significant permanent cognitive residual and there would be a negligible long term effect on the Claimant's ability to work. In response, Dr. Gellrick noted that she would defer to the opinions of Dr. Howard Entin and felt that, if anything, the Claimant should be considered for reevaluation and neurocognitive testing follow-up with Dr. Schmitz.

110. On October 15, 2012, the Claimant reported to Dr. Zimmerman that what he was doing for her neck was helping and "the combination of OMT, chiropractic and acupuncture and the work at CACC is providing some significant temporary relief." The Claimant was walking a mile up to three times per week.

111. On November 5, 2012, the Claimant reported that her back and neck symptoms were improved overall in the last two months and she had increased mobility. Her activities were not as painful. Dr. Zimmerman did note that the Claimant appeared somewhat fatigued and occasional stuttered and had word find struggles. He also noted increased muscular tone on physical examination. This was the last medical record of OMT treatment with Dr. Zimmerman submitted into evidence.

112. On February 11, 2013, Dr. Politzer saw the Claimant again for an annual comprehensive exam noting the Claimant still reported difficulty with migraine headaches, blurred vision for distance and near, as well as with reading. Dr. Politzer noted that the Claimant was still not able to achieve her desired level of acuity with bifocal contact lenses and additional lenses were ordered for the Claimant to evaluate.

113. On March 14, 2013, Dr. Politzer completed an Ophthalmological Functional Capacity Questionnaire. He diagnosed the Claimant with convergence insufficiency and ocularmotor dysfunction. Dr. Politzer reported that the Claimant was sensitive to light, had episodic double vision and that her double vision condition caused "eye fatigue" such that the Claimant would need to rest her eyes at unpredictable intervals and, after fixing her gaze on an object, computer screen or printed matter after two hours. At that point, the Claimant would have to close her eyes to rest them for up to 5 to 10 minutes. Dr. Politzer checked that the eye impairment would not impair or preclude the operation of an automobile but it would impair or preclude the operation of a computer. He opined that the Claimant's eye impairment would significantly impair her ability to use tools, coordinate eye-hand movements and see well enough to work with small objects. However, it would not, or only moderately, impair the Claimant's ability to view objects when looking up, down or to the side or straight ahead. He also noted it would not impair her ability to read or to clearly view a computer screen on regular basis for two hour segments. Her condition would not, or only moderately, impair her ability to recognize errors and record information, work with speed and accuracy in the performance of tasks, coordinate eyes and hands rapidly and accurately to make precise movements with speed or impair the Claimant's ability to avoid ordinary hazards.

114. On March 27, 2013, Ms. Haddow prepared a written response to various questions related to the Claimant that were posed by the Claimant's attorney. In her report, Ms. Haddow stated that the Claimant "frequently appeared to forget the question or topic and often provided excessive detail" and she "exhibited moderate problems with fluency." The Claimant advised Ms. Haddow that she had problems with reading and recall, dizziness and balance. The Claimant also reported that she was cleared to drive but was uncomfortable driving more than a mile or two from her home. Ms. Haddow opined that the Claimant's "visual deficits, cognitive deficits, cognitive fatigue and persistent headaches would interfere with her ability to perform reliably and consistently with testing that extended beyond 15 to 30 minutes." Ms. Haddow opined that the Claimant functioned better when she was in a quiet environment rather than noisy, visually stimulating environments if sustained cognitive attention was required. Ms. Haddow stated that she did not observe the Claimant reading and understanding an 8x11 printed page or writing a page of long text as she did not ask the Claimant to attempt these tasks since Ms. Haddow believed they were too difficult for her. Ms. Haddow documented that the Claimant was hypersensitive to noise, startled easily, and had trouble sustaining attention in crowded stores and noisy environments. Ms. Haddow reported that the Claimant had "problems recalling recent events, [and] headaches with any cognitive effort (attempting to read, listen to a conversation, watch a television program, following a recipe, shop for groceries)." Ms. Haddow noted that at the time she

completed her treatment with the Claimant, the Claimant required accommodations for computer work, in order to follow written or spoken directions and to read or write anything. Generally, she required additional time, someone to check for accuracy and frequent breaks. Ms. Haddow ultimately concluded that, based on the March 14, 2013 report of Dr. Politzer, in spite of some improvement in visual functioning, the Claimant would still have difficulty reading and writing on paper or with a computer.

115. On March 28, 2013, Dr. Gellrick completed a form stating that she agreed with Dr. Walter Torres' March 15, 2013 Mental Residual Functional Capacity Statement.

116. Dr. Gellrick testified by evidentiary deposition on May 6, 2013. She testified that she began treating the Claimant on December 8, 2008. She testified that it was significant to her that Dr. Hnida had ordered a CT scan, because due to his experience with combat situations and head trauma, he picked up on the Claimant's dizziness and a probable head trauma where Dr. Artist and the EMTs would not have. Dr. Gellrick testified that she was trained at the Denver Health Emergency Department and in her experience, in a Level 1 trauma emergency room, they will not be as concerned with someone who is not experiencing acute trauma evidenced by bleeding or loss of consciousness. She did not see any evidence that emergency room personnel performed any kind of mental status exam other than the Glasgow Coma Scale. Dr. Gellrick testified that during the golden hour the blood supply goes to the brain and to the heart and the patient may not be aware of some of her injuries. During the first hour to three hours (the time frame varies depending on the patient) the body clamps down and is "capable of doing amazing things to try to survive." Even emergency personnel may not recognize the extent of the patient's injuries. It is not until the patient gets past the golden hour that the patient's injuries will start surfacing. Dr. Gellrick testified that because of the golden hour, the Claimant could have looked good initially. Dr. Gellrick thought (mistakenly) the Claimant had neurologic deficit which was documented in the paramedic report as slurred speech and facial drooping (although review of the record shows these symptoms were listed as negative with a minus symbol). Dr. Gellrick testified that you can have a Glasgow Coma Scale score of 15 and still have a mild traumatic brain injury. Dr. Gellrick testified that Claimant's traumatic brain injury was caused by a bump or blow, as defined by the Division of Workers' Compensation Rule 17, Exhibit 10, Section C, and this does not require a laceration or hematoma. Rather, "you can have a countercoup injury, and the force of the brain being jolted around inside the skull can cause symptoms of mild TBI." Dr. Gellrick testified that Dr. Woessner's recommendation to have a head CT indicates that Dr. Woessner was concerned that the Claimant had a brain injury, even though the Claimant and her husband declined it. Dr. Gellrick noted that under the Mild Traumatic Brain Injury Guidelines, the Claimant had most of the symptoms associated with mild TBI. Dr. Gellrick also testified that, in her training, she learned that there are outliers (approximately ten percent of patients with TBIs) who do not get better. Based on Dr. Gellrick's personal experience, she verified that there are patients with TBIs who never recover. Dr. Gellrick also found that the patients who fall into the 10-20% outlier category may recuperate from depression and other similar diagnosis, however the vestibular symptoms, i.e., dizziness and headaches, may continue. Dr. Gellrick testified that Client has visual blurriness and

difficulty looking at a computer screen. Dr. Gellrick stated that these symptoms fit within the Treatment Guidelines E9 for TBI and that a visual dysfunction in these circumstances is a common problem. Dr. Gellrick testified that fatigue is a common symptom for patients experiencing chronic pain. Dr. Gellrick testified that the Claimant is not the type of person who doesn't want to go back to work: "This patient wanted to go back to work. It's one of the things she said to me when I first evaluated her. . . . This -- is based on work reviews, the Claimant had -- she presented -- according to those comments made by previous . . . employers or supervisors, as more of a -- what we call a type A, a person that's driven to do well and do it correctly and do it perfectly." Dr. Gellrick testified that "I don't see that she would have secondary gain from avoiding work." Dr. Gellrick stated that the Claimant's headaches stemmed from two sources: 1) The MTBI and 2) Cervicogenic pain as a result of the injury to Claimant's neck. Dr. Gellrick testified that Claimant has speech difficulties, including word-finding and stuttering. Dr. Gellrick agreed with Dr. Wolff's report that Claimant's chronic headaches would affect her ability to function. Dr. Gellrick testified that the Claimant would not necessarily be able to work even part-time (15-20 hours per week), because the Claimant suffers from severe headaches that can last over the course of several days. Dr. Gellrick agreed that the Claimant had improved since March of 2011. It was obvious that she can now walk more than two city blocks, she can sit for more than 20 minutes and stand for more than 20 minutes. She agreed that the Claimant can probably sit/stand and walk a little more than four hours in an eight hour day. To the extent that the Claimant would need to lie down that wouldn't necessarily be every single day and could be done at a break such as lunch. Based on her review of the surveillance video, Dr. Gellrick believes that the Claimant was able to lift 20 pounds and the video showed that the Claimant's ability to twist, stoop, bend and crouch, may have gotten better. Dr. Gellrick did not know how often the Claimant gets dizzy spells at this time. Dr. Gellrick testified that Dr. Roe is a competent ophthalmologist and Dr. Wilson is a competent neuro-ophthalmologist. Dr. Gellrick had every confidence in their ability to evaluate the Claimant. Dr. Gellrick would defer to Dr. Lipkin regarding vertigo and dizziness.

117. Dr. Gellrick's evidentiary deposition was completed supplementally on July 24, 2013. Dr. Gellrick testified that she didn't know what the Claimant can do today. If you really want to know what the Claimant can do you should do a repeat FCE. It doesn't change MMI but gives you more objective data. Dr. Gellrick agrees that her opinions about restrictions are guess work. She agrees that the Claimant showed improvement from March through August, 2011 and would have hoped that the Claimant's improvement would have continued through her use of a gym program and continued strengthening. Dr. Gellrick does fall back on the surveillance video since it showed a longer period of time than she normally had a chance to observe the Claimant and at no point did the Claimant appear to be having difficulty or being uncomfortable in the surveillance video from the Peach Festival. At no point did the Claimant appear uncomfortable while walking nor did she appear to be dizzy or have dizzy spells.

Video Surveillance of the Claimant

Multiple CDs with video surveillance were provided as part of the record in this case. From this, a few relevant portions are summarized below:

January 8, 2009

118. At 10:28 a.m. the Claimant is seen exiting her house through the garage and going down to hand outgoing mail to the driver of a mail truck and retrieving that day's mail. After this, the Claimant has a conversation with a woman walking by and she has no apparent difficulty communicating. At 10:48 a.m., the Claimant is seen driving off alone in the minivan and she goes into an office. She is seen exiting the office at 12:36 p.m. walking while talking on her phone. She gets back into her minivan while talking on the phone with no apparent difficulties and drives off. At 12:53 that day, the Claimant is seen out in front of her house talking with a woman who has arrived in a dark gray SUV and the Claimant gets into the passenger side of the vehicle. The woman drives the Claimant to Exempla and the Claimant is at this appointment until approximately 2:05 p.m. when the Claimant and woman exit the building, return to the vehicle and the Claimant enters on the passenger side with no apparent difficulty. The Claimant arrives at her home at about 2:40 p.m.

January 13, 2009

119. The Claimant is seen driving off in the minivan from her home at approximately 9:47 a.m. The Claimant parks and enters a King Soopers at approximately 9:52 a.m. She drives off at 9:59 a.m. and drives home. At 11:13 a.m. that day, she backs the minivan out of her garage again, stopping in the driveway. She exits the vehicle and walks over to the mailbox over a snowy area but exhibits no balance issue or walking difficulty. She reenters the vehicle and drives to Mission Viejo Elementary school and enters the building. She exits the elementary school at approximately 11:18 and reenters the minivan.

January 14, 2009

120. At approximately 7:15 a.m. the Claimant is seen leaving her house in the minivan and she drives to Colorado Athletic Conditioning Clinic. The Claimant is at Colorado Athletic Conditioning Clinic until approximately 9:12 when she exits the building with a gentleman with whom she is conversing. They walk out to his truck and continue to converse. Then, the Claimant enters her minivan which is parked next to the truck at approximately 9:14 a.m. The Claimant continues to talk to the gentleman until she drives off at approximately 9:15 a.m. At 10:16 a.m., the Claimant is seen leaving her house and getting into the passenger side of a dark gray SUV. The Claimant and the woman who drove run errands, stop to eat and go to the grocery store where the Claimant is seen pushing the grocery cart full of groceries and shopping with the assistance of the woman who drove her. They leave the store at approximately 12:27p.m. and both women take bags out of the car and put time into the back of the SUV.

August 20, 2011

121. The Claimant, her husband and another couple, the Morelands, drove to Palisade, Colorado and spent several hours at a Peach Festival. Later in the day she went to a farmer's market, winery, and out to dinner that evening in Fruita, Colorado. Her activities were videotaped. The Claimant is left on her own on and off throughout parts of the day. The Claimant is seen bending over at the waist to look at items being sold at various booths. She is shown conversing with many vendors without any apparent communication problems. Throughout the day the Claimant is shown walking, going from standing to sitting positions, lifting, bending at the waist, crouching/squatting and reaching overhead with both arms. At one point she picks up a large box of Peaches and carries it for a bit. The Claimant testified that the video does not show that she had difficulty carrying it and set it right down for her husband to carry. However, even taking this into consideration, the video surveillance shows a regular and normal amount of activity on the part of the Claimant over the course of the day, including a lengthy car ride and typical activity at the Peach Festival. Despite it being a sunny day, the Claimant doesn't wear sunglasses (except on her forehead). She demonstrates no problems with photophobia. Her interaction with friends and strangers appear normal and comfortable. She demonstrates no balance problems and she exhibits fine motor skills. Contrary to her testimony at the hearing, Rosemary Moreland exhibits no apparent concern about balance issues or dizzy spell and she leaves the Claimant on her own, intermittently throughout the day.

August 26, 2011

122. On this day, the Claimant was videotaped on and off from approximately 9:20 a.m until mid-afternoon. Over the course of the day, the Claimant is seen retrieving her mail while talking on the phone with the phone cradled between her right neck and shoulder. She is next seen driving the family's minivan to the pharmacy to pick up her prescriptions. She is wearing different clothes than those she was wearing in earlier video footage from that day. While at the pharmacy, the Claimant has no apparent problems signing the payment pad and appears able to read the print on her receipt as she looks at it. Later, after returning home, the Claimant comes outside and does some gardening which involves kneeling and crouching. There are no signs of discomfort. She is outside in the sun without sunglasses with no apparent vision or photophobia issues. Still later that day, the Claimant attends an IME with Dr. Bernton. Following that evaluation she is shown carrying on a conversation, smiling and laughing. The Claimant shows no apparent ill effects from the day's activities which included driving to the pharmacy, gardening and attending an IME. She seems animated without any apparent problem with speech, communication or social skills or fatigue.

September 10, 2011

123. On this day, the Claimant drives the minivan to Lowe's at 12:00 p.m. She arrives at Lowe's and is at the customer service window at 12:11 p.m. She has her handbag slung over her shoulder and is on the phone. She picks up two 11 pound cans of paint and carries them to the register and then to her car all while her handbag is slung over her shoulder. She drives home. At no time does she display confusion or

discomfort. The Claimant testified at the hearing that she ran this errand, despite "really not feeling all that well."

September 11, 2011

124. The day after running an errand to Lowe's to pick up paint cans, the Claimant goes to church. She arrives at 8:53 a.m. The family vehicle is parked a good distance from the church. The Claimant is seen walking into the church with a bag slung over her shoulder and a coffee cup in her hand. The Claimant is observed outside the church at 12:09 p.m., about 3 hours and 15 minutes later. Contrary to her and Ms. Moreland's testimony, she does not appear the least bit fatigued from the morning's activities. She is very animated and expressive, carrying on a conversation. She does a little dance. The claimant looks to have good muscle tone without atrophy. At 12:14 p.m. the Claimant, while walking to the car, appears to be carrying 3 or 4 different items at once including a duffle bag or pillow case full of items.

December 7, 2011

125. At 11:36 a.m the claimant is shown outside her house having a conversation. She again appears animated and engaged. While engaged in this conversation at 11:37 a.m., the claimant is bending over and laughing. Later that day, at 1:53 p.m. the Claimant drives the minivan over snow-covered streets to 16900 E. Quincy Avenue and she drives home. At 2:42 p.m. the Claimant again drives her minivan on the snow-covered streets and goes to the chiropractor. She comes out of the chiropractor's at 4:04 p.m. and drives to Michael's, a craft store, where she is seen at 4:14 p.m. She crouches down to look at merchandise. She exits Michael's at 4:20 p.m. carrying a bag of merchandise.

Lay Testimony Related to the Claimant's Abilities and Limitations

126. Over the course of the hearing, the Claimant testified that, as a result of her work-related injury, she suffers from headaches every day. The Claimant testified that the more extreme headaches cause her to feel shooting pains through her head. The Claimant also stated that she experiences extreme headaches whenever the weather patterns change. The Claimant testified that she does not drive on days when she experiences extreme headaches or dizzy spells. The Claimant testified that, on many occasions after the accident, she would have to cancel plans with friends because her headaches were so severe. The Claimant testified that when she feels rushed, she experiences confusion, increased anxiety, and worsening of her headaches. The Claimant testified that as her headaches get worse, she becomes fatigued. This can then cause her to have double vision. She also testified that after 10-15 minutes of sitting at a computer, looking at the lights on the screen causes unbearable headache pain. The Claimant also testified that headaches make it harder for her to focus, and her cognitive functioning decreases. The Claimant further testified that her headaches increase when she gets upset or stressed, and that can cause emotional problems, physical pain and more confusion. The Claimant testified that since the accident, her ability to think, process information, concentrate, and focus is diminished. The Claimant stated that she had been trained by Ms. Haddow, a speech and occupational specialist,

to keep a calendar for medical appointments, personal appointments, mileage, and notes. The Claimant stated that her calendar provided her with constant reminders of appointments, prescription refill requests, and questions that needed to be asked of her physicians. The Claimant also testified that, despite using the calendar as a compensatory device, she continues to experience difficulty remembering details, such as specific questions to ask a physician during an appointment. The Claimant testified that her computer skills have diminished, and even her ability to compose a simple email without mistakes has diminished. She testified that she has the ability to compose short e-mails but often relies on her husband to check them for her for errors. The Claimant testified that since the accident, she has a problem with blurting out statements she does not mean, or that come out in way that she did not intend. She stated that some of her unintended comments have caused difficulties in her relationships with friends and family members. The Claimant testified that the medications she takes makes her feel extremely fatigued and tired.

127. The Claimant testified for a full day on August 16, 2013 and two half days on September 26 and November 22, 2013. The Claimant was present in person for testimony taken at the OAC on April 19, 2013, August 16, 2013, September 26, 2013 and November 22, 2013. In addition the Claimant was present for the deposition testimony of Dr. Schmitz on April 30, 2013, Drs. Gellrick and Entin on May 6, 2013, Dr. Torres on May 7, 2013, Dr. Thwaites on May 9, 2013, Drs. Bernton and Reinhard on May 10, 2013, and Dr. Zierk and Ms. Antcil on December 6, 2013. The Claimant was also present by phone for the testimony of Dr. Weingarten on May 13, 2013. During testimony at the OAC, the ALJ notes that the Claimant demonstrated a great deal of stamina, endurance and mental fortitude. She appeared to be able to follow along with the testimony of other witnesses and she had the ability to respond to questions thoughtfully and otherwise participate meaningfully in the hearing process. In addition, the Claimant also attended most of the days of deposition testimony with the expert witnesses which occurred over seven days. During redirect testimony by the Claimant on November 22, 2013, after participation in previous hearing dates in the matter, the Claimant stated she was bedridden for at least two days following each hearing.

128. Over the course of the hearing, there was testimony that the Claimant reviewed many of the medical records including most or all of the IME reports, and she has read some of the deposition transcripts although she has not read any of them in whole. During testimony, the Claimant was able to recall from memory the names of the multiple medications which she was taking in connection with this claim, as well as when she took them and what they are for. She also demonstrated a good memory of her job history, going back to her teenage years when she worked at a grocery store as a bagger and for a fulfillment company stuffing envelopes. This employment included using a computer/word processor while working out of her house.

129. The Claimant testified to problems with reading and small print, yet was able to read the IME reports of Drs. Bernton, Weingarten, Reinhard and Kenneally and form opinions about whether she thought those reports were accurate. In fact, she prepared a three page ethics complaint against Dr. Kenneally. Further, on cross-

examination, the Claimant prepared nine pages of notes in anticipation of her testimony which were entered into evidence. The notecards were primarily handwritten by the Claimant, although there are some type written notes which are cut and pasted into the exhibit. These were notes that the Claimant testified that she prepared to help her memory. However, the Claimant, by and large, did not need to refer to the notes. She acknowledged her testimony was from memory. All of the handwritten notes were prepared by the Claimant and are in her handwriting. The rest of these notes were prepared on a computer/word processor and they were cut and pasted onto the notecards. The Claimant testified that this was accomplished with her husband's help.

130. The Claimant testified that her hands are continuously busy whether it is continuous wringing of her hands, stuffed animals or a smooth stone. She testified, "my hands are usually busy doing something." However, in surveillance video and during substantial portions of time over 4 days of hearing testimony, the Claimant was often noticed without anything in her hands or without the motion of wringing her hands.

131. The Claimant testified that her previous jobs required a level of detail that she does not believe she is capable of performing now. The Claimant stated that her job at the Department of Education required her to file documents in various buildings. The Claimant stated that she would be unable to do the walking and navigating in downtown that her job required because of the noise, and her anxiety related to the traffic. The Claimant also testified that the noise and number of people associated with the Department of Education job would cause her headaches, which would cause her decreased cognitive ability so that she could not handle the details required in the job. Claimant stated that even bagging or cashiering in a Grocery Store would cause her difficulty. The Claimant testified that the noise and anxiety related to the number of people in a grocery store would be difficult for her to "filter out." The Claimant testified that she feels more fatigued after going to the gym, or following her medical appointments because this requires the use of more energy. The Claimant testified that, following her testimony on April 19, 2013, she experienced a migraine that lasted for several days. the Claimant testified that she spent the following day in bed, and it took her several days to recover from the headache.

132. The Claimant testified that she uses a day planner to stay organized that was provided by Ms. Haddow. The fact that the Claimant uses compensatory measures such as a day planner evidences her ability to adapt and plan. It demonstrates organizational skills. Moreover, even before using the tool, there is evidence that the Claimant maintained some organizational skills as corroborated by Dr. Gellrick's report on February 26, 2009 that the Claimant had been to 29 physical therapy appointments and that she had been able to, "track her appointment dates correctly," which is notable as the Claimant was first seen by Judith Haddow on March 25, 2009, a month later. The medical records demonstrate and the Claimant acknowledged that she was able to consistently keep her physician and therapy appointments. As is exhibited by the pharmacy log, the Claimant picks up her prescriptions on a regular basis. In her answers to interrogatories the Claimant stated that between the date of her injury and the date she reached MMI, approximately 2 1/2 years, she would spend 30 to 40 hours

a week attending appointments. She testified that she kept these medical appointments because, "it was important," and because she was "dependable."

133. The Claimant has also engaged in multiple activities that contradict her testimony about her ability to work on the computer, write e-mails and engage in tasks that require cognitive functions. The Claimant prepared mileage logs in which she kept track of medical appointments and prescription pickups. She would calculate her mileage each month and send the log to the claims adjuster with a cover email which she prepared. This demonstrates that the Claimant is capable of calculating miles, preparing an email transmittal as a cover sheet on a pdf format, scan an attachment and email those materials to the claims representative. The Claimant, her husband and another couple owned a rental property in Ohio which they sold in 2013. Notwithstanding her claimed disabilities, the Claimant was responsible for receiving payments and taking care of repairs. The Claimant was able to enter information on an Excel spreadsheet prepared by her husband in connection with her management duties attributable to this property. The Claimant and The Claimant's husband testified that she could barely balance a checkbook, yet she continued to perform this activity. Further, the Claimant's emails to Kaiser, post accident, demonstrate the extent of the Claimant's involvement in her kids' medical care. After reviewing the Peach Festival's surveillance video, the Claimant prepared a page and one-half rebuttal statement on October 15, 2011. She was apparently able to review the 120 minute video and then thoughtfully respond to the information in the video. In addition she obtained rebuttal statements from her husband and Mark and Rosemary Moreland.

134. While volunteering at the church daycare, the Claimant worked with infants because she testified that she couldn't handle the noise of the older kids or pick up the older kids. However, this testimony is inconsistent with some of the other testimony offered by the Claimant over the course of the hearing. Babies cry and make noise which the Claimant has indicated would lead to headaches and migraines and more cognitive dysfunction. Further, according to the Claimant, she would walk around the nursery holding the babies. This is not consistent with the Claimant's avoidance of a number of activities due to balance problems and claims of intermittent dizzy spells.

135. Much has been made of the Claimant's attendance at the Peach Festival in August of 2011 with regard to the Claimant's ability to perform certain activities. At the hearing, the Claimant testified that in August 2011, she attended a Peach Festival on the Western Slope with her husband and some friends, the Morelands. The Claimant stated that before driving to the Peach Festival she had taken extra medication to assist her with managing her symptoms. She testified that the day of the Peach Festival was "not a bad day." The Claimant testified that she slept during nearly the entire ride, except when they stopped on a couple of occasions to get out and stretch. The Claimant testified that, on the day of the Peach Festival, the weather was warm and her body didn't hurt as much as it usually did. Also, her headache was not as terrible as usual, for part of the day. The Claimant testified that videos the Respondents took during that day did not show all the times she rested or needed to deal with her dizziness during her time at the Peach Festival. She testified that, when she was dizzy

while at the Peach Festival, she would lean up against a booth or hold onto her husband or Ms. Moreland to steady herself. The Claimant testified that she was able to sit down at the Peach Festival whenever she needed to. The Claimant testified that she sat in the rocking chairs at one booth on multiple occasions, but the video did not show it. The Claimant and her husband testified that, since the accident, she engages in OCD behavior that the Claimant did not perform before the accident. The Claimant and her husband testified that the Claimant's OCD behavior was demonstrated during the Peach Festival when she insisted on sorting the Peaches to ensure she got the best box of Peaches. The Claimant testified that she should not have tried to sort the Peaches, even though she was compelled to do so, because it put extra strain on her neck, arms, and shoulders. The Claimant testified that, because both Mr. and Mrs. Moreland were carrying a box of Peaches, Claimant also wanted to help by carrying her own box of Peaches. The Claimant, her husband and Mrs. Moreland testified that the Claimant was only able to carry the box of Peaches for about ten feet before she had to set the box down. Her husband then carried the Peaches out to the car after the Claimant set them down. However, the video tape did not show the Claimant setting down the box. The Claimant testified that by the end of the Peach Festival she was tired and overwhelmed. The group then made a few stops, returned to the hotel, and the Claimant took an hour-and-a-half nap before dinner. The Claimant testified that the group did not return home from the Peach Festival until the next day. The Claimant testified that she slept in the car on the way home for about eight hours. These statements were corroborated by the Claimant's husband and the Morelands.

136. The Claimant has engaged in travel and camping activities after her injury, prior to MMI, and subsequent to MMI. In the Claimant's answers to interrogatories, she stated that she had only taken one overnight in-state trip since her accident when in fact she had taken multiple trips to Ohio, Kansas, Mississippi and Virginia. The medical records and therapy records also document several times when the Claimant travelled or went on camping trips with her family. More recently, the Claimant flew to Newport News, Virginia by herself on short notice in March of 2013 to take care of her son's infant due to a family medical emergency. She was responsible for taking care of her fifteen month old grandson while her son and daughter in-law were at the hospital with their premature newborn. The Claimant's son and in-laws were aware of the Claimant's condition, yet they trusted that the Claimant could provide the necessary care. The Claimant flew to Ohio and spent a week on her own when her father was sick in March of 2012. She stayed, by herself, at the family home. Notwithstanding the fact that she hadn't lived in the Columbus area for 7 or 8 years, she drove locally, without any apparent problems getting lost. The day after the Claimant flew back to Colorado, her father passed away and the Claimant returned to Ohio in the Suburban, a 20-25 hour road trip each way.

137. The Claimant testified that it was never necessary to schedule an emergency appointment with Dr. Gellrick or any other provider following her out of state trips. She was not required to go to urgent care or the ER following these trips or while on these trips. According to the Claimant's testimony, traveling takes its toll. She stated that it normally takes a couple of weeks for her to recuperate. However, this is not

necessarily reflected in the medical records. It is not seen in the August 26, 2011 surveillance video, which shows the claimant's activities five days after the Peach Festival at which time she drove to the pharmacy, gardened, and attended an IME without any apparent visible difficulties.

138. Prior to the accident, the Claimant's husband testified that Claimant was the life of the party. She conversed well, and she talked nonstop. He also testified that prior the accident the Claimant enjoyed camping, hiking, walking, exercising, assisting with home improvement projects, gardening, and collecting large rocks for the family rock garden. In addition, prior the accident, the Claimant enjoyed Denver Bronco games, family baseball games, photography, and hosting family get-togethers, including cooking elaborate meals and cleaning up afterwards. The Claimant's husband testified that Claimant does not enjoy family camping trips in the same way she did prior to the accident. Prior the accident, Claimant would often camp with her family. The Claimant's husband testified that the family does not take as many camping trips because of Claimant's injury. In addition, The Claimant's husband testified that he takes his kids to go hiking, but that Claimant stays near the campsite. The Claimant's husband testified that she also organized all the family activities and outings before she was injured. He further testified that, prior to the accident, the Claimant passed the Ohio real estate exam, managed the family finances, managed all family real estate transactions and refinancing, and worked easily on a computer. The Claimant's husband testified that, prior to the accident, Claimant weighed approximately 130 pounds, and she had no issues with her weight. In 2012, Claimant's weight plummeted to 99 pounds, although she has regained about 15 pounds since that time. The Claimant's husband testified that, he and Claimant were not able to participate in as many dinner parties and card games with friends after the accident. As a result, The Claimant's husband stated that he and Claimant lost many friendships.

139. The Claimant's husband testified that, the day following the accident, the Claimant experienced a headache and she had difficulty rising from bed. The Claimant's husband testified that this was unusual for his wife, so they made an appointment with the family doctor. The Claimant's husband testified that, following the accident, the Claimant's husband testified that Claimant suffered from a constant headache, pain in her limbs, and difficulty moving. He also testified that her mood changed. She became highly irritable and she stuttered when she spoke. The Claimant's husband testified that, weather fronts, family pressure, stress, and OCD behavior can cause Claimant to suffer from Migraine headaches. The Claimant's husband testified that, on days Claimant suffers from a migraine, she is unable to get out of bed. The Claimant's husband testified that Claimant's migraines can last from several hours to several days, and she experiences severe migraine headaches six or seven days per month. The Claimant's husband testified that, following the accident, Claimant was no longer capable of putting together Sunday brunch for her extended family and was no longer even capable of cooking family meals, other than very simple meals. The Claimant's husband testified that she has extreme difficulty participating in family game night, family get-togethers, baseball games, or concerts because the noise associated with these types of activities, causes migraine headaches for the Claimant. If she tries to do these types of activities

she generally must then lay down afterwards to manage her headaches. The Claimant's husband now manages the family finances as the Claimant is no longer capable of doing this activity. The Claimant's husband also testified that, following the accident, Claimant developed problems with her eyes. The Claimant's husband explained that fast forwarding commercials on the TiVo causes Claimant to jump, so she shuts her eyes whenever The Claimant's husband fast forwards the television. In addition, cars or motorcycles passing Claimant's car from behind cause the Claimant to jump and feel frightened. The Claimant's husband testified Claimant also does not enjoy photography like she used to, because she has difficulty working on the computer.

140. The Claimant's husband testified that prior to the accident, Claimant was a confident driver, following the accident, the Claimant became a very nervous driver. Following the accident, The Claimant's husband testified that Claimant had difficulty finding her words, getting lost in thought, being off-topic, changing the subject abruptly, and misplacing words. The Claimant's husband testified that Claimant had a difficult time recovering from the wedding trip for their son. The Claimant's husband testified that Claimant suffered from bad headaches while they were in Mississippi and that the 20-hour drive was difficult for Claimant each way. The Claimant's husband testified that he created a bed in the back area of his vehicle for the Claimant when the family drove to Mississippi. The Claimant's husband testified that Claimant slept in the back of the vehicle for the majority of the twenty-hour trip. The Claimant's husband testified that Claimant was unable to participate in most of the wedding festivities due to migraine headaches.

141. With regard to the Peach Festival, the Claimant's husband testified that two friends accompanied the Claimant and him to the Peach Festival. The Claimant's husband testified that, Claimant sat in the passenger seat behind the driver's seat of the family Chevy Suburban. The Claimant's husband testified that Claimant leaned against the window with a pillow, closed her eyes, and slept most of the way. The Claimant's husband testified that they took a break from driving, and exited the vehicle in Silverthorne and at a rest stop during the 4-hour trip to the Peach Festival. The Claimant's husband testified that the day of the Peach Festival, the sky was blue, the weather was warm, and no storms were coming in that would bring on a migraine. The Claimant's husband testified that he walked with the Claimant and their two friends around the Peach Festival for about one and a half hours before lunch. During this time, they socialized with their friends, and looked at jewelry booths and different Peach booths to determine from which vendor they wanted to purchase Peaches. The Claimant's husband testified that they then bought lunch from a food vendor and sat in a grassy area for a half hour or so eating their lunch. As the weather was very warm, they decided to move to a shaded area under a tent to finish their lunch. The Claimant's husband testified that they sat in the shady area for another fifteen to twenty minutes. Afterwards, they returned to walking around the Peach Festival for forty-five or fifty minutes and Claimant picked out the Peaches she wished to purchase. The Claimant's husband testified that, since the accident, Claimant suffers from OCD behavior, which was shown when she insisted on picking out the very best Peaches during the Peach Festival. The Claimant's husband testified that the Peach vendor asked Claimant to

stop opening and moving the Peach boxes, but she was ultimately permitted to pick the Peaches she wanted. The Claimant's husband testified that they purchased two boxes of Peaches. Claimant picked up one box, and The Claimant's husband picked up the other. The Claimant's husband testified that Claimant walked with a box of Peaches for about 10-15 steps, but she had to set the box down because she was unable to carry it any further. The Claimant's husband testified that he picked up the second box of Peaches and he carried both boxes to their car. The Claimant's husband testified that the video failed to show Claimant setting the box down or The Claimant's husband's assistance in carrying both boxes of Peaches to the car. The Claimant's husband testified that the video ended abruptly after Claimant took a few steps holding the box of Peaches. The Claimant's husband testified that, after purchasing the Peaches, Claimant and her husband and friends went to their car. The Claimant's husband testified that they had parked in a handicapped spot that was fairly close to the Festival entrance. In total, The Claimant's husband testified that they spent three hours at the Peach Festival, which included a one-half hour lunch. After leaving the Peach Festival, The Claimant's husband testified that they drove towards the hotel. On the way to the hotel, they stopped at a fruit stand. The Claimant's husband testified that Claimant and Ms. Moreland exited the vehicle and looked at fruit for about five minutes. They did not purchase anything, and they got back into the vehicle. They continued down the road, and noticed a winery which Ms. Moreland wished to visit. They stopped and everyone exited the vehicle to visit the winery and gift shop for about 20 minutes. After the winery, they went to the hotel. The Claimant's husband testified that Claimant took some medication and then she slept for an hour and a half. Following Claimant's nap, The Claimant's husband testified that he and Claimant went to dinner with the Morelands at a restaurant a few minutes down the road. The Claimant's husband testified that it had been a long time since they had had such a nice day with another couple. They returned to the hotel about 8:00 PM after dinner. The Claimant's husband testified that the Claimant then went straight to bed. From the time they left home at about 6:00 AM to the time the Claimant went to bed at about 8:00 PM, the Claimant's husband estimated that the Claimant was only awake 5-6 hours out of 14 hours.

142. Ms. Rosemary Moreland testified that she had known the Claimant for about three years after meeting the Claimant at church. Ms. Moreland testified that on August 20, 2011 she and her husband traveled to the Peach Festival in Palisade with the Claimant and her husband. Ms. Moreland testified that the Claimant slept for the majority of the time that they were traveling. Ms. Moreland testified that the Claimant experienced an episode of dizziness while they were looking at jewelry at the Peach Festival and the Claimant had to grab onto Ms. Moreland's arm so she could steady herself. Ms. Moreland testified that it appeared that the Claimant became tired and uncomfortable so they decided to stop and have lunch and rest. Ms. Moreland testified that the Claimant carried a box of Peaches for about ten feet before she had to set it down. Ms. Moreland testified that The Claimant's husband then carried the Peaches to car. Ms. Moreland testified that they left the Peach Festival and drove down the street to a fruit stand. Ms. Moreland testified that, after they left the fruit stand, they drove to winery where they stopped for about 15 minutes. Ms. Moreland testified that after they left the winery, they drove to the hotel. Ms. Moreland testified that they went to dinner at

about 6:30 or 7:00 PM. Following dinner, they returned to the hotel and everyone went to their rooms. Ms. Moreland testified that, the following day, they packed the vehicle, and then they ate at a restaurant. They then left the hotel at approximately 11:00 AM on Sunday morning. Ms. Moreland testified that the Claimant slept for the majority of the time they were driving home.

143. Ms. Moreland testified that the Claimant often fell asleep during social visits. Ms. Moreland testified that the Claimant often cancelled planned social visits due to headaches or doctor appointments. Ms. Moreland testified that the Claimant left church service on occasion due to headaches and dizziness. Ms. Moreland testified that, on occasion, she drove the Claimant to some of her doctor's appointments because the Claimant advised her she was unable to drive due to severe headaches. Ms. Moreland testified that she observed Claimant becoming dizzy on several occasions. Ms. Moreland testified that she observed the Claimant lose her balance and hold onto the wall on several occasions. Ms. Moreland testified that she observed the Claimant's difficulty with reading, stuttering, mispronouncing words, and other speech problems such as inserting the wrong word or making sudden topic changes. Ms. Moreland testified that she observed the Claimant's difficulty with memory. Ms. Moreland stated that Claimant forgot that Ms. Moreland's daughter-in-law was pregnant, despite discussing it on multiple occasions. Ms. Moreland testified that the Claimant often forgets the topic being discussed right in the middle of a conversation. Ms. Moreland testified that she has observed the Claimant become extremely nervous when the Claimant is driving, and when the Claimant is a passenger in a car. Ms. Moreland testified that she has never driven on the highway with the Claimant.

144. Annette Gordon also testified at the hearing in this matter. Ms. Gordon testified that she has been friends with the Claimant for more than 30 years. Ms. Gordon testified that, prior to the accident, the Claimant was a good mother, and an intelligent, quick witted, capable, kind, and thoughtful person and she had no difficulty with home chores such as painting homes, moving, or packing to assist with moving. Ms. Gordon testified that, approximately 25 years earlier, she had hired the Claimant in a sales position at Radio Shack where Ms. Gordon was the manager. Ms. Gordon testified that the Claimant was an excellent employee. According to Ms. Gordon, the Claimant was punctual, enthusiastic, and good at customer service. Ms. Gordon testified, that prior to the accident, the Claimant had no difficulty working on computers or corresponding by email and that the Claimant was a voracious reader and they often swapped books.

145. Ms. Gordon testified that, following the accident, the Claimant began repeating herself so often that they developed a signal to alert the Claimant when she was repeating herself. Ms. Gordon testified that, also following the accident, the Claimant began stuttering and she had difficulty with word finding and that she developed obsessive compulsive type behavior, such as rubbing a stuffed animal or a piece of glass. Ms. Gordon testified that, following the accident, the Claimant communicated with Ms. Gordon mostly in phone conversation rather than by emails. Ms. Gordon testified that when Claimant does send emails, they are mostly inspirational

email forwards. According to Ms. Gordon, she and the claimant speak on the phone two to three hours at a time, pretty frequently. In fact, Ms. Gordon testified that she bought a headset since she could not be stationary when talking to the Claimant. This activity is another indicator of the Claimant's stamina and endurance. Ms. Gordon testified that, following the accident, she believes the Claimant would have significant difficulty drafting substantive emails. Ms. Gordon testified that the Claimant suffers from poor stamina. Her disposition is better so long as she takes a nap each day.

146. Ms. Pamela Ponder testified at the hearing that she is the current office manager for the State Services section of the Colorado Attorney General's Office. Ms. Ponder testified that part of her duties include supervision of three administrative assistants. Ms. Ponder testified that she supervised the Claimant when the Claimant was employed as an administrative assistant in the Colorado Attorney General's Office between 2006 and 2007. This was prior to the Claimant being hired by the Department of Education. Ms. Ponder stated that the Claimant was an energetic, friendly, reliable, team player. Ms. Ponder stated that the Claimant was good at communicating, taking on additional work, finding solutions, researching issues, drafting documents, and working on the computer. Ms. Ponder testified that the Claimant stopped by the Attorney General's office around March, 2010 to visit. Ms. Ponder stated that, at the time of the visit, the Claimant was not herself, the Claimant spoke slowly and with a stutter that she hadn't had before, and the Claimant -had difficulty finishing sentences. Ms. Ponder testified that she would not have initially hired the Claimant for the job of administrative assistant, if the Claimant had presented in an interview the way the Claimant presented during that visit. Ms. Ponder stated she did not have confidence that the Claimant could complete her job competently and she could not rely on her consistently.

The Claimant's Psychological Condition

147. Dr. Artist referred the Claimant for a neuropsychological evaluation which was performed by Thomas Broadhurst, M.A., N.C.C. under the supervision of Dr. Kenneally, PsyD. The referral information provided to Dr. Kenneally and Mr. Broadhurst was that the Claimant's MVA "resulted in postconcussive symptoms including difficulty with short-term memory, difficulty with processing speed, difficulty forming thoughts and complete sentences, as well as a feeling of not being herself. The referral question was to assess her current cognitive functioning, impairments, and to make recommendations as far as further treatment." The Claimant was interviewed and provided a personal history as well as a history of the present illness. The following procedures were administered during the course of testing:

Wechsler Memory Scale, Third Edition (WMS-III)
Wechsler Adult Intelligence Scale, Third Edition (WAIS-III)
Test of Memory Malingering (TOMM)
Beck Depression Inventory II (BDI-II)
PPI
Millon Clinical Multiaxial Inventory III (MCMI-III)

Controlled Oral Word Association Test (COWA)
Trail Making Test A and B
Seashore Rhythm Test
Speech Sounds Perception Test
Computerized Assessment of Response Bias

148. In a November 12, 2008 neuropsychological evaluation report, it was noted that the Claimant was given two psychological tests to assess effort levels and symptom exaggeration. It was reported that, "In both tests, [the Claimant] presented with scores that were significantly below results observed in research samples of individuals with significant brain injuries. This type of profile is suggestive of an individual who is consciously exaggerating the extent and nature of a variety of clinical symptoms or cognitive impairment, and/or an individual who is not putting forth maximum effort." It was noted that because the Claimant exhibits a high level of anxiety in regards to the testing and regarding her injury in general, this likely had an effect on the effort she put into the testing procedure. Thus, taking her high level of anxiety into account, the results of the psychological evaluation were considered valid but it was noted that the Claimant's scores on many of the performance scales were estimated to be in the lower range or her usual or normal capabilities. Dr. Kenneally and Mr. Broadhurst summarized the testing results concluding that "in addition to her somatic complaints, [the Claimant] is exhibiting significant deficits in working memory and processing speed. Additionally, she is exhibiting a high level of stress and anxiety, which she is reluctant to acknowledge at this time." However, the Claimant's symptoms were expected to dissipate and it was expected her cognitive functioning would return to normal. It was again stressed that the psychological evaluation did not represent the Claimant's maximum efforts and that the results represented the "lower echelon" of the Claimant's capabilities. Retesting in six months was recommended.

149. On December 30, 2008, the Claimant saw Walter Torres, Ph.D.., on referral from Dr. Gellrick, for a psychological evaluation. Dr. Torres reviewed the prior neuropsychological evaluation from November 12, 2008 and conducted a psychodiagnostic interview with the Claimant. At this evaluation, the Claimant's speech was organized and of a normal rate and volume, however, Dr. Torres noted a "slight stutter was evident several times during the interview." The Claimant commented on it to Dr. Torres and noted that it had gotten better and she had been stuttering quite a bit in the weeks after the accident. The diagnostic impression offered by Dr. Torres was:

Axis I:	Posttraumatic Stress Disorder Depressive Disorder, NOS Cognitive Disorder, NOS Pain Disorder Associated with Psychological Factors and a General Medical Condition
Axis II:	Deferred

Dr. Torres noted that "in addition to her cognitive dysfunction, she appears to be suffering from and anxiety disorder and mild depression" and her sleep remains

impaired. Dr. Torres recommended psychological counseling aimed at helping the Claimant to accept and manage her cognitive impairments and relieve symptoms of anxiety. He also recommended a low dose of an antidepressant such as Zoloft. He estimated the need for 8 psychological counseling sessions.

150. Dr. Gellrick referred the Claimant to Dr. Howard Entin, a psychiatrist, for a psychiatric evaluation. Dr. Entin initially saw the Claimant on June 9, 2009. The Claimant reported to Dr. Entin that she was struck by a vehicle traveling perhaps 15 miles per hour. The Claimant reported to Dr. Entin that she "probably had a brief loss of consciousness and was quite dazed." Dr. Entin reported that the Claimant told him that after retaining an attorney, Ms. Furutani, a change of physician was instituted and she began seeing Dr. Gellrick. The Claimant advised that the conservative treatment managed by Dr. Artist resulted in no improvement over months. As for physical conditions, the Claimant reported daily headaches with shooting electric pains and occasional migraines once or twice a week. Dr. Entin reported that the Claimant's vision and hearing are okay. Dr. Entin noted that the Claimant advised him that she is overwhelmed and gets no joy out of anything and that she had trouble with motivation. Her anxiety was reported as quite high. Cognitively, the Claimant reports that she has difficulty with speech and finds herself stuttering with difficulty finding words. She has trouble with concentration, focus and memory. Dr. Entin reported that "at this point she is so overwhelmed emotionally and cognitively she does not feel she is capable of working and is not seeking employment." Dr. Entin diagnosed the Claimant with major depressive disorder – moderate, with associated anxiety, cognitive disorder and post concussive syndrome. Dr. Entin recommended continued follow up with Dr. Torres and, as the Claimant's sleep and mood improves, he may begin to add cognitive enhancing medicine such as stimulants or Provigil. He reported that hopefully when the claimant's emotional symptoms improve the cognition will also improve. However, he ultimately concluded the Claimant is likely to have residual impairment.

151. Dr. Gellrick referred the Claimant to Dr. Kenneally again for an neuropsychological assessment on September 15 & 17, 2009 and Dr. Kenneally prepared a written report dated September 25, 2009. In addition to a clinical interview, Dr. Kenneally administered the following procedures during the course of testing:

Wechsler Memory Scale, Third Edition (WMS-III)
Wechsler Adult Intelligence Scale, Third Edition (WAIS-III)
Halstead Reitan Battery
- A. Category test
- B. Seashore Rhythm Test
- C. Speech Sounds Perception Test
- D. Trails A & B

Test of Memory Malingering (TOMM)
Behavioral Dyscontrol Scale (BDS)
Paced Auditory Serial Association Test (PASAT)
Rey 15 Item Test
Controlled Oral Word Association Test (COWAT)

Millon Behavioral Medicine Diagnostic
Millon Clinical Multiaxial Inventory III (MCMI-III)
Pain Presentation Inventory

152. Dr. Kenneally made a number of behavioral observations about the Claimant in her written report of September 25, 2009. She noted the Claimant was not driving per Dr. Gellrick's orders, She was "mentally alert, well oriented to person, place and time and able to communicate her thoughts in a clear manner with no unusual ideation noted. Dr. Kenneally opined that the Claimant's speech rates and motor rates were within normal limits. She did note the Claimant took a small stuffed toy from her purse and played with it in her hands during much of the evaluation. Dr. Kenneally noted that the Claimant's pain behavior was high, consisting of frequent verbal reporting of pain symptoms, anxious movements with her hands and holding her head in her hands and putting her head down on the desk.

153. Relating to validity considerations, Dr. Kenneally noted that the Claimant's neuropsychological test results indicate a marked degree of variability that is atypical. This degree of variability in her test results is inconsistent with the pattern of test results seen in individuals with documented traumatic brain injury. Dr. Kenneally reported that the Claimant's test scores on the TOMM were below those seen in, "institutionalized elderly demented patients." Dr. Kenneally found her performance indicative of the intentional production of wrong answers. Dr. Kenneally opined that failure at this level is actually a complex cognitive task requiring the patient to learn both the right and wrong answers to the test materials; and deciding in real time to provide the incorrect answers. Moreover, on other tests such as the Category test and the Paced Auditory Serial Addition Test, the Claimant performed at the mean or above average. Given that the Claimant performed successfully on these tests, her failure on the simpler measures is inconsistent since the simpler tests cover items considered "building blocks" to the more complex cognitive tasks tested in areas where she performed better. Dr. Kenneally opined that the Claimant's current test results cannot be interpreted in standard fashion given her failure of validity measures, the marked degree of variability in her test scores and the stark contrast between her impaired test scores and her observed and self-reported level of daily functioning. Dr. Kenneally noted that individuals with documented traumatic brain injuries do not obtain this highly variable pattern of test results. Further, the Claimant's test scores on certain measures, if valid, would indicate that her level of impairment would make it impossible for her to sustain a conversation or independently dress or bathe herself on a daily basis. Dr. Kenneally noted that the testing did indicate that Claimant's depression and anxiety appear to be worsening and this may be having a negative impact on cognition, sleep, pain and recovery. She found that the Claimant's test results "indicated a marked translation of psychological distress into physical symptomatology" and Dr. Kenneally advised the Claimant's medical treaters to obtain objective measures of the Claimant's pain symptom report when possible. Ultimately, Dr. Kenneally found "no objective neuropsychological test data to indicate that the Claimant has cognitive deficits resulting from her work injury on October 15, 2008.

154. On October 27, 2009, the Claimant attended a feedback session and Dr. Kenneally noted that she reviewed neuropsychological test results indicating no brain based cognitive sequelae associated with the injury during the session. Dr. Kenneally recommended a review of her antidepressant medications and the Claimant requested that Dr. Kenneally speak with Dr. Entin.

155. On November 11, 2009, Dr. Torres reviewed the psychological testing report of Dr. Kenneally. He noted that he found "the psychological test findings inconsistent with [his] observations of her clinical condition and course. The psychological testing suggests that her depression and anxiety are worse now than they were at the time of her first psychological testing. That is patently not the case. Both depression and anxiety are significantly less severe now than they were from January through at least June of this year. A review of the progress notes of her psychological therapy stands as evidence to this effect." Dr. Torres further found that his observations of the Claimant's cognitive disorder have been consistent and that they are diminishing. He noted that the Claimant "vented" about the report and "felt invalidated and strongly offended by it."

156. On November 19, 2009, Dr. Torres noted that he reviewed written observations made by the Claimant's long-time friend over a recent 14-day visit in Kansas. Dr. Torres found that the behaviors noted by the friend are "generally inconsistent with the notion that her deficits are due to malingering or a factitious disorder." He opined that the "behaviors described may suggest a picture in which deficits of function that do stem from cognitive disorder are aggravated by her shame about these, by emotionally motivated avoidance of situations that elicit awareness of her deficits, as well as by overcompensation for her deficits." Dr. Torres further noted that, "it is my opinion that [the Claimant] suffers from a cognitive disorder….I believe that her cognitive dysfunction is aggravated by posttraumatic anxiety and possibly by performance anxiety, and other stressors. Controversies regarding the validity of her dysfunctions have also impacted her, as they have added a significant layer of stress. I do not see her deteriorating, but the recent controversies have contributed to some degree to the disorganization in her functioning."

157. On December 8, 2009, partially in response to Dr. Goldman's report, Dr. Entin stated that he did not believe the Claimant was consciously exaggerating symptoms nor malingering. Rather, he opined that she is anxious, easily overwhelmed, high-strung and can be easily frustrated, and irritable. He felt that the Claimant's psychological state interferes with her functioning. Dr. Entin admitted that he did not know how to explain the significant variability found in Dr. Keneally's report. He further acknowledged that he did "not have enough expertise in neuropsychological testing to know if severe anxiety and being overwhelmed could explain the variability and invalidate the testing," but he nevertheless suspected that something of this nature occurred during the testing to cause the variability and scatter in the results. Dr. Entin opined it would be useful to have another neuropsychologist review the raw data from Dr. Kenneally to see if the same conclusions would be drawn. He recommended either Dr. Schmitz or Dr. Thwaites.

158. On November 16, 2010, Dr. Entin, in a Neuropsychiatric MMI/Impairment Report, gave a final diagnosis of major depressive disorder largely in remission, generalized anxiety disorder largely in remission, pain disorder and post-concussive syndrome with ongoing headaches, cognitive and emotional symptoms. Dr. Entin found the Claimant was stable and plateaued from a neuropsychiatric perspective with a date of psychiatric MMI of February 1, 2010. Dr. Entin assigned a 10% whole person impairment rating for impairment of the complex integrated cerebral function with an ability to carry out most activities of daily living. He reported that the Claimant could not do complex cognitively demanding jobs and it was unclear if she could even do simple repetitive jobs on a consistent basis due to cognitive fatigue, disorganization and chronic pain. He reported improvement in terms of decreased depression, anxiety, improved sleep, better pain management and better social function, but opined that she still has significant deficits and recommended continued medication and supportive counseling.

159. Dr. Steven Schmitz, a neuropsychologist, saw the Claimant for an initial neuropsychological consultation on April 9, 2010. As part of this evaluation, Dr. Schmitz conducted a thorough medical record review, and he also reviewed letters from the Claimant's family and friends, reviewed the raw test data from the neuropsychological evaluations conducted in 2008 and 2009 and he interviewed Drs. Torres and Entin along with the Claimant and her husband. Dr. Schmitz notes that the Claimant's initial medical records shortly following the injury "were suggestive primarily of orthopedic injuries." He notes that within the first week, the Claimant did report to Dr. Artist of "dizziness, difficulty finding words, and slowed processing of thoughts." Dr. Schmitz finds that it is reasonable to conclude that this does not mean that the symptoms only emerged at that time, but rather that she was experiencing cognitive symptoms earlier in the week closer in proximity to the accident but was not yet demonstrating any psychiatric conditions. He further opines that "given the predominance of the acute and traumatic physical pain conditions following an assault such as is typically associated with a pedestrian/automobile accident….it is not unreasonable to conclude that [the Claimant] did sustain a concussive injury in the accident and that her subsequent cognitive complaints were of a timely nature, related to that injury, and also associated with her pain condition at the time." As for her current condition, Dr. Schmitz believes that it is reasonable to conclude that the Claimant's current condition "is a combination of her physical, emotional, and sleep difficulties. While he supposes that she may still be experiencing the residual effects of a concussive injury, "it would appear that those other factors are much more prominent to her current condition." Dr. Schmitz also opines that there is nothing to support that the Claimant is consciously exaggerating her symptoms or malingering. As part of his April 9, 2010 evaluation, Dr. Schmitz conducted no new psychological testing himself, rather he commented on the data obtained from the 2008 and 2009 testing. He reports that: "my analysis of the neuropsychological test results obtained in November 2008 finds that the patient demonstrated a number of cognitive deficits likely due to a combination of her physical pain, sleep difficulties, emotional distress, medications, and the lingering effects of the concussion she sustained in the accident." Dr. Schmitz opined that while the Claimant's test

performances were influenced by all of those factors, there is no evidence that the Claimant consciously exaggerated her condition. Rather, "her test scores accurately reflected her functional cognitive distress at the time, due from a combination of sources."

160. Also in his April 9, 2010 report, Dr. Schmitz disagrees with Dr. Kenneally's conclusions from the second neuropsychological evaluation in 2009 that the Claimant was demonstrating behavior consistent with a conscious exaggeration of her condition and inconsistent with patients with a documented traumatic brain injury. Dr. Schmitz argues that the Claimant's performance on the TOMM was impacted by her physical pain and sleep disturbance accounting for her poor performance on the validity measure. Further, Dr. Schmitz found it "inappropriate to conclude that a patient's test battery results are invalid on the basis of one single test." He opined that the Claimant's good performance on many of the tests in the battery is "clearly indicative of good effort." Dr. Schmitz found that the Claimant's deterioration in performance from some tests in 2009 compared to her 2008 results is indicative of the impact that the confounding factors, such as chronic pain and sleep difficulties, on her scores. Thus, he disagrees with Dr. Kenneally's conclusion that this decline is not attributable to the effects of the October 2008 injury. Dr. Schmitz also takes issue with Dr. Kenneally's comment that the Claimant's working memory score in the 3rd percentile is equivalent to almost no working memory ability and, if valid, would put the Claimant's level of impairment at a level that would make it impossible for the Claimant to sustain a conversation or independently dress or bathe herself on a daily basis.

161. On November 21, 2012, the Claimant saw Dr. Torres and he noted that the Claimant "struggled to complete the neuropsychological testing" although Dr. Torres also noted that the Claimant "felt Dr. Schmitz's stance was respectful and that it strongly fostered for doing the best she could. She felt that she could therefore be more at peace with the results." Upon reviewing Dr. Schmitz's findings, Dr. Torres noted that, "the behavior which he described raised the question for me as to whether an attention-deficit disorder profile of symptoms is contributing to the highly erratic level of participation in test activities."

162. Dr. Schmitz performed another neuropsychological evaluation and prepared a written report dated November 26, 2012. Dr. Schmitz refers to his prior April 9, 2010 report as well as the reports of Drs. Goldman, Weingarten, Feldman, Gellrick Entin, Torres, Bernton and Reinhard. He notes that the doctors fall into two camps, one of which opines that there is nothing essentially wrong with the Claimant and that she is functional and able to return to work, the other which has concluded that the Claimant experiences ongoing cognitive, physical and emotional difficulties related to the October 15, 2009 injury.

163. Dr. Schmitz noted that the Claimant reported that prior to beginning the testing, the Claimant stated that she knew her effort was going to be assessed and she was concerned that shooting pains she felt in her body were uncontrollable and that they might impact her performance. She also expressed her general paranoia about

being watched since she had recently been videotaped related to this case. The Claimant reported shooting pains, seeing spots in her vision and having a severe headache and she commented on her symptom complaints throughout the day. Other behavioral observations by Dr. Schmitz during the testing included,

> [The Claimant's] effort was suspect throughout much of the testing day. She displayed an attitude of uncaring and a notable lack of engagement.
>
> ....
>
> It was often difficult to engage her in the testing. At various times, for example, she began rummaging through her purse and on one of those occasions was seen flossing her teeth. During the IOVA test she was standing and walking around during the majority of the test and appeared to not be trying.
>
> ....
>
> [On a test of fine motor coordination] At times she appeared to have placed the instrument correctly but then turned it to an incorrect position.
>
> ....
>
> Her performance on purported measures of effort was generally poor and strongly suggestive of her giving incomplete effort. Additionally, many of her performances on the clinical tests were at or below the 1st percentile. Some of her scores had dropped from her previous testing in 2009.
>
> ....
>
> Her performance on the MMPI-2-RF was strongly indicative of the overreporting of somatic, cognitive, and memory complaints.

164. Dr. Schmitz noted under his clinical impression that, "despite being clearly aware of the importance and necessity of providing good effort on the current neuropsychological test battery, [the Claimant's] performance was considerably less than optimal and suggestive of a non-cooperative approach to the assessment process. Unfortunately, as a result it is impossible to offer a definitive determination of the patient's current level of neurocognitive functioning. On the other hand, she did perform quite well on a few of the measures in the battery and most specifically on a test considered very sensitive to the effects of cerebral dysfunction. Her "impaired" performances, however, were confounded by a distinct lack of effort and were therefore uninterpretable." He went on to conclude that "it is likely that her current presentation is reflective of a combination of the conscious and unconscious exaggeration resulting in her actual condition being far worse than would otherwise be expected….While she did apparently sustain an actual physical injury (including a concussion) as a result of the original accident, it would appear that her 'response' to this injury has been quite dramatic and it is likely that these non-organic factors are playing a substantial role in the maintenance of her ongoing complaints."

165. Dr. Schmitz met with the Claimant and her husband on November 29, 2012 to discuss the testing. In spite of his acknowledgement that the Claimant's performance was poor and suggestive of incomplete effort, Dr. Schmitz does not believe the Claimant is malingering in her condition. He opines that "fundamentally, [the Claimant] remains incapacitated from functioning effectively at her pre-accident level. As evidenced on the neuropsychological testing her cognitive functioning fluctuates on a daily or even minute by minute basis. She has developed a self-perception of being totally disabled, which clearly exacerbates any physical pain or cognitive difficulties she may be experiencing." Dr. Schmitz acknowledges that the Claimant represents an "outlier" in her response to a traumatic event, but finds that "but for" the event of October 15, 2008, the Claimant would not be as functionally disabled as she has become. He went on to opine that it is unlikely that the Claimant would experience any considerable improvement in functioning with further treatment and he finds her condition permanent.

166. On March 6, 2013, Dr. Torres reviewed with the Claimant some of the behaviors that Dr. Schmitz identified in his report "which were clearly disruptive to her participation in the neuropsychological testing." With Dr. Torres, the Claimant identified some of what was going on with her during the testing situation and she tried to clarify what she recalls was actually occurring, presenting a notably different perception related to the same behaviors. In looking at the broader context for this behavior, Dr. Torres opined that, "it speaks for deficits in self-regulation that result in significant behavioral dyscontrol and a tendency to produce behavior that is significantly discordant with what a situation calls for." Ultimately, Dr. Torres concluded, "neuropsychological testing batteries may not be the most suitable instruments for evaluating this kind of problem, and may instead simply yield descriptions of her as erratic and uncooperative."

167. Dr. Thwaites performed an Independent Neuropsychological Evaluation on March 8, 2013. He performed a thorough review of the previous medical records which were provided to him, including the earlier record and the prior psychological evaluations along with the treating physician records and IME reports. The record review was exhaustive. He also interviewed the Claimant and administered the following:

Rey 15 Item Test
Word Memory Test
Wechsler Adult Intelligence Scale IV
Benton Judgment of Line Orientation Test
Trail Making Test
Digit Vigilance Test
Seashore Rhythm Test
Rey Complex Figure Test
Boston Naming Test
Multilingual Aphasia Examination (verbal fluency)
Wechsler Memory Scale-IV subtests
California Verbal Learning Test-II (alternate form

Wisconsin Card Sorting Test
Booklet Category Test

168. Dr. Thwaites noted that the Claimant arrived unaccompanied and she exhibited a normal, "narrow-based" gait without any loss of balance or assistance required. She only exhibited a tremor in her hands when Dr. Thwaites advised her she was looking for that. He noted no right/left confusion and no motor asymmetry. She showed "extreme slowing" with fine motor movements with her hands bilaterally, but Dr. Thwaites comments that this "would not be consistent with what is known about her medical history." He noted that the Claimant's speech was disfluent and halting, but inconsistent, throughout the interview. He did not observe any loss of cognitive set, impulsivity, or disinhibition during the examination and "no obvious cognitive problems at the conversational level." Dr. Thwaites found that the Claimant "performed in the significantly impaired range on a formal test of effort and motivation" and he found that her test results, "are not believed to be an accurate depiction of her current abilities."

169. In his March 8, 2013 report, Dr. Thwaites notes that from a neuropsychological perspective, there are a couple of relevant issues in the Claimant's case. The first issue is whether or not the Claimant suffered a concussion (which he notes may be used interchangeably with the term "mild traumatic brain injury"). Dr. Thwaites notes that there is a convergence of literature to suggest that this is a neurologic event and the World Health Organization and the National Academy of Neuropsychology recommend diagnosing this injury based on the history and on acute injury parameters and "not by how a person is reporting their symptoms at a later point in time." Dr. Thwaites notes that relevant injury parameters include "retrograde amnesia, loss of consciousness, altered consciousness, posttraumatic amnesia and the signs and symptoms of concussion are all used to make the diagnosis. The Glasgow coma scale score and neuroimaging (if available) are also helpful diagnostically." Dr. Thwaites notes the discrepancy between the acute injury parameters and the Claimant's current self-report about the injury, but opines that "it is most prudent to offer diagnosis of very minor concussion within a reasonable degree of probability" based on the available information.

170. Dr. Thwaites goes on to note that the next neuropsychological issue in this case is one of prognosis from a concussion standpoint. Dr. Thwaites points out that in a minor concussion with no loss of consciousness and brief posttraumatic amnesia with no observable cognitive symptoms in the field and in the early aftermath, there is an excellent prognosis for complete cognitive recovery within days to weeks. It is extremely rare to have symptoms beyond seven to ten days from a cognitive perspective following this level of injury. Of the population that does not have a complete cognitive recovery, it is typical that the individuals have neurologic vulnerability or and advanced age or other confounding factors. A person of the Claimant's age without other prior concussions or neurologic difficulties (which are not present in the Claimant's case) are expected to have a good cognitive recovery.

171. The next relevant issue that Dr. Thwaites addresses is that of the Claimant's neuropsychological assessments. He notes that these are used to determine a person's functioning at a later point in time following the initial event. He points out that to understand the brain-related cognitive functioning, the other factors that can contribute to poor test scores must be ruled out. In this vein, Dr. Thwaites notes that the Claimant "has not participated fully in now four different neuropsychological evaluations." He opines that the Claimant's test scores in these evaluations cannot be perceived as an accurate reflection of her true cognitive abilities from a brain functioning standpoint. Further she displayed an onset and course of neurologic symptoms over time that would not be consistent with residuals from a concussion.

172. Dr. Thwaites ultimately concluded on March 8, 2013 that the Claimant's neurologic complaints across time are not associated with a concussion and her neuropsychological test data are not an accurate reflection of her abilities. He opines that she may have mild cognitive error, possibly based on her current medication regimen or based on psychiatric factors and pain. However, Dr. Thwaites concludes that, "we are without objective data that would indicate that she has cognitive impairment within a reasonable degree of probability, even though that is certainly a strong possibility." He finally notes that "it is safe to say that what we are seeing in her presentation does not make sense neurologically based on a minor concussion, a normal MRI, and what is known about her medical history.

173. On March 30, 2013, Dr. Kenneally reported that she found no objective evidence or data to change the clinical opinions included in her neuropsychological evaluation of September 25, 2009. She agreed with Dr. Schmitz's conclusion that non-organic factors are playing a substantial role in the maintenance of her ongoing complaints and she opined that "these psychological factors have been a consistent element of [the Claimant's] presentation since she was first psychologically evaluated in November of 2008." Dr. Kenneally agreed with Dr. Weingarten's conclusions of September 2011 and with her diagnosis of pain disorder with associated psychological factors versus malingering and personality disorder. She agrees with Dr. Reinhard that the Claimant has no permanent cognitive impairment resulting from the subject accident. Dr. Kenneally specifically references and agrees with Dr. Reinhard's conclusion that "the magnitude of cognitive dysfunction this patient displays far exceeds that which originates from the amount of neurological damage stemming from a mild concussion. Her course of recovery is contrary to the pattern of spontaneous neurologic improvement one reliably observes following traumatic brain injury of any severity." Dr. Kenneally concludes that the Claimant has no permanent cognitive impairment from the October 16, 2008 claim. Dr. Kenneally also took issue with "incorrect assumptions" that Dr. Schmitz made in his April 9, 2010 record review about the November 2008 neuropsychological testing of the Claimant and provided a letter she had previously sent to Dr. Schmitz to clarify misconceptions.

174. Dr. Schmitz testified by evidentiary deposition on April 30, 2013. In preparation for his deposition, he reviewed the substantial medical records in this case, the surveillance video taken on August 20th, 26th, September 10th, 11th, December 16th,

17th, 24th and February 9th, 10th, 14th and 18th of 2011. He also reviewed the Claimant's personnel records along with statements of lay witnessed regarding the Claimant's pre-accident functioning. Based upon his review of the initial emergency and medical treatment records, Dr. Schmitz testified that he found that the Claimant met the criteria for suffering a mild traumatic brain injury. He testified that he does not believe that the Claimant could function at a job at her pre-injury levels without a lot of accommodations. Dr. Schmitz testified that he does not feel a diagnosis of malingering is appropriate for the Claimant and he does not believe that any of her treating providers consider the Claimant to be malingering or exaggerating. Rather, the neuropsychological testing performed in his office and on the three other occasions with other providers merely shows that she is performing poorly, suggestive of poor effort, and inconsistent with what the Claimant was doing with Ms. Haddow. Dr. Schmitz testified that he finds that other factors are influencing her performance on the neuropsychological testing such as headache, speech problems, dizziness, emotional distress and sleep difficulties. Nevertheless, Dr. Schmitz did testify that his "neuropsychological test results with respect to the impact on her cognitive functioning are -- are uninterpretable." Even so, Dr. Schmitz opined that this does not support a diagnosis of malingering since, "there are additional and alternative and more expansive explanations of the patient's performances…." Dr. Schmitz characterizes the Claimant's performance on testing as "inconsistent" and "poor effort" and notes that it is "unusual" but he testified that he does not believe this constitutes the intentional production of exaggerated symptoms. He does agree that the Claimant's symptoms have "been expanded upon as she has matured into this injury" but Dr. Schmitz testified that this falls short of grossly exaggerating symptoms since her symptom complaints are consistent with what many people describe following traumatic brain injury. Dr. Schmitz also disagreed that patients always experience a pattern of spontaneous neurologic improvement. He testified that there is improvement that occurs on a physiologic level but even once that is sustained, "it's not the case that they no longer have any cognitive difficulties." With specific reference to the Claimant, Dr. Schmitz testified that she "is impaired and does have cognitive difficulties rendering her disabled." Dr. Schmitz also testified regarding the validity measures during the neuropsychological testing. With respect to the TOMM, he stated that "it only accurately identifies incomplete effort 55 percent of the time." Dr. Schmitz acknowledged that the Claimant's condition and her presentation is unusual, but in looking at her behavior during neuropsychological testing and the marked changes to the Claimant's condition reflective of an impairment of functioning, he still finds that "it does make sense neurologically" in spite of the unusualness. Dr. Schmitz testified that he would classify the Claimant as an "outlier, a person who does not present in a way that is, I'll say, typical of patients who have experienced similar injuries." In terms of the Claimant's abilities and functional restrictions, Dr. Schmitz testified that her ability for recall and remembering would be inconsistent as would her ability to carry out instructions and maintain attention and concentration for extended periods. He further testified that the Claimant would be inconsistent in maintaining regular attendance, punctuality and sustaining an ordinary routine. He opined the Claimant would also inconsistently be able to perform work without distractions or interruptions. Dr. Schmitz also testified that the Claimant would inconsistently be able to interact appropriately with the public, coworkers or supervisors without exhibiting

behavioral extremes. Dr. Schmitz also testified that the Claimant would likely be absent from work three or more times a month due to significant fatigue.

175. On cross-examination at his April 30, 2013 deposition, Dr. Schmitz agreed that his "bottom-line opinion" of the Claimant's condition is that, "based upon her course over the past four years, her prognosis is quite poor. It is unlikely she would experience any considerable improvement in functioning with any further treatment. For all intents and purposes, her condition should be considered permanent." Dr. Schmitz again agreed that the Claimant's case is not "normal or garden-variety" but rather "is a case that has unusual and complicated elements." Dr. Schmitz agreed that "conscious exaggeration" and "malingering" generally mean the same thing. Dr. Schmitz nevertheless does not agree that the Claimant was malingering. He testified that although he "certainly found a lot of behavior that was consistent with what we consider to be incomplete effort," he did not find it "profound" enough to reach a determination that the Claimant was malingering. Although Dr. Schmitz did acknowledge that his threshold for making a determination of malingering is high. On re-direct examination at the deposition, Dr. Schmitz testified that that when he stated in his report that the Claimant was in the "first percentile" this means that the Claimant's performance is at the very lowest end in comparison to women of her age with her level of education who had an absence of any history of neurologic compromise. In other words, 99 percent of women with no history of brain injury performed better than the Claimant on the testing. Overall in the testing performed at his office, Dr. Schmitz testified that the Claimant performed inconsistently with performances across the board, but ultimately, "her effort on the testing made any conclusions to be drawn regarding her cognitive functioning inappropriate." Also during redirect testimony, Dr. Schmitz is referred to the initial emergency medical records and he incorrectly agreed that "incontinence and slurred speech and facial droop" were objective findings that were observed by EMTs. As noted elsewhere in this Order, these symptoms were noted to be negative, thus, not present for the Claimant.

176. Dr. Entin testified by evidentiary deposition on May 6, 2013. With respect to the validity testing on the neuropsychological evaluations, he testified that there are a number of factors that can interfere with the ability to take a test consistently and reliably such as insomnia, pain, anxiety, distraction and medication. This is why Dr. Entin finds that there are problems with validity testing that compares patients with head injuries to people without such injuries. Dr. Entin testified that he performed a mental status exam and finds that, from his perspective, the Claimant has been consistent in how she presents. He testified that there are times when she has difficulty with speech fluency and stutters but, as she gets more comfortable, the stuttering stops. He testified that her word-finding difficulties present similarly. He found that this is how it has been all along. After reviewing the Claimant's history and mental status exam, Dr. Entin testified that he found the Claimant had evidence of a major depressive disorder with a moderate degree of associated anxiety. He also thought she had a cognitive disorder that he labeled "NOS" meaning "not otherwise specified." He testified that this is basically the same thing as a post-concussive syndrome, which he also diagnosed. Dr. Entin testified that he also found she clearly met the criteria for mild traumatic brain

injury. He testified that the mechanism of injury of a pedestrian being hit by a car at 5 miles an hour results in a significant trauma and he finds that the Claimant has describe an altered mental state due to the inability to remember all of the details and the feeling of being somewhat dazed. Dr. Entin discounts the value of the Glasgow Coma Scale, noting it is a gross test and not helpful in assessing the Claimant's cognitive state. Dr. Entin testified that the psychological testing with Dr. Kenneally showed that the Claimant has trouble doing the validity testing and thus, all of the rest of the testing isn't very helpful or useful. He testified that the Claimant was a high functioning individual pre-injury. He believes that due to her perfectionistic tendencies, she tried to fake it and minimized her symptoms for a long time and subjectively reported she was not having terrible depression or anxiety. However, the psychological testing picked up that she was depressed and anxious. As for the diagnosis of somatization, Dr. Entin notes that this means that physical symptoms are not completely explained by objective physical testing and therefore it is determined that unconscious psychological factors are playing a role in a patient's presentation. However, he testified that this doesn't mean it is all psychological, there can be an organic physical component as well. He differentiates this from "malingering" or "facticious disorder" which is purposely faking symptoms for secondary gain. Dr. Entin testified that he does not believe that the Claimant is malingering or has facticious disorder and he does not believe her treating, as opposed to evaluating, physicians find that the Claimant is malingering. He does agree with Dr. Weingarten that the Claimant presents somewhat histrionic. He agrees that you don't develop a personality disorder following an injury and he agrees that the degree of Claimant's cognitive complaints far exceeds what would be expected in a mild brain injury so the Claimant's presentation is not consistent with the usual recovery. However, he does not agree with Dr. Kenneally that research shows mild traumatic brain injury is a short-lived event from which most patients make a full recover. Rather, he testified that 20% of patients do not recover as expected. He characterizes the Claimant as an "outlier" and repeatedly emphasizes that he believes the Claimant is not "intentionally" exaggerating her symptoms. Yet, Dr. Entin does agree that the Claimant is incorrect in asserting that none of her symptoms are improved. In his opinion, there has been significant improvement since he first saw the Claimant, improvement in all parameters, depression is better, anxiety is better, sleep is better, headaches are better, thinking is better and the ability to do tasks has improved. Dr. Entin specifically disagreed with Dr. Thwaites statement that the Claimant has an onset and course of neurologic symptoms over time that would not be consistent with residuals from a concussion. He testified that he thinks, "all of her symptoms are consistent with someone who is an outlier, has ongoing post-concussive symptoms, all of the post-concussive symptoms she has are usual and normal types of symptoms….[although] they don't usually persist in most patients." He does not believe the Claimant presents with bizarre, weird or out of the ordinary symptoms. He finds her symptoms were consistent and that they improved over time. Dr. Entin testified that Drs. Thwaites, Weingarten, Reinhard, Kenneally, Goldman, Bernton and Wilson do not adequately address how the Claimant's ongoing symptoms of chronic headaches, chronic pain, insomnia, anxiousness and mental and physical fatigue could play in the Claimant's presentation.

177. On cross-examination, Dr. Entin agreed that since all the Claimant's neuropsychological testing is invalid, there is no way to objectively quantify the Claimant's neurologic dysfunction. Dr. Entin would defer to Dr. Lipkin on vestibular, vertigo and dizziness issues. Dr. Entin testified that as of MMI, and currently, the Claimant's major depressive disorder and her generalized anxiety disorder are largely in remission and that the Claimant's pain disorder has improved over time. The Claimant's depression and anxiety doesn't significantly interfere with her ability to work. Dr. Entin also conceded that motivation is a factor of what the Claimant can and cannot do, but he pointed out that the Claimant's ability to function on a sustained basis is not largely based on motivation. Dr. Entin does believe the Claimant can drive, including highway driving for short periods of time although he does not think it's a great idea given the Claimant's complaints of visual problems and difficulties with reaction time and her dizziness and difficulties with concentration and attention. In fact, Dr. Entin testified that he would be surprised if there was a driving evaluation that said the Claimant could drive without limitation. Dr. Entin also testified that the Claimant's condition is still stable and plateaued, with little change since MMI and she remains largely on the same medications. In terms of the Claimant's ability to perform work, Dr. Entin opined that the Claimant would "have difficulty doing more than very simple, routine, repetitive tasks and cannot do them consistently. Dr. Entin testified that, in an eight-hour-day, the Claimant would have some level of difficulty with the following: remembering and carrying out short, simple instructions; remembering and carrying out detailed instructions; with attention and concentration for extended periods of time; sustaining an ordinary routine without special supervision; work in coordination with others without being distracted by them; make simple work-related decisions; interact appropriately with the general public; get along with co-workers without distracting them or exhibiting behavior extremes; maintain socially appropriate behavior and appear neat and clean; and travel in unfamiliar places or use public transportation. He did not believe she could work an 8-hour day and was not sure if she could work a 4-hour day. However, if a vocational counselor came up with an in-the-home job where the Claimant could work 15 to 20 hours at her own pace, Dr. Entin testified that he would encourage the Claimant to do this.

178. On May 7, 2013, Dr. Walter Torres testified by evidentiary deposition. Dr. Torres is a clinical psychologist who has treated injured workers with psychological problems for 20 years. Dr. Torres began treating the Claimant about two and a half months after her injury. Dr. Torres testified that, upon his review of the Claimant's medical records and psychological testing up to that date, he was "concerned that her conditions were not being adequately represented." He stated that he believed the Claimant had shown evidence of conditions of anxiety and/or depression that did not result in a diagnosis for either of these conditions. He testified that his concern was that these conditions were "at risk of being ignored" and he opined that these conditions could be affecting the Claimant's presentation. Dr. Torres testified that he diagnosed the Claimant with posttraumatic stress disorder, a depressive disorder, not otherwise specified, a cognitive disorder, not otherwise specified and a pain disorder associated with psychological factors of a general medical condition. Dr. Torres testified that as a result of her posttraumatic stress disorder stemming from her accident, the Claimant

had difficulty with driving. She had difficulty tolerating cars coming towards her from behind whether she was in a vehicle or walking on the sidewalk. Dr. Torres testified about the EMDR he conducted with the Claimant and explained how in EMDR, he asked the Claimant to focus on the circumstances of her accident and notice the emotional reactions, physical reactions and thoughts that she had in reaction to the accident. Dr. Torres testified that while questioning a person about a trauma, they are in a state of hyperarousal, or increased anxiety, and you have them move their eyes left and right for 30-40 seconds and then you stop them and ask "what's there?" and you get them to notice details. Dr. Torres testified that the purpose of EMDR is to expose the person back to thinking about a trauma and develop a greater ability to discriminate what was there. He disagrees that the EMDR process produces false memories. Rather, Dr. Torres testifies that through the EMDR process, people will recall things that they did not previously recall when the person focuses intensively on moments of an accident and details emerge. Ultimately, Dr. Torres explains, the EMDR allows certain experiences that are "vivid" in the present to become more like ordinary memories and their vivid quality recedes which diminishes the vivid, persistent, intrusive quality of the memories. Dr. Torres testified that in the Claimant's case the vivid quality of flashbacks diminished pretty significantly, but she "appeared to have developed as a symptom of her brain injury an inability to tolerate rapidly shifting fields" and this didn't have to be in a car, but could also be rapid movement on the television. Dr. Torres explains that this could be another component to why driving is jarring to the Claimant. Dr. Torres also noted that he had to alter the way he performed EMDR with the Claimant as she could not tolerate the movement of hands in front of her face or the rapid eye movements. So, instead, he would use headphones to alternate sounds from one ear to the other or he tapped on her hands alternating the hands. Interestingly, the Claimant testified that she believed that she never really got the hang of EMDR.

179. During his deposition testimony, Dr. Torres disagreed with Drs. Bernton, Reinhard and Weingarten with respect to a diagnosis of malingering. He testified that he did not note the Claimant exhibiting the intentional production of false or grossly exaggerated physical or psychological symptoms. Dr. Torres testified that in the Claimant's employment records prior to her accident, her work performance is excellent and she is regarded as someone good with detail, organization and bringing order to chaotic situations. He finds this inconsistent with an "accusation" of malingering. Dr. Torres testified that the Claimant developed personality changes as a result of her brain injury, including obsessive-compulsive disorder features and possibly mild hypomanic features, such as a tendency to be expansive in her flow of thought so that when she starts talking about one topic, it expands broadly in a way that is out of control. Dr. Torres also testified that, whereas before her accident, the Claimant's likely "histrionic" personality features made her someone engaging who was able to make things happen, now the features are operating in a different context and having a disruptive effect because the Claimant doesn't have the cognitive organization and the sense of competence that she had before, resulting in disorganized and disruptive behavior. Dr. Torres testified that, contrary to Dr. Weingarten's opinion, the Claimant has improved and the psychotherapy is of benefit to her. Dr. Torres also testified that Claimant exhibited post-concussive symptoms associated with outlier patients who do not recover

from a TBI. Dr. Torres, stated that 10 to 20 percent of patients in his practice do not recover from TBI. Dr. Torres attributes a number of conditions to the Claimant's mild traumatic brain injury in this case, namely: visual disturbance, speech disturbance (stuttering or stammering), word-finding problems, and her confusion and disorientation. Dr. Torres testified that he could not necessarily attribute some of her other symptoms to the head injury as they could be related to physical issues or psychological distress, or a combination of the two. These symptoms included the headaches, the sleep dysfunction, the dizziness and balance and the feeling of being foggy. Dr. Torres testified that with respect to the Claimant's post-injury behavior, she is overwhelmed by information and stimuli and has difficulty multitasking. She is prone to circumlocution, rambling, expansiveness and obsessive-compulsive features. Dr. Torres noted that these behaviors were noted during psychological testing (e.g. the Claimant flossing her teeth), but "it wasn't understood as a probable representation of a psychiatric disorder that was disruptive to her functioning in that situation." Rather it was explained as conscious behavior. Dr. Torres additionally testified that, this resulted in the Claimant failing the effort testing and being characterized as not having applied effort; that she was able to apply effort but she simply didn't. However, Dr. Torres stated that in his opinions "there may be any number of other factors that are disruptive to her functioning in relationship to the effort test" namely, the tendency to become overloaded by demand and interaction that results in disorganized, impulsive and fixating behavior. Dr. Torres finds the neuropsychological testing to be only one component of the gold standard to determine if a person has a mild traumatic brain injury. The overall gold standard would encompass "an adequate set of observations" including treating practitioners as well as persons who observe the Claimant in her daily life. Dr. Torres testified that it is not unusual for the paramedics and DHMC Emergency Department not to conduct an in depth neurological evaluation. Dr. Torres explained that because the ER is dealing with more pressing matters, they only conduct brief neurological screenings to determine if the patient has a condition that must be resolved immediately. Dr. Torres testified that the paramedics and DHMC made some observations that are relevant to a determination of Claimant's cognitive status, but the evaluation was not thorough. With respect to the video surveillance of the Claimant, particularly the days of the Peach Festival, Dr. Torres testified that he did not see activities in the cognitive domain that were inconsistent with what he would expect to see as far as her behavior. Referring to his written report at Claimant's Exhibit 6, pp. 80-81, Dr. Torres testified regarding modifications to his original opinion regarding various interferences with the Claimant's function during an eight-hour workday. In considering a part-time or 4-hour work day, Dr. Torres felt that the interferences with the Claimant's function would be less due to less fatigue and overload. Although he opined that even in her home environment, the Claimant is prone to become overloaded.

180. On cross-examination, when questioned if he would encourage the Claimant to take a job where she could work at home, about 15 to 20 hours a week, at her leisure and take breaks when overloaded or fatigued, Dr. Torres testified that he would encourage the Claimant to try such a position. Dr. Torres defined cognitive overload as "stimuli of a conceptual nature, of a visual nature, of a factual nature that is hard for the person to process." In this context, he testified that he did not think an

environment that included newborn babies and potential for crying and noises that newborn babies make would probably not be an appropriate environment for the Claimant.

181. Dr. Thwaites testified by evidentiary deposition on May 9, 2013. Dr. Thwaites conducted a neuropsychological evaluation of the Claimant on March 8 and 28, 2013. Dr. Thwaites performed a medical record review and took a history from the Claimant, including personally interviewing the Claimant for two hours. His diagnosis is of the Claimant's condition is "cognitive disorder not otherwise specified by self report." During his testimony, Dr. Thwaites outlined the physiology associated with a concussion or mild traumatic brain injury. He testified that, "when sufficient force is transmitted through the head, there's a series of cellular changes that take place….there is an uncoupling of automatic regional cerebral blood flow probably because of an influx of calcium into the intracellular space. So at a time when the brain is working very hard to reestablish homeostasis, there is a lack of automatic regional blood flow that supplies glucose and energy to the brain. And this series of events causes a metabolic or energy crisis to the brain which causes the appearance of a lot of signs and symptoms that we see in the early aftermath [of a brain injury]." A diagnosis of concussion is based on the history, you look at certain signs, symptoms and factors at the time the accident occurred to establish the diagnosis. Neuropsychologists help to establish or refute that diagnosis depending on the facts. Neuropsychological testing is utilized to understand a person's level of functioning at a later point in time. Neuropsychologists try to rule out other factors that could contribute such as pain disorder, medication effect, sleep disorder, mood disorder, psychological factors and lack of participation in the exam. Validity tests were administered to determine if the Claimant could participate fully in the examination. The validity testing for the Claimant showed that she was not able for whatever reason to participate fully in the exam. Prior test results from Drs. Schmitz and Kenneally are also invalid. Testing shows that the Claimant was not able to put forth her best effort. Thus, while it establishes the lowest level of the Claimant's functioning, Dr. Thwaites testified that he believes, as do other evaluators in this case, that the Claimant is actually "functioning at a higher level than her test results would suggest." Referring to his written report, Dr. Thwaites confirms that he did opine that the Claimant sustained "a very minor concussion" in her 2008 accident. Dr. Thwaites testified the basis for this is the Claimant's history and certain diagnostic variables. In this case, Dr. Thwaites testified, "there is a bit of a discrepancy between what the acute records show about those injury parameters and what she has later said about those injury parameters." Dr. Thwaites testified that the pre-ambulance trip did not suggest any retro-grade amnesia, loss of consciousness, altered consciousness, post traumatic amnesia, or impaired cognition although later the Claimant reports these injury parameters. Therefore, Dr. Thwaites testified that he gave the Claimant the benefit of the doubt in diagnosing a concussion. Dr. Thwaites explained that the early medical records in this case are important because, "there is a convergence of literature that suggests that cognitive symptoms and concussion symptoms are worst generally speaking closer to the time of the accident and improve across time." There is animal literature to suggest that the cellular cascade occurs almost immediately within minutes to hours and then improves and resolves by two weeks post injury. There is a sports

concussion literature beginning in the 1990s that shows an immediate onset increased symptoms and decreased cognitive test scores right after the concussion and with serial testing the cognitive symptoms improve rapidly across time. Dr. Thwaites testified that, with this in mind, it was important to note that "when [the Claimant] would have been at her worst from a cognitive perspective, she really wasn't displaying or reporting much in the way of cognitive symptomatology." He further testifies, "the overwhelming majority of individuals do well particularly if they are young, neurologically healthy and this is their first concussion." The small minority of patients whose symptoms persist beyond six months are older populations, people with multiple concussions, people with neurological comorbidity. All human literature about brain functioning after a mild injury shows that it is worst right away and improves across time and then resolves. There is a wide consensus about that among researchers. Although Dr. Thwaites agrees that you can't have human testing at a cellular level because you would have to kill the test subject, "we do have indirect evidence that the energy metabolism issue does start right away and goes away, resolves." Dr. Thwaites testified that this is found in MRI data in Sports Concussion Studies and the Department of Defense Treatment Guidelines says that concussions are generally worse right away and improve across time. This is applicable to mild brain injuries although it would not necessarily be true for severe brain injuries because you have brain bleeds that grow. With more catastrophic injuries you can be up and down. In referring back to the Claimant, Dr. Thwaites agrees that "it is possible she has some cognitive error in her daily routine" due to medications, pain and sleep disturbance. However, he points out, there is no objective testing that her brain is not capable of working in a normal way, that she is not functioning cognitively. Rather, it is based on self report. Dr. Thwaites testified that, he doesn't believe you can only use the Claimant's self report to make a diagnosis that the Claimant has a cognitive disorder.

182. Dr. Thwaites testified that he did rotations at the Denver Health ER. He disagrees with the notion that paramedics and ER doctors did not do a full work up. He testified he also sees a fair number of records from time to time from Denver Health which are not consistent with that conclusion. He has never seen an ER record where they have done a mini mental status exam. It doesn't render the ER records unreliable and does not mean that they did not fully work up the Claimant. Dr. Thwaites has read thousands of paramedic reports and it is pretty common for paramedics to include witnesses' statements of the accident. It can be useful and give qualitative information about the mechanism of injury. Dr. Thwaites disagrees with Drs. Gellrick and Schmitz that the record supports a positive finding of slurred speech and that that constitutes evidence of mild TBI. That's a negative note. She did not have slurred speech or facial droop. The EMTs were thorough, they checked whether she was awake, alert and answering questions appropriately, whether she was speaking in full sentences, whether her head had any signs of trauma, they went through motor asymmetry, they looked for fluidity of speech, and asked her personally about consciousness, headaches, vision changes, dizziness, nausea and vomiting. The report shows that they specifically asked the Claimant if she was confused which she denied. Dr. Thwaites testified that typically people with post traumatic amnesia look dazed and confused and are repeating themselves. Overall, Dr. Thwaites testified that he finds information from

early medical providers helpful in drawing conclusions about whether or not a concussion occurred in a specific case.

183. Dr. Thwaites further testified that when he was with the Claimant for two hours he did not see her lose her train of thought, she wasn't disimpulsive, disinhibitated, and he didn't notice any cognitive errors in his discussion with her. He saw no obvious cognitive problems at the conversational level. Based on the available information, Dr. Thwaites opined that there would be no reason the Claimant would be unable to sit at a computer screen for a sustained amount of time. Dr. Thwaites testified that there was not any objective evidence to suggest that the Claimant couldn't do her prior job from a cognitive perspective. Dr. Thwaites testified that he agrees with the statement found on page 3 of Dr. Schmitz' November 26, 2012 report, where he states that the Claimant's "current presentation is reflective of a combination of conscious and unconscious exaggeration, resulting in her actual condition being far worse than what otherwise would be expected." However, Dr. Thwaites testified that Dr. Schmitz' explanation of the use of the words conscious exaggeration made no sense to Dr. Thwaites. He testified that, "I think that we all understand in neuropsychology what conscious versus unconscious means, I think it's clear." Conscious exaggeration means a person is aware that they are not doing their best or looking more impaired than they typically would be otherwise. Dr. Thwaites "adamantly disagrees" that symptoms following a concussion will appear months later. He has seen people who refuse to report symptoms and will minimize symptoms until they are spiraling and getting worse and then have to tell someone. However, he testified that this is extremely rare. Dr. Thwaites did agree that some concussive symptoms may not surface until several days, such as cognitive fatigue. He testified that, "if a person was in a hospital with multitrauma and they underwent emergency surgery right after their accident, they were unconscious and then highly sedated for a week and really were out of it for a period of time because of artificial sedation, I can see them a week later, going gosh. And they get back to home, noticing some symptoms, yes. That's not really what we're talking about here." In fact, Dr. Thwaites testified that the early responders "didn't diagnose a brain injury" and he felt there was "consensus in that regard." Dr. Thwaites disagrees that there is objective findings related to the Claimant's various cognitive symptoms such as the speech disfluency and her anxiety related behaviors. He testified that her display of these symptoms is "a form of self-report." He notes that she shows them to some providers and not others, and even when she shows the symptoms it is not consistent. Dr. Thwaites did not see any objective testing by Judith Haddow. He characterizes the work with Ms. Haddow as a "cognitive retraining module" but states that it is not objective testing, rather Ms. Haddow provided the Claimant with "tasks." He opined that Ms. Haddow's statement that 30% of patients cannot pass validity measures on neuropsych testing is completely false and misstates the large literature regarding effort and testing.

184. During cross-examination, Dr. Thwaites continued to assert that the Claimant's presentation is unusual and that he doesn't think that it is accurate from a neurologic perspective. He testified that he doesn't believe that, "what [the Claimant] is reporting and portraying is her true level of brain function." He opined that you can get a

blossoming of inflammatory and metabolic factors in the 24-48 hours post injury but disagrees that you can get a worsening neuropathology over weeks or months. With regard to the validity testing, Dr. Thwaites noted that the Claimant scored worse than people with advanced severe Alzheimer's, people with severe traumatic brain injury, catastrophic brain injury, and mental retardation. Dr. Thwaites does not believe it is plausible. While Dr. Thwaites did diagnose the Claimant with a mild traumatic brain injury, he disagrees with some of the Claimant's other medical providers who find that the Claimant continues to have neurogenic-based cognitive difficulties because of her concussion. Moreover, Dr. Thwaites opined that adding symptoms over time is not consistent with a mild traumatic brain injury.

Independent Medical Evaluations of the Claimant

185. The Claimant was evaluated by Dr. Tashof Bernton in an independent medical examination on August 26, 2011. Dr. Bernton took a history from the Claimant and conducted a thorough records review. He noted that the Claimant's presentation to him and in the medical records, "is one of an individual who is extraordinarily disorganized and requires extreme help from others and is essentially unable to function. This is entirely inconsistent with the nature of the accident and the documented medical history." In reviewing the medical records, Dr. Bernton notes that the early records from the paramedics, DHMC, Exempla and Kaiser do not report symptoms which would be consistent with a closed head injury/traumatic brain injury. With respect to the initial evaluation by Dr. Artist, Dr. Bernton notes that, "at this point, two days after the accident, at which point in time organic symptoms due to head injury would have been at worst, there is no notation of any cognitive symptoms. There is no notation of any headache. There is no notation of any confusion and there is no indication on examination of any stuttering or cognitive symptoms. Two days after the accident it was noted specifically that the patient "denies any loss of consciousness." Dr. Bernton opined that he found the assessment of injuries contained in Dr. Artist's initial assessment to be the most accurate and reliable assessment of the injuries the Claimant suffered on October 15, 2008. Dr. Bernton further notes that, the Claimant did return (to Exempla) for re-evaluation on October 20. The reports note that the patient "says she is feeling a little bit better over weekend." The report notes that the patient "says she can't drive when she takes medications and is wondering about work." Again, Dr. Bernton points out there is no notation of any cognitive impairments or abnormalities and the patient is described as "in no apparent distress, healthy appearing female who is alert and oriented x 3. She is appropriate." Dr. Bernton opined that head injury due to organic head trauma symptoms are at their worst at the time of the injury or shortly thereafter, certainly within 24 hours, with the exception of a subdural in which the blood slowly accumulates in the brain with symptoms presenting on a slow and increasing course. However, Dr. Bernton points out that there was no evidence of a subdural hematoma on the Claimant's CT scan. Therefore, Dr. Berton opines that there is simply no way that organic head injury due to the accident could produce the change in symptoms seen in this case. Additionally, although the absence of loss of consciousness does not rule out a mild concussion, it would be extraordinarily unlikely and certainly not medically probable that a trauma of that type could produce long-

lasting, functionally, extremely significant cognitive complaints. Even if such did occur, the patient's problems would be evident immediately. Dr. Bernton found that the Claimant's clinical course is not in any way consistent with that. Dr. Bernton further opined that the Claimant's reported cognitive complaints may be on the basis of conscience representation for external gain (malingering), conscience representation for emotional support (a factitious disorder), or unconscious symptom production including increased symptoms on the basis of anxiety or depression. However, these do not represent organic cognitive complaints, they are not disabling, and do not preclude the Claimant from employment. Thus, Dr. Bernton opines that the Claimant clearly does not have a physical inability on the basis of the accident to return to work. Dr. Bernton opines that the Claimant has not had a head injury, has multiple non-physically-based symptoms and that she would not be prohibited from returning to vocational activities she performed prior to her injury. He opined that it would be counter-therapeutic for the Claimant to be placed in a disabled status as she is physically capable of performing vocational activity.

186. Dr. Bernton also testified by evidentiary deposition on May 10, 2013. Dr. Bernton testified that he frequently evaluates patients for TBI, mostly with mild traumatic brain injuries. He has also been a primary reviewer on the Committee drafting the back, chronic pain and head injury chapters of the Medical Treatment Guidelines. Dr. Bernton testified that while the Claimant may have had a minor concussion, the type of head injury the Claimant had cannot produce, and is not consistent with, the marked deficits that the Claimant demonstrates at this point. Dr. Bernton testified that these complaints are based on malingering or on a very similar diagnosis such as factitious disorder which is the conscious production of symptoms for emotional support. Neither malingering or factitious disorder is an accident related diagnosis. Of these differential diagnoses, factitious disorder is more probable. With factitious disorders, the primary enforcers are not so much financial gain as they are emotional support. With factitious disorder you are more likely to find behaviors that are frequently maintained across a wide variety of circumstances including family and friends. The TOMM (Test of Memory Malingering) is the best information for determining whether the Claimant is giving full effort in a neuropsychological testing. If a patient intentionally does poorly on a neuropsychological test, it is useless. If you can't address the issue of effort there is no value in the testing at all because any individual can simply go in and intentionally do poorly and all you would ever say is "well the brain injury did it." Confounding factors such as anxiety, depression, chronic pain and insomnia are typical conditions associated with TBI patients, so you wouldn't expect them to skew the neuropsychological results. The TOMM testing is relatively insensitive to brain injury but is sensitive to a voluntarily lack of effort. Dr. Bernton testified that he doesn't know one way or the other whether the Claimant had a mild TBI, and he gives the Claimant the benefit of doubt that she has a TBI, but Dr. Bernton opines that it doesn't matter. Dr. Bernton agrees that the Glasgow Coma Score is a gross test as to whether or not the Claimant had a minimal brain injury. However, he testified that when we are talking about a situation in which a patient years later states that she has gross defects that prevent her from functioning on the basis of a head injury, a Glasgow Coma Score of 15 immediately after the accident is extremely useful and important. Because of the risk of

significant head injury, both emergency room personnel and EMTs are taught to assess patients for just those factors because they are quite clinically important. Dr. Bernton testified that the Claimant would not be awake, alert and answering questions appropriately at the time of the incident and then years later be disorganized, non-functional and stuttering. Slurred speech and facial droop in the EMT report represented a negative finding, otherwise other things described such as an odor of alcohol and a pelvic mass would have also been present. Additionally, you would not get a facial droop from a mild TBI. In reviewing the questionnaire the Claimant provided to Dr. Bernton, he testified that her account of the injury on that form was internally inconsistent. Dr. Bernton testified that in the questionnaire, the Claimant stated she struck the front windshield with her head where she was rendered unconscious, then she was thrown from the car to the pavement where she struck the back of her head on the pavement. Specifically, Dr. Bernton notes that if she was unconscious from the first head strike against the windshield, then she would not remember being thrown from the car and an impact with the ground. Dr. Bernton also pointed out that the account of the injury that the Claimant gave him was also inconsistent with the EMT records and the ER records. Dr. Bernton testified that he disagreed with Drs. Gellrick and Schmitz and he opines that in the Kaiser record with Dr. Woessner the day after the injury, when the Claimant says things like she "doesn't think" or "may have," that does not constitute evidence of post traumatic amnesia. Dr. Bernton opines the most likely explanation for the headaches reported on October 16 and 17, is that the Claimant had stress as a result of her accident which would not be unexpected and certainly could trigger a migraine. Even if it was associated with mild TBI, Dr. Bernton testified that it makes no difference. The Claimant's presentation down the road of a dramatic decrease in function is not characteristic of a head injury. When weeks, months, years later progressive neurologic symptoms develop which become disabling and markedly evident on examination preventing the Claimant from functioning, it doesn't happen that way anymore than if you get hit on the head today and six months later have a loss of consciousness. Dr. Bernton testified that there are no accident related impairments or restrictions which prevent the Claimant from returning to her pre-injury job as an administrative assistant. Dr. Bernton disagrees that the Claimant has physical restrictions that would prevent her from working as a result of the October 15, 2008 injury. Specifically, he disagrees that as a result of the injury, she is limited to sitting at a computer for 30 minutes at a time, that she has processing problems and that she has balance issues. Dr. Bernton pointed out that in the August 20, 2011 video, at one point, the Claimant was carrying a cup or something and was able to do so without evidence of balance problems. At one point she carried some food in one hand and ate and walked without evidence or concerns for balance. Dr. Bernton also testified that in another video, the Claimant was carrying a phone against her shoulder while holding mail. Yet, people with balance sensitivity have difficulties with changes in head position. Dr. Bernton testified that he saw the Claimant five days after she had gone to the Peach Festival. She did not disclose that to him nor did she say that she was wiped out as a result of her activities associated with attending the Peach Festival.

187. Dr. Bernton also testified regarding the Claimant's ability to drive. He opined that it does not make sense to say that someone is safe in a certain situation

such as local driving but not highway situations, because although the consequences to the individual in a vehicle may be greater at higher speeds on the highway, complex tasks which put other people at direct risk are clearly present in local, slower speed driving. For example, auto-pedestrian interactions are more common in local, slower speed driving. You don't want someone driving without a neurologic capacity to do so. Either an individual does or does not have capacity for driving. Dr. Bernton testified that "worst at first" applies to brain-injured patients. It is an organ like a liver or a valve. There may be some process of inflammation or swelling which may mean that you'll see the worst deficits within 24 hours. You can't have a psychological reaction to essentially a non-physical event that then becomes absolutely predominant and controls your life. Dr/ Bernton testified that in the Claimant's case her injury was, at best, a physically minor event, particularly in terms of a head injury. In reference to the Medical Treatment Guidelines at page 8, section C(6)(a), and discussing the 10%-20% of brain injury patients that don't respond, Dr. Bernton testified that they tend to be at the more severe end of the minor brain injury which includes unconsciousness up to 30 minutes. They also tend to have comorbid conditions such as preexisting neurologic conditions, previous history of concussions, and other things that put them at risk. And most importantly, according to Dr. Bernton, "even if that were the case, there's still no basis for the patient having symptoms at this point in time that were dramatically greater than the symptoms which were present at the point in time at which symptoms would have been at their worse right after the injury." So, the passage about outliers, in terms of brain injury patients who don't recover as expected still would not explain the Claimant's current status. Dr. Bernton also testified in regard to an abstract by Professor Ron Ruff and multiple clinicians from a June 2004 article. He agreed with the conclusion of the literature that symptom exaggeration and fabrication occurs in a sizable minority of neuropsychological examinees with a greater prevalence in the forensic context, that is, with respect to individuals engaged in a legal process.

188. On cross-examination, Dr. Bernton agreed there are errors in medical records all of the time. However, he further testified that there is nothing in the emergency room records which show that they somehow did an incompetent job and missed a very evident marked brain injury or that there is reason to doubt the observations in terms of the Glasgow Coma Scale. A Glasgow Coma Score of 15 in a period immediately following head injury indicates that the patient did not have a significant or severe head injury, although it doesn't rule out a mild traumatic brain injury. Dr. Bernton also testified that the medical records are very clear that the Claimant denied confusion and memory problems and he rejected an attempt to try to deconstruct the medical note from the day after her accident since he found it clear on its face. Dr. Bernton goes on to testify that if the Claimant has no confusion or memory problems 24 hours after the accident, there is no basis for her to have those problems two years later. Dr. Bernton opined that when the Claimant reported additional symptoms to Dr. Hnida, we were beginning to see the evolution of what could either be psychological or other factors. The symptoms reported by Dr. Hnida are precisely the same symptoms that are manifested by anxiety. Going back to the accuracy of the initial medical records in this case, Dr. Bernton testified that the idea that emergency room physicians don't assess mental status is clearly incorrect. A critical factor of emergency

room evaluation is to look for potentially life or limb threatening conditions. Among life or limb conditions which are important to evaluate are head injuries, particularly in an auto-pedestrian accident. Dr. Bernton testified, "And the idea that one of the primary trauma centers in the State simply doesn't do the evaluation for one of the most important conditions for which they are supposed to be evaluating the patient is nonsense." Specific to this case, Dr. Bernton expressed his opinion that there is documentation of an appropriate and appropriately detailed examination of mental status. And whether or not subtle cognitive symptoms might have been missed is irrelevant to the observations which are present, which is the fact that the patient was described as alert, conscious, answering questions in full sentences, Glasgow Coma Scale of 15, was clearly evaluated for head injury and was found not to have one. During his testimony, Dr. Bernton ultimately concluded, consistent with his prior written report, that "an individual who was noted to have no loss of consciousness by several observations at the time, was noted to have a Glasgow Coma Scale of 15 initially and in the emergency room, was noted to be alert and cooperative, and the day after the accident was noted to have no problems with confusion and memory loss, cannot be said to have an organic head injury several years later which leaves her so confused that she stutters, has balance loss, has inability to function, can't work, that all of these multiple symptoms are not physically present from that accident. And I think that that's entirely consistent with the medical record and demonstrated by it."

189. Dr. Judith Weingarten performed an independent psychiatric evaluation of the Claimant over a three hour period on September 12, 2011 and Dr. Weingarten's opinions are set for the in a written report dated September 22, 2011. Dr. Armin Feldman was also present during the interview with the Claimant during this evaluation, but he observed and did not participate. At the outset of the interview, the Claimant expressed to Dr. Weingarten that she was anxious about this evaluation. Dr. Weingarten took a detailed history (set forth in detail previously in this order). The description of the injury that the Claimant provided to Dr. Weingarten is inconsistent with other accounts and is notable for recollection of two separate instances where the Claimant hit her head and the fact that the Claimant now specifically alleges a loss of consciousness. The Claimant reports to Dr. Weingarten that "she stutters now which she never did before and started slurring her speech and could not put things together or remember things. She states that she has balance issues and has been in vestibular therapy and in and out of physical therapy. She states that she has had a headache for almost four years which are migraines and shooting pains through her head….She states that she is still in pain…and cannot put into words the amount of pain she has had. She states that over three years, her pain has changed. She does not have endurance or physical capabilities that she used to have. She states that she used to take eight hour hikes in the mountains and cannot do that anymore and she's always running into things." The Claimant reported the different therapies tried for pain alleviation, noting that massage therapy would result in her inability to move for three days and acupuncture offered only temporary relief and after 2-3 weeks, she is back to square one. The Claimant reported RF blocks "were a disaster" and now she is trying Botox therapy for her migraines. The Claimant reported that none of her treatments have worked for any length of time, although at one point while she was treating with an

osteopath and had acupuncture and medical massage, she was able to maintain with some pain and they made things a little more bearable, but these treatments stopped once the Claimant reached MMI. The Claimant reported that her current symptoms are poor memory, getting easily overwhelmed, slow processing, headaches, and balance issues. The Claimant did state that her vision is better but her vision brain processing is not. The Claimant stated that she is depressed now whereas before the accident, she was optimistic and didn't believe in depression or anxiety. The Claimant reported to Dr. Weingarten that before MMI, "she would spend her time almost 40 hours per week going to doctors appointments." She reported to Dr. Weingarten that she walks around in circles and just loses track of time. The Claimant reported that she does simple chores, such as laundry, and finds small projects and goes to appointments because she feels she has control when she does. In addition to the interview, Dr. Weingarten performed a record review which she summarized in her written report. During the course of the mental status examination, Dr. Weingarten noted that the Claimant was on time, cooperative and changed positions from sitting to standing every so often. Dr. Weingarten noted the Claimant was talkative and wordy and her speech was vague and she took a while to get to the point. Dr. Weingarten noted that in the beginning of the interview the Claimant was wringing her hands, then she didn't and then at the end of the interview the Claimant did this again. The Claimant's stuttering behavior was similar with some stuttering in the beginning and at the end of the interview, but not during the middle. Dr. Weingarten also noted that she reviewed surveillance video from August 20, 2011 and August 26, 2011. Dr. Weingarten's diagnosis was for pain disorder and histrionic personality disorder. She reports that the claimant describes her symptoms in a very vague and dramatic way. She goes on to report, "I am extremely concerned that even though her treating providers agree that her diagnosis of Pain Disorder and have seen the personality testing, that shows somatization and histrionic features that she is not being treated for Pain Disorder regardless of the question of malingering. Patients with Pain Disorder should not have treatment recommendations on subjective complaints alone, but only on clear objective findings. After a reasonable workup they should not have continued multiple referrals and passive treatments, especially when there is no improvement." Dr. Weingarten expressed concern for a diagnosis of malingering after reviewing surveillance video which showed a marked contrast to the Claimant's presentation in her office and other providers' offices as opposed to how she presents herself in daily life. She notes that the three-days of surveillance video she reviewed shows the claimant doing normal activities without pain behavior which was very different than the Claimant's report of her abilities and symptoms to her providers and me. The Claimant's ability to ride to Palisades is inconsistent with the Claimant's statement that she can barely be a passenger in a car. Dr. Weingarten recommended that the patient's pain disorder be treated by seeing one physician with limited medications and no further referrals of modalities of therapy. She noted that pain disorder rarely improves with psychotherapy, the Claimant was unlikely to improve with EMDR and that she did not recommend that form of treatment. She recommended that the Claimant undergo an MMPI to evaluate for malingering. Dr. Weingarten does not get the sense that the Claimant is vested in returning to work and expressed concern that the Claimant was taken off work based on her subjective complaints. In conclusion, Dr. Weingarten opined that the Claimant's diagnoses of pain disorder or malingering

would not be caused or aggravated by her work injury. Dr. Weingarten goes on to state, "I don't see any reason she could not work. In fact, I would encourage her to return to work as it may help her confidence."

190. On March 26, 2013, Dr. Weingarten provided supplementation to her written report after reviewing additional records from Dr. Reinhard, Dr. Bernton, Dr. Kenneally and Dr. Schmitz. After her review of these records, Dr. Weingarten opined that she continued to believe that there was no psychiatric or cognitive limitations or restrictions on the Claimant's ability to work. She stated that not only did she believe that the Claimant could work but that she should be encouraged to return to work.

191. Dr. Weingarten testified by evidentiary deposition on May 13, 2013. Dr. Weingarten is board certified in neurology and psychiatry and Level II accredited. She has also a Level II EMDR certification. Dr. Weingarten testified that the Claimant had a good memory of her medical history and what happened to her, except that sometimes there was inconsistency between what the Claimant said and what was in the medical records. The Claimant reported that prior to her injury, she was juggling 150 things at once, with 4 kids at home and a lot of people relying on her. Dr. Weingarten felt like the Claimant was at the end of her rope and it seemed like the Claimant's pre-injury activities were overwhelming her. From a mental status exam, Dr. Weingarten opined that the Claimant's memory was intact. Dr. Weingarten's accident diagnosis was a pain disorder associated with psychological factors and a general medical condition, chronic versus malingering. Dr. Weingarten noted that the Claimant did not stutter during the middle of her exam when she was more distracted, when she was talking about more things and not focusing on stuttering. Dr. Weingarten testified that she felt that was consistent with her questioning the diagnosis of malingering. Dr. Weingarten also testified that she observed the Claimant wringing her hands at the beginning and end of her interview but not in the middle when she was distracted, similar to the stuttering and Dr. Weingarten found that when the Claimant was distracted and thinking of other things, she was not attentive to doing those sorts of behaviors. Dr. Weingarten testified regarding her concern with the surveillance video of the Claimant presenting a marked contrast in the way that the Claimant would present herself to Dr. Weingarten and some of her other providers. For example, the Claimant told Dr. Weingarten that she always had to force herself to keep her shoulders down in order to be in a protective mode. Yet, Dr. Weingarten did not observe that in the surveillance video. The Claimant reported that she can't relax, she's always tense, she's always running into things, she couldn't even walk in a straight line which Dr. Weingarten did not observe in the video. She did not observe any pain behaviors. The Claimant reported that she can only do things in 15 minute intervals and had to rest and Dr. Weingarten observed the Claimant doing things for longer than 15 minutes in the video. The Claimant reported that she always had to change positions and there was no evidence of that in the video. The Claimant did not appear to be in distress. The Claimant said she had photophobia, yet she was out in the sun, not wearing sunglasses which you would expect. Dr. Weingarten disagrees with the diagnosis of post traumatic stress disorder. The Claimant was not experiencing PTSD when Dr. Weingarten saw her. Dr. Weingarten testified that if the Claimant did have anxiety disorder or depression it was in remission when she saw the

Claimant. There is a component of conscious exaggeration in the Claimant's diagnosis whether it be malingering or factitious disorder. Dr. Weingarten's Axis II diagnosis for the Claimant was personality disorder with histrionic features. Histrionic means that a person is vague, dramatic and needing to be the center of attention. Dr. Weingarten testified that she disagrees with Dr. Torres' opinion that histrionic features are acquired. Dr. Weingarten opines that rather, this is a part of a personality disorder that develops in early adolescence or early adulthood. Dr. Weingarten also disagrees with Dr. Torres that observation of the patient is more important in determining diagnosis than neuropsychological testing. Dr. Weingarten opined that neuropsychological testing is the gold standard in determining cognitive function. If that testing is invalid, then, Dr. Weingarten opines, "one has to put together the whole history and the medical records and try to make an assessment of why it's invalid." Dr. Weingarten testified that she thinks the Claimant had a "premorbid personality" of doing a lot and she tried to help a lot of people and she was overwhelmed and had to get a job even though she was not particularly invested in the job, even though the Claimant would say that she loved the job. However, based on this, the Claimant was at a high risk for things happening to her to get her to the position where she didn't have to work. Dr. Weingarten noted that although, the Claimant's accident was minor with a musculoskeletal injury and it was "her ticket out of the dilemma of feeling overwhelmed and preferring not to work." Then, things just snowballed from there. Whether or not Dr. Schmitz' use of the word "conscious exaggeration" was inartful (in his opinion), Dr. Weingarten testified that agrees with his use of those words. She also testified that she disagrees with Dr. Torres that a minimal job would be bad for the Claimant's esteem. Dr. Weingarten opined that, "anything that would get her out of the house and have her feel like she was performing a function and help her feel like she is making a contribution would help her self esteem."

192. On cross-examination, Dr. Weingarten testified that, being momentarily dazed after an accident and not remembering everything is not what the Medical Treatment Guidelines are talking about with regards to amnesia. Dr. Weingarten acknowledged that within a week of her accident, the Claimant complained of dizziness, difficulty finding words, and difficulty processing thoughts, and, other than the dizziness, these are possible symptoms associated with cognitive problems. Dr. Weingarten also admitted that a week after her accident the Claimant was exhibiting a number of acute and chronic symptoms that the Medical Treatment Guidelines list as associated with a mild traumatic brain injury. Dr. Weingarten agreed that Dr. Hnida diagnosed the Claimant with a closed-head injury on October 22, 2008 and on October 27, 2008, so did Dr. Artist. In discussing the notation in her written report about the Claimant talking excessively and not getting to the point and not answering questions, Dr. Weingarten testified that it is common for people she sees not to get to the point and talk excessively and not answer questions because they have their own agenda. She further testified that vague and circumstantial speech is very common in personality disorders, especially histrionic, and it's not at all inconsistent with functioning well at a job. Dr. Weingarten testified that this is talking about two completely different things. Dr. Weingarten also testified that she continues to stand by her diagnosis of personality

disorder, although she conceded that she does not have expertise in traumatic brain injuries, but rather, her expertise is in psychiatry.

193. On redirect examination during her deposition and in reviewing Dr. Hnida's medical record, Dr. Weingarten testified that Dr. Hnida did not report PTSD, but rather, closed head injury. Dr. Weingarten testified that when Dr. Hnida reported that the Claimant's mini mental status exam was "normal" that probably means that she got 30 points, a perfect score or maybe 28 and 29. If she had gotten a lot wrong and had obvious memory problems, he would not have reported that as normal. Dr. Weingarten noted that the Claimant did better on Dr. Hnida's mini mental status exam than on Dr. Weingarten's mental status exam and she testified that you would have expected to see better results on Dr. Weingarten's testing. In looking at the initial emergency medical records again, Dr. Weingarten opines that the EMT report does not indicate any loss of cognition and the EMT reports facial droop and slurring in the negative.

194. Dr. David Reinhard completed a thorough records review and prepared a written report dated April 16, 2012. Dr. Reinhard was specifically asked to address whether or not the Claimant suffered any cognitive injuries as a result of her October 15, 2008 pedestrian vs. motor vehicle accident. The records reviewed include the treatment medical records, independent medical evaluations, therapy records, FCEs and records of neuropsychological testing, among other records. After an 8-page summary of the records that Dr. Reinhard found most relevant, he offers his assessment and opinion as follows,

> It is my opinion that there is no cognitive impairment on the basis of a neurological injury. If a concussion occurred and resulted in a brain injury, then this would have been a mild traumatic brain injury at the very mild end of the spectrum of mild traumatic brain injury. The magnitude of the cognitive dysfunction this patient displays far exceeds that which originates from the amount of neurological damage stemming from a mild concussion. Her course of recovery is contrary to the pattern of spontaneous neurological improvement one reliably observes following traumatic brain injury of any severity. Instead of there being cognitive improvement and normalization over time, she reports an ongoing cognitive disability the degree of which far exceeds what one could reasonably expect to see following a mild concussive injury. This type of delayed recovery and the level of cognitive complaints [the Claimant] demonstrates are often results of psychological factors such as anxiety, depression and somatization. When validity measures show a significant lack of effort being put forth then the diagnosis such as factitious disorder and malingering become more reasonable diagnostic considerations.

Ultimately, Dr. Reinhard concludes, "Whether or not a concussion occurred is a question that has been argued a lot, but it is not all that critical in making an assessment of cognitive impairment in this case. That is to say, the amount of organically based cognitive impairment that would have resulted from a mild concussion would not

produce any significant permanent cognitive residual. Furthermore, there would be negligible long term impact in one's ability to work, need for any cognitive restrictions or for one's career longevity."

195. Dr. David Reinhard testified by evidentiary deposition on May 8, 2013. Dr. Reinhard is a board certified physiatrist. He is fellowship trained in traumatic brain injury at the Moss Rehab Hospital and was an assistant professor at the University of Pennsylvania Medical Center in their Division of Neuro Rehabilitation. He was the Medical Director at Spalding Rehabilitation Hospital. He has worked at Centennial Rehab and since joining CROM, about 50% of his practice is treating patients with traumatic brain injuries. Dr. Reinhard testified that he evaluates brain injured patients, orders appropriate tests to evaluate symptoms, prescribes a course of treatment which can include medications, therapeutic injections, physical therapy, occupational therapy, speech therapy and neuropsychological evaluations. Dr. Reinhard testified that most of his work is clinical and 80%-90% of his brain injured patients have mild traumatic brain injury as opposed to moderate or severe traumatic brain injuries. Dr. Reinhard has testified in about 40 cases going back to 2008 with about half of those civil and half workers' compensation cases. Most of those cases had something to do with brain injury and between 70-75% of the time, Dr. Reinhard was testifying for the Plaintiff/Claimant and about 25-30% of thei time he would have been testifying for the Defendant/Respondent. In reviewing his written report of the medical records review that he conducted, Dr. Reinhard testified that he continued to support his ultimate conclusions, including his opinion that, "there is no cognitive impairment on the basis of a neurological injury. If a concussion occurred and resulted in a brain injury, then this would have been a mild traumatic brain injury at the very mild end of the spectrum of mild traumatic brain injury. The magnitude of the cognitive dysfunction this patient displays far exceeds that which originates from the amount of neurological damage stemming from a mild concussion. Her course of recovery is contrary to the pattern of spontaneous neurological improvement one reliably observes following traumatic brain injury of any severity." Dr. Reinhard further testified that, "the concussion itself whether it's mild, moderate or severe, goes back to the initial event, the initial injury and not necessarily the course that follows." Dr. Reinhard testified that based on the initial symptoms here, this injury would be the mild end of a mild TBI. Dr. Reinhard testified that it is difficult to determine that the Claimant even suffered a concussion, but even if it is assumed that the Claimant suffered a concussion, the paramedic report would be evidence of the Claimant's injury being mild. Dr. Reinhard specifically reviewed the report and noted that the dash in the paramedic report was a negative meaning that symptoms of facial droop, slurred speech and odor of alcohol were not present. So, Dr. Reinhard testified, for clinicians to rely on all those symptoms being positive, it would be misleading. Dr. Reinhard testified that the Claimant's lack of confusion in the ER is significant, if she was confused, that would be more in line with things you would see in mild TBI. Word finding difficulties could possibly be due to anxiety, pain medication or pain, those would be the most common things. If it were due to a brain injury you would expect to see it in the ER records. When you are talking about cognitive or neuro-cognitive effects of the brain injury itself, worst first usually applies. Dr. Reinhard testified that he agrees with the Clinical Practice Guideline, Management of

Concussion, Mild Traumatic Brain Injury put out by the VA and the Department of Defense in April of 2009 which states that the vast majority of people recover from mild TBI within one and half months. He testified that, "the initial injury would be the thing most predictive of the course of recovery." So, because it was quite mild, he testified that, "[i]f you're months or years down the road and still have big functional issues, big disability, then it's usually because of other factors such as psychological factors, such as anxiety and depression, or physical factors such as medication effects, pain, and lack of sleep." Dr. Reinhard testified that when the Claimant reported a headache the next day at Kaiser, it's hard to say how that fits in, is it a concussive headache, a cervicogenic headache or just a tension headache? He testified that it would be speculation, in the absence of other pieces, that you would expect to find with a concussion. When asked to respond to opinions of other witnesses in this case as to the issue of whether or not the EMTs and ER personnel sufficiently worked the Claimant up for mild traumatic brain injury or, were instead, preoccupied with her physical injuries, Dr. Reinhard testified that the role of the ER personnel would be to look for emergent and catastrophic situations, son, in doing this, they would evaluate for focal and neurologic deficits to make their determinations, and they would be looking to make sure that someone was safe with discharge. In his opinion, Dr. Reinhard found that, based on the medical records, the ER personnel was not picking up on cognitive brain symptoms. They were likely not seeing post traumatic confusion or post traumatic amnesia. Dr. Reinhard testified that he agrees with the Medical Treatment Guidelines which state that deterioration after mild TBI is uncommon and in those situations where you have worsening complaints, other issues such as psychological or social stressors should be considered in the differential and an unidentified diagnosis. As far as the differential and unidentified diagnosis, Dr. Reinhard testified that the psychological group of factors could include factitious disorder, malingering or somatization.

196. On cross examination, Dr. Reinhard confirmed that he works with Dr. Bernton who is a partner in the medical practice of which he is a part. Dr. Reinhard also testified that he has worked with Dr. Torres, Dr. Entin and Dr. Gellrick before and he is also familiar with Ms. Haddow at OT Plus and he has also referred patients to Dr. Politzer. Dr. Reinhard testified that he respects the abilities of these doctors and Ms. Haddow. Dr. Reinhard testified that he is not familiar with Dr. Weingarten. Dr. Reinhard testified that for the purposes of the Medical Treatment Guidelines, the criteria "loss of memory for events immediately before or after the injury" could be fulfilled by any loss of memory, including someone saying that they don't remember if they hit their head, it could be an example of posttraumatic amnesia. Dr. Reinhard also conceded that blurry vision could be a neurological deficit as well. However, the fact that the Claimant reported dizziness 12 days after the accident doesn't mean it's due to a brain injury. It could be, but Dr. Reinhard testified that it could also be due to an inner ear injury. Dr. Reinhard testified that the symptoms reported by Dr. Artist 12 days after the accident are consistent with having been thrown up onto a car and thrown to the ground. He also agreed that symptoms of having difficulty thinking, finding words and concentrating are cognitive problems. Dr. Reinhard testified that his experience is not consistent with Ms. Haddow who says 30% of patients with TBI are unable to pass validity testing. He testified that he believed Ms. Haddow sees more moderate and severe TBI patients. Dr.

Reinhard testified that most of the patients he treats have passed validity measures, which is why this stands out to him when it's off. Dr. Reinhard admitted that, as Dr. Schmitz has discussed, that it is difficult to determine the reason why a person doesn't pass validity measure due to unknowns. However, a situation where it's more convincing that there is a conscious attempt to exaggerate cognitive weaknesses in a test like the TOMM. Dr. Reinhard testified that the Claimant's development of anxiety and depression could exacerbate symptoms of a mild traumatic brain injury and could "put in motion a number of different problems that can be a big problem for functioning." Dr. Reinhard testified that he doesn't have any doubt that "there was a big change from how [the Claimant] was functioning before this injury to how she was functioning afterward." Dr. Reinhard testified that the most frequently reported post concussive symptoms include headaches, cognitive difficulties and dizziness. Patients may also complaint of irritability, fatigue, photophobia, sonophobia, tinnitus, visual changes, hearing loss and insomnia. Dr. Reinhard also testified that standard diagnostic tests including CTs and MRIs often fail to show abnormalities.

197. On redirect examination, Dr. Reinhard agrees with the Medical Treatment Guidelines section D(1)(b) that the speed of the auto is an important piece of information, as is information from first responders, witnesses, paramedics, etc. to obtain details of the event and the injured person's behavioral and cognitive responses immediately following the injury. In referring to TBI patients who are outliers, Dr. Reinhard agreed that normally when you are looking at the 10%-20% of outliers, you are looking for people with preexisting neurological conditions, someone with a prior concussion, someone of an advanced age, or you are looking for differential diagnosis. Dr. Reinhard testified that this is consistent with the Medical Treatment Guidelines. Dr. Reinhard testified that he did not understand Dr. Schmitz' explanation of the use of the term "conscious exaggeration" in the context of evaluating for malingering or a facticious disorder although Dr. Reinhard opined that "usually there has to be some pretty overwhelming evidence to make the diagnosis or to make it correctly." In Dr. Reinhard's opinion when the Claimant was seen in the ER on October 15, 2008, there weren't any symptoms that would typically trigger getting a CT of the head. Dr. Reinhard also testified that his interpretation of the ER medical records is that the Claimant reported that she did not hit her head without equivocation. Further, he testified that there is nothing to indicate that the Claimant had posttraumatic amnesia about whether or not she hit her head. When the Claimant says without equivocation in the ER that she didn't hit her head, has a clear memory of it, and then the memory becomes less clear on day two saying she doesn't know, Dr. Reinhard would attach more weight on the thing closer in time to the event rather than the subsequent telling. Dr. Reinhard testified that it would be an extraordinarily unusual scenario for the Claimant to have almost no symptoms five days from for her injury as was reported on October 20, 2008 and then two days later appear with an array of new and different symptoms. In terms of the order TBI symptoms would be expected, Dr. Reinhard testified that headache would be "right out of the gates," and disorientation and altered mental status should come on simultaneously with headaches. In the context of videotape review, Dr. Reinhard testified that he did not see no signs or symptoms of vertigo, disequilibrium or balance on the video tapes. In conclusion, Dr. Reinhard stands by the opinion he offered in the

written report for his record review that, to a reasonable degree of medical probability that the Claimant has no cognitive impairment on the basis of neurological injury and that her course of recovery is contrary to the pattern of spontaneous neurological improvement that is reliable observed following a traumatic brain injury of any severity. Dr. Reinhard testified that it is still his opinion that the Claimant has no neurological cognitive deficit that would preclude her from working.

Vocational Assessments and Evaluations

198. David W. Zierck, PsyD. Evaluated the Claimant on January 30, 2013 and March 13, 2013 and issued a written report entitled "Integrated Psychological and Vocational Evaluation" report on March 28, 2013. The Claimant was described by Dr. Zierk as "sufficiently polite, cooperative and friendly throughout the interview and testing process. She was able to communicate her thoughts in a clear manner and normal voice, albeit with infrequent episodes of stuttering and staccato speech patterns with word finding difficulties, and associated self-degrading comments…She was sufficiently oriented to place, time and situation and displayed intelligence consistent with her level of education without exhibiting any overt thought disorders or psychotic symptoms in her verbalizations." Dr. Zierk found that the Claimant displayed average to above average intelligence and did not display signs of psychosis or signs of serious mental illness or grave disability. Dr. Zierck reported that the Claimant's overall personality characteristics are consistent with someone who experienced early childhood parental insensitivity and disengagement that may have resulted in an element of underdeveloped personality with regard to self-image, self-esteem, and internalized validity as a person of worth. Dr. Zierk theorized that the Claimant used her practical intelligence, driven nature, and vocational life as a means of compensating for her history of parental insensitivity. "Thus, the loss of her vocational life due to case-related physical and mental injuries has not only introduced unwanted physical pain and functional limitations, but has essentially robbed her of her core identity and primary organizing principles as a human being. As part of his written report, Dr. Zierk prepared a summary of the portions of the voluminous medical records that he found "most relevant to the issue of [the Claimant's] residual functional capacity, permanent work restrictions, remaining labor market values and capacity to resume and sustain competitive employment under present day circumstances." Dr. Zierk also took into account the Claimant's subjective symptomatic complaints and functional limitations, especially the symptoms and limitations related to the Claimant's tolerance for activities. Dr. Zierk posited that the critical issue for him was whether the Claimant's disability would "allow her to satisfy the performance expectations of prospective employers as related to punctuality, reliability, dependability, and reasonably meet key requirements of a specific job as related to physical, cognitive and environmental demands and essential functions." Dr. Zierck reported that when considering the opinions of treating physician, Dr. Gellrick, the Claimant retained, at best, a capacity for sedentary employment but that when you incorporated discipline-specific functional parameters from Drs. Politzer, Entin, Torres, Wolffe and Ms. Haddow, that the Claimant's "capacity to resume competitive employment on a predictable, sustainable and productive basis, is substantially compromised and consistent with sub-sedentary and non-feasible

residual employability." Alternatively, when considering the medical opinions of Drs. Weingarten, Bernton, Kenneally and Goldman, Dr. Zierk concluded that the Claimant has retained sufficient residual functioning to resume employment in the local labor market in sedentary/light duty categories.

199. Dr. Zierk noted that he administered a number of assessment tools and tests, including:

- Mini-Mental Status Examination (MMSE)
- Health Index Questionaire (HIQ)
- Clinical Assessment of Depression (CAD)
- Perceived Stress Scale (PSS)
- Modified Somatic Perception Questionnaire (MSPQ)
- Oswestry Neck Disability Questionnaire (ONDQ)
- McGill Pain Questionnaire – Short Form (MPQ-SF)
- Illness Intrusiveness Rating Scale (IIRS)
- The Migraine Disability Assessment (MIDAS)
- Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2)
- Survey of Pain Attitues (SOPA)
- Millon Behavioral Medicine Diagnostic (MBMD)
- Brief Battery for Health Improvement – 2 (BBHI-2)

200. On the Clinical Assessment of Depression (CAD) and the Health Index Questionnaire (HIQ), Dr. Zierk noted the Claimant's scores reflected depressed mood, anxiety and worry, diminished interest and cognitive and physical fatigue. The Claimant scores further reflected moderate to severe functional problems related to depressive symptomatology. The claimant's Modified Symptomatic Perception Questionnaire (MSPQ) indicates that the Claimant's pain complaints "are likely somewhat influenced by symptomatic preoccupation or symptom exaggeration." The Claimant took a Million Behavioral Medicines Diagnosis (MBMD) inventory test which demonstrated among other things, that the Claimant's "capacity to moderate stress appears to be markedly impeded by the combination of illness apprehension, functional deficits, pain sensitivity, and future pessimism" along with "an inadvertent or intentional resistance to following medical recommendations." On the Brief Battery for Health Improvement – 2 (BBHI-2), the Claimant's score, "represented an obvious concern either related to a 'cry for help,' an exaggeration of symptoms for secondary gain, or desire to convince others of the seriousness of her plight….Her level of reported depression can impede physical rehabilitation and recovery." The Claimant's Minnesota Multiphasic Personality Inventory (MMPI-2) profile "presents a clear pattern of symptoms in which somatic reactivity under stress in a primary difficulty." According Dr. Zierck's interpretation of this testing on the PSY-5 scales, the Claimant also is or has become socially introverted and has little capacity to experience joy and pleasure. Ultimately, Dr. Zierck's psychological diagnosis was for Mood Disorder due to General Medical Condition and Pain Disorder

Associated with both Psychological Factors and a General Medical Condition. His Axis II diagnosis was "deferred" and he listed Histrionic, Negativistic and Avoidant Personality Features.

201. Dr. Zierk's vocational evaluation summary takes into account the consideration of five factors related to the Claimant's medical and non-medical issues. In terms of "defining the problem," Dr. Zierk opines that the Claimant's overall disability is multifaceted, variable and unpredictable. "Consequently, the relevant issue related to [the Claimant]'s current employability involves the assessment of her residual functional capacity against the physical/mental demand characteristics associated with alternative work opportunities in the open labor market." Dr. Zierk also notes that the various medical opinions about the Claimant's diagnosis and prognosis contain stark contrasts and the second factor he addressed is the ability to select pertinent information to solve the problem. He notes that on the one hand, Dr. Gellrick's medical restrictions of February 8, 2011 are consistent with the Claimant's resumption of work in a sedentary capacity on a modified basis. However, factoring in Dr. Entin's expressed concerns about the Claimant's ability to perform both complex and fairly simple and repetitive tasks, along with the additional medical opinions of Drs. Wolff, Politzer and Torres and Ms. Haddow, regarding the Claimant functioning, further alters assessment of the Claimant as capable of resuming sedentary work. However, Dr. Zierk also notes that the opinions of Drs. Weingarten, Bernton, Kenneally and Goldman do not attribute any physical or mental functioning difficulties to the October 15, 2008 work injury and/or, there is not sufficient objective evidence to support the ongoing "organicity" to account for the Claimant's markedly disabled presentation. Next, Dr. Zierk addresses the factor of consideration of the Claimant's self-reported symptomatic difficulties and functional problems in the context of the credibility of the Claimant's presentation. Regarding this factor, Dr. Zierk ultimately concludes that, "in light of the interplay between injury variables, neurophysiological and neuropsychological variables, metacognitive and emotional variables, and social and environmental variables, it is opined [the claimant] is likely experiencing a foundation of organic-based physiological distress and chronic and episodically incapacitating pain that is exacerbated by relatively poor adaptive functioning, inadequate coping skills, and insufficient social support." In addressing his fourth factor, Dr. Zierk expressly considers the opinions of the Claimant's treating physicians, including the discipline-specific functional parameters noted by Drs. Politzer, Entin, Torres and Wolff and Ms. Haddow, and in incorporating these opinions into his determination of the Claimant's overall employability equation, Dr. Zierk opines, "it appears her capacity to resume competitive employment on a predictable, sustainable, and productive basis is substantially compromised and consistent with sub-sedentary and non-feasible employability" and she "lacks the ability for quality work performance as well as the capacity for stability of employment performance consistent with everyday work demands that would satisfy reasonable management expectations." Finally, in terms of the fifth factor Dr. Zierk identified, the ability to draw valid conclusions and judge the validity of inferences, Dr. Zierk finds that, as "[the Claimant's] primary care physician, psychiatrist, and psychologist have collectively identified discipline-specific precautions and functional limitations, this consultant concludes that [the Claimant's] residual functional capacity is equivalent with the sub-sedentary category of

employment and that reemployment of any kind is non-feasible….[the Claimant] lacks the capacity to be considered a reasonable candidate for new employment on a sustainable, predictable, and productive basis."

202. Dr. Zierck testified by evidentiary deposition on December 6, 2011. When questioned about the expertise and qualifications of Drs. Thwaites, Schmitz and Kenneally, Dr. Zierk conceded that "they have a lot more years under their belt than I do. So they have a lot more experience and a lot more dealing with issues of high degree of variety. I have three years compared to their whatever. So the distinction is that I like to consider myself as having a very short learning curve and being smart in record time, but I also bow my head down to those people who have substantial [sic] more experience than I do, such as Schmitz, Thwaites, and Kenneally." Dr. Zierk testified that he identified the Claimant as having, "primarily a mood disorder. The mood disorder is expressed with an anxious presentation that she has a preoccupation…with her disability. It's become the primary source of her identity. She has a hard time letting go of it….so that's one of the reasons why you get some of these clinical elevations across different areas that are sensitive to somatic expressions." As a result of this, "there's an element of exaggeration as identified through the MSPQ." Dr. Zierk further testified that he disagrees that the Claimant is malingering or has a factitious disorder, but rather "she falls on the exaggeration continuum" which is one of the reasons he identified her with a pain disorder, which "is a pain condition that's legitimate and organic in nature where a person becomes overly attached to the significance of that pain disorder and begins processing their life around it. If you will, they develop a relationship with their pain….and so the person begins to become more exaggerated in their expressions of their disabilities….and uses their expressions of somatic distress as a plea for help." In this case, Dr. Zierk testified that he believes that this does not translate into a "secondary gain" issue for the Claimant as "there are secondary losses associated with secondary gain. The losses seem to far exceed the gains; and, therefore it doesn't seem to be reasonable that she's trading in all of her hope and talents for her to live the life as a disabled individual. I don't see where the benefit lies." Dr. Zierk testified that his main concern is the Claimant's unpredictability and he opines that, "she can get a job, she can present sufficiently to convince an employer to take a chance on her. But I'm mostly concerned about her ability to stay on job and stay on task on performance." He disagrees with Ms. Patricia Antcil's earlier testimony that there are some jobs out there that would work for the Claimant and testified that, "I can't even get my hands around that. I mean, it's so axiomatic. You have to be predictable in order to stay employed." With respect to the availability of jobs where you can work from home at your own pace, Dr. Zierk testified, "I don't liken it as being competitive employment. I liken that to college kids taking the year off. It's a joke." With respect to jobs with the company Expediter, Dr. Zierk would consider this "a bridge work employment opportunity where there is a heavy level accommodation to see – take an employee out on a trial run to see if they can satisfy the demands of an employer, and if they pass that probationary test, then and only then do they segue or bridge into real employment." Dr. Zierk testified that he would identify the three primary components to the Claimant's disability which lead to her unpredictability as vestibular (per Dr. Lipkin), vision (per Dr. Politzer) and headaches (per Dr. Wolff). Based on the comprehensive

assessments from these providers, Dr. Zierk finds, "that the level of ongoing problems across all three of those areas is such that she is no longer predictable. She's highly unpredictable, as a matter of fact." Thus, even based on the restrictions from Drs. Gellrick and Entin which put the Claimant in the sedentary category of work, Dr. Zierk opines the Claimant cannot do any of the jobs listed in the third paragraph of page 48 of Patricia Antcil's written report, due to the Claimant's "unpredictability, cognitively, physically, as well as interpersonally." Dr. Zierk further testified that "the length of this disability has reached a threshold that has convinced the individual that she's unemployed….the host of providers that have been orchestrating around her…have informed her, and she's that state of mind where she had to find a little bit of peace of mind, if you will, around it. She's accepted the fact that she has a severe incapacitating disability, and as a result of that, her behavior falls in line. She hasn't looked for work as a result of that." When questioned about the video surveillance of the Claimant doing different activities and how he would correlate that with what he saw when he evaluated her, Dr. Zierk testified that it, "didn't change my mind. Good days, bad days, that old expression, if you will." He found that this did not affect the issue of consistency which is important in the vocational setting. Based on the permanent restrictions from Dr. Entin and Dr. Gellrick alone, leaving aside the restrictions from Drs. Wolff and Politzer, Dr. Zierk still finds the Claimant incapable of earning any wages physically and psychiatrically.

203. On cross-examination, Dr. Zierk agreed that the ability to earn wages in the same or other employment would be applicable to part-time, unskilled, and minimum wage employment. He also conceded that according to Drs. Bernton, Weingarten, Reinhard, Kenneally and Goldman (who he identifies as "Camp B"), the Claimant would be capable of earning wages in the same or other employment. Dr. Lipkin, the vestibular specialist, is one of the major components utilized to determine the Claimant's ability to work according to Dr. Zierk. However, Dr. Zierck conceded that he had not seen Dr. Lipkin's November 23, 2011 report indicating that there would be no limitation from an otolaryngological basis for the Claimant being employable in a sedentary or light work based, in part, on the review of the video surveillance of the Peach Festival trip. In light of this, Dr. Zierk agreed that this "increased functionality" and there was "real world evidence that the vestibular issue, balance issue, is not a significant problem as long as you put her into a cautionary, sedentary category." Dr. Zierk also conceded that after reviewing the video surveillance of the Peach Festival trip, Dr. Gellrick also opined that the Claimant was capable of increased exertional capacity so that the Claimant "fell more into the sedentary light category." Dr. Zierck testified that he would have no problems with the Claimant going out to look for work. That would be true as a vocational rehabilitation specialist or as a psychologist. However, Dr. Zierck did not refer the Claimant out for vocational services nor did he conduct a labor market survey on the Claimant's behalf. Now, on cross-examination, rather than the three components affecting the Claimant's unpredictability, Dr. Zierk focuses on the headaches and he testified that the biggest impediment to the Claimant returning to work is headaches. He testified that it is his understanding that visual stimuli associated with looking at a computer screen leads to eye fatigue which contributes to onset of her headaches. Dr. Zierk testified that visual stimulation could include the intensity of lights, peripheral

motion, or a lot of other different stimuli that is no longer static. He agreed peripheral vision can absolutely be an issue when you drive a car. Dr. Zierk also agreed that when you are talking about computer screen brightness, you can dial it down. However, Dr. Zierk testified that he couldn't explain the discrepancy between the Claimant's testimony that she could not tolerate fluorescent lighting as it was like the light from a computer screen to her, but she nevertheless was able to sit in a courtroom for three days under fluorescent lighting and in this deposition which was lit by fluorescent lighting. Dr. Zierk also agreed there is nothing Dr. Politzer's opthamology functional capacity questionnaire that would indicate that the Claimant would have to rest her eyes after fixing her gaze on a computer screen for a period of time shorter than two hours and eye fatigue would not necessarily be an impediment to continuing to look at a computer screen. When questioned about other vision evaluations the Claimant underwent in this case, Dr. Zierck was not aware of Dr. Roe's report or that the Claimant had seen Dr. Roe. Zierck was not aware of the fact that the Claimant saw Dr. Wilson on referral from Dr. Gellrick. If you consider Drs. Roe's and Wilson's opinions, it would not appear that the Claimant had any visual impairment. Diplopia and double vision are the primary vision difficulty that contributes to fatigue and then sets into motion the headaches. Double vision contributes to the Claimant's headaches, however, Zierck has no understanding of the frequency of the Claimant's double vision. Dr. Zierk conceded that if the Claimant's double vision resolved you would have expected headaches to be less of a problem. He had not seen Dr. Politzer's February 29, 2012 report which said that the Claimant's double vision had resolved but he does agree that it's important as "any updated medical information from a treating or informed physician that gives us a better understanding of the ongoing nature, or lack thereof, is informative." Dr. Zierk testified that he wasn't aware that Judith Haddow hadn't seen the Claimant since January 6, 2010, that hit had been so long ago. He testified that the Claimant is capable of writing on an 8 by 11 page of long text but that, whether or not the Claimant was capable of reading an 8 by 11 page of text would depend on what that page looked like, the complexity of the page. Somatoform disorder is one of Dr. Zierck's diagnosis. It is described in the DSM-IV as unconscious exaggeration. Factitious disorder is conscious exaggeration and a factitious disorder you know you are deceiving, you just don't know why and malingering is a conscious disorder where there is an obvious external incentive. In describing the Claimant's memory, Dr. Zierk testified that the Claimant's remote memory is intact, recent memory is episodically disrupted. She does fine in conversation narrative. He saw the claimant twice on January 30 and March 13 and each time, the Claimant was on time, dressed appropriately and drove herself. Dr. Zierk's testing took three hours. He has a difference of opinion with Dr. Entin regarding whether the Claimant's anxiety and depression continues to be in remission. His psychological diagnosis is mood disorder superimposed on preexisting anxiety. Dr. Zierk testified that the Claimant's MSPQ testing, RBS testing, which is a neuro scale in the MMPI shows that the Claimant is sensitive to over reporting of cognitive and memory problems. Zierck agrees that testifying at hearing was "right up there in terms of being as stressful a situation as the Claimant was going to find herself in that would have amplified her symptoms." However, he thought she did variably well in terms of testifying, attentiveness, comprehending questions asked of her and communicating her

answers. Dr. Zierk agreed that the act of driving a vehicle is considered complex from a cognitive standpoint. He testified that, "driving is an executive functioning task."

204. Ms. Patricia Anctil, a vocational rehabilitation specialist, prepared an Assessment Report on March 20, 2013. Ms. Anctil reviewed pertinent medical records, interviewed the claimant twice and then reviewed approximately 2 1/2 hours of video surveillance covering periods August 20, 2011 through December 7, 2011. Following her review of the medical records, Ms. Antcil drafted summaries of the medical assessments and recommendations. She indicated that "the medical records are extensive and will not be outlined in their entirety in this report." Rather she focused on the "pertinent medical information used to complete this assessment" as set forth in the summary of the medical aspects of the Claimant's evaluation from page 2 to page 23. Ms. Ancil also interviewed the Claimant over two meetings, the first conducted in person at the office of the Claimant's attorney, and the second by telephone with the Claimant and her attorney present in order to complete the interview. During the course of the interview, Ms. Anctil noted that after talking more slowly and regulating her breathing, the Claimant was better able to control her speech and was only "occasionally observed to stutter." The Claimant reviewed her current medical treatment and medications with Ms. Antcil, noting she sees Drs. Gellrick, Wolff, Entin, Torres and Politzer on a continuing basis. The Claimant indicated that her treatment with Dr. Zimmerman, Dr. Gridley and at Colorado Athletic Conditioning Clinic was not currently active, but that she would like to be treating with these providers as "it made her more functional and her life easier." The Claimant reported working out at a gym with a trainer but stated that "some days she does not feel well enough to participate in her independent exercise program due to her headaches. With respect to her medical progress and ongoing symptoms, the Claimant reported that she is unable to multi-task and continues to have difficulty finding words. Overall, the Claimant said, "she has not really improved since the accident" with reference to her cognitive difficulties. The Claimant reported that "her ears are blogged and she feels like she is under water. She is distracted by noises." The Claimant also reported continuing headaches, especially on days when a weather front is coming in. She reported that the Botox and Topamax help but she will also lie in bed when she has a headache. The Claimant reported having a headache every day and one or two migraines every other week. The Claimant also reported numbness and tingling in both arms and painful episodes in her right knee and stated that after sitting for approximately 15 minutes, when she unbends it, "it is as painful as giving birth. I am not exaggerating." The Claimant reported that she is still having problems with her vision and "referenced her eye and brain not tracking." The Claimant reported she was wearing multifocal lenses and stated that her "faraway" vision is good and her "reading is not so good" and noted difficulties with small print. The Claimant reported that when her anxiety gets really bad, relaxation techniques provided by Dr. Torres, "do not work real well." Ms. Anctil's report included multiple opinions of medical providers regarding her ability to function and her return to work capacity. These opinions range from physical limitations that generally place the Claimant in a sedentary light category, to cognitive performance opinions that run the gamut from "no psychiatric cognitive limitations or restrictions" to questioning if the Claimant can consistently perform even simple cognitive tasks on a recurrent basis. Ms. Antcil also noted her review of the

Claimant's FCE results and the observations made by the evaluators. Ms. Antcil also noted some of the inconsistencies between the Claimant's clinical presentation and what was viewed in the video surveillance. Ultimately, Ms. Antcil noted that the January 2011 FCE results pointed to "overall demonstrated abilities [which] are most consistent with the light work category at this time." In reviewing the surveillance video, Ms. Anctil observed and reported a number of inconsistencies when compared with the Claimant's presentation at her interview. These included:

- She was not holding an item in her hands, which during our meeting included a polished rock and per the records included small stuffed animals.
- Rubbing the left and right side of her forehead.
- Bending at the waist, numerous times, reaching below knee level, leaning forward at the waist, and quickly reaching down to pick up her bottle off the ground – her husband was standing next to her when this occurred.
- Squatting – sustained – observed several times, for 30 to 60 seconds at one time.
- Lift 2 cans of paint, each weighing approximately 10 pounds.
- Multi-tasking, talking on the phone, walking, looking at the mail.
- Simultaneously weeding and watering – use of hands/arms in extended position.
- Walking backward, sideways, walking in crowds.
- Extended reaching with both upper extremities.
- Playful, energetic while talking with people.
- Standing from a seated position, on the ground, with no assist to get up.
- Walking/Standing for approximately 1 ½ hours while wearing sandals.

In going through the Claimant's activities of daily living, Ms. Antcil notes that during the telephone portion of the interview, after approximately an hour, the Claimant's attorney asked the Claimant if she was okay or if she needed a break. Interestingly, although the Claimant responded that she would like to take a break, she also volunteered that "while she was on the telephone, she was walking around and doing things, she got some coffee and let the dogs out," which contradicts her testimony and statements to numerous evaluators that she is unable to multitask or do other things while she is on the phone. In discussing the Claimant's transportation issues, Ms. Antcil noted the Claimant reported that most of her local driving is within 10-15 miles or less and that while she avoids highway driving, there are certain places she will drive for a couple of miles on the highway during non peak hours. The Claimant has gone out with her daughter who has a driver's permit, but this is "nerve-racking" to her and the anxiety is too much to deal with so usually her husband takes her daughter out to accumulate driving hours. Ms. Anctil also conducted vocational research including a transferrable skills analysis. Considering all of the restrictions imposed by Drs. Gellrick and Entin, Ms. Anctil felt that the Claimant would need a selective placement, not sheltered employment, possibly part time work and vocational rehabilitation services to assist her gradual return to work in a sedentary position. In considering the return to work capacity opinions which included physical and cognitive abilities provided by Drs.

Kenneally, Goldman, Lipkin, Bernton, Weingarten and Reinhard, Ms. Anctil identified numerous occupations classified at the sedentary or light levels which would be appropriate for the Claimant including, but not limited to, teacher's aide, contract clerk, administrative assistant, office manager, school secretary, hospital admitting clerk, outpatient admitting clerk, file supervisor, general clerk, customer service representative, and registration clerk. She summarized by reporting that based on the opinions of Drs. Kenneally, Goldman, Lipkin, Bernton, Weingarten and Reinhard, and the 2011 FCE, the Claimant was capable of returning to work in a position she had previously held along with numerous other occupations which had been previously identified in her report.

205. Ms. Anctil testified by evidentiary deposition on December 6, 2013. Ms. Anctil testified that she has been employed as a vocational rehabilitation specialist since October of 1982. She has worked as a supervisor training peers in this field of work. She is a certified rehabilitation counselor, certified disability management, specialized certified case manager and a qualified rehabilitation counselor. She has received referrals from respondents where she has rendered opinions that injured workers are incapable of earning wages in the same or other employment. Ms. Antcil testified generally consistent with her written report. In response to questioning regarding the distinctions between sheltered work and selective placement which may involve vocational services that are available to assist people with situation assessments, trial work periods and on the job evaluations. Ms. Antcil clarified that this is called selective placement, not sheltered work. Ms. Antcil testified, as Dr. Zierk had previously, that this case was more complicated than most from a vocational evaluation standpoint "because of the varying opinions of the medical professionals," which is why Ms. Antcil testified that she focused more on the opinions from the medical records that related to the Claimant's limitations and ability to return to work. Although, Ms. Antcil noted that "knowing the diagnoses is also connected to that." When meeting with the Claimant on March 22, 2013, Ms. Antcil testified that within 10 minutes of the beginning of the meeting, the Claimant began displaying a lot pain behaviors such as rubbing her forehead with her hand, standing up, stuttering and rocking. At this point, Ms. Antcil referenced and recommended Ms. Haddow's compensatory strategies such as breathing techniques and using this strategy, the Claimant was not stuttering as much. The second interview (of approximately three hours) was done by phone on March 27, 2013. The Claimant did not request any breaks until a break was suggested by her attorney an hour into the meeting. The Claimant was stuttering, but Ms. Antcil testified that the Claimant did not have any problems understanding or answering questions and she did not appear to have any memory problems with the materials being discussed. On the ultimate question of whether the Claimant, taking into account her limitations, has the ability to earn any wages in the same or other employment, Ms. Antcil used the same classification of Camp A and Camp B to distinguish the contrasting opinions from each group of physicians. Ms. Antcil testified that in considering the opinions of the Camp B doctors, including Drs. Lipkin, Roe, Wilson, Thwaites, Reinhard, Bernton, Weingarten and maybe one or two others, the Claimant is capable of wages in the same or other employment. On the other hand, Ms. Antcil testified, if you consider the opinion of the Camp A doctors such as Drs. Entin, Gellrick and Torres, the Claimant

would be able to return to selective employment but she would need some assistance in getting back to work. It would be challenging. Ms. Anctil testified that she was informed by DVR counselors of an organization that provides information regarding legitimate at home employment where clients are placed providing part time employment for persons with disabilities that is within their physical capabilities. Ms. Antcil also testified that there is a company called Asurion that provides customer service phone work 3-4 hours a day that can be done at the employees own pace. This company provides virtual reality training and they hire people with disabilities. Asurion provides services for lost or damaged cell phones or road side assistance. The calls are inbound. If a person gets tired they can log out and pick it back up later. The log in and log out time basically determines how many hours a person has worked and how they get paid. Later in redirect testimony, Ms. Antcil reiterated that Asurion is an actual company providing real work opportunities and it is not "sheltered work." She noted that statistics show that there are 1,700 annual job openings for customer service positions in Colorado according to the U.S. Census Bureau. Ms. Antcil also testified that working with Expeditor may be feasible. Expeditor offers bridge work that involves updating customer information from billings or receipts. They are a bridge to other employment and provide on the job training support. After approximately three months depending on performance, they are put on the payroll. Ms. Antcil also testified regarding adaptive measures that could increase the Claimant's ability to sit at a computer screen. Ms. Anctil agrees with Dr. Zierck's testimony that eye fatigue after gazing at a computer for thirty minutes wouldn't necessarily mean that she would be limited to thirty minutes working at a computer. Ms. Antcil also testified that having the right computer screen size and decreasing the brightness would help, as would adjusting ambient noise and light and setting up the work station so that the Claimant could alternate positions. Use of a day planner is another compensatory measure that the Claimant uses. As a vocational rehabilitation specialist, Ms. Antcil testified that, if you're trying to find a job for a client, you definitely take into consideration those compensatory measures. When asked if she agreed with Dr. Zierk that "at home employment is the 'bottom of the barrel'," Ms. Anctil testified that she was shocked. She testified that she is "always shocked when a vocational professional refers to an occupation as bottom of the barrel because people are out there working, making a living, and it's kind of a slap in the face to the people who are out there."

CONCLUSORY FINDINGS OF FACT
Generally

206. A considerable amount of time over the multiple days of hearing was spent presenting lay testimony regarding the Claimant's pre-injury condition and lifestyle. Respondent did not challenge this testimony. Rather, Respondent has argued that, if anything this testimony demonstrates that the Claimant was high functioning neurocognitively prior to the subject claim and therefore would not fit in the category of patients who don't recover predictably (within 90 days) after sustaining an MTBI.

207. There was considerable discrepancy between earlier versions of the October 15, 2008 accident and versions reported later. It is found that the descriptions

of the injury the Claimant provided to Dr. Erin Woessner on October 16, 2008 and to Dr. Rick Artist on April 17, 2008 are likely the most accurate versions. The Claimant reported the incident to these doctors after the initial trauma of that day, but within a short time period after the accident. These two versions of Claimant's report of the injury are also consistent with each other. In reviewing and summarizing these reports, the ALJ finds that the Claimant was hit from behind by a turning vehicle as she crossed the street. The vehicle that hit the Claimant was turning left on red after complete stop which supports the fact that the Claimant was likely hit by a vehicle travelling at a lower speed, probably closer to the 5 mile per hour range. The Claimant experienced a direct hit on her right hip and her buttocks. The Claimant was knocked onto the hood of the car, the car brakes slammed, then the Claimant fell/slid onto the street. More likely than not, the Claimant did not hit or head or experience any loss of consciousness. To the extent that there was a loss of consciousness, it would have been brief.

208. It is noted by the ALJ that Respondent did not challenge the notion that it would not be necessary for the Claimant to strike her head in order to sustain an MTBI. However, regardless of whether she struck her head or not, the Respondent argues that if the Claimant did sustain an MTBI, it is on the "mildest" of the mild spectrum and would not account for the development of cascading subjective complaints over the years. In any event, the weight of the evidence is that the Claimant did not strike her head and she did not lose consciousness. However, regardless, it is found that the Claimant, more likely than not, did sustain a mild traumatic brain injury.

209. There are two groups of medical providers who have evaluated and/or treated the Claimant. Supporting the Claimant's contention that she is permanently and totally disabled are Drs. Gellrick, Torres, Entin and Schmitz, referred to as the "Camp A" medical providers. These providers generally provided ongoing treatment to the Claimant and argue that the Claimant is in a group of 10%-20% of patients with mild traumatic brain injury (MTBI) who don't get better in a predictable period of time (90 days). These opinions are inconsistent with what is prescribed in the Medical Treatment Guidelines (see below). The accepted science with regard to mild traumatic brain injuries is that symptoms are "worse at first" and that MTBI patients fully recover within ninety days. The Camp A physicians argue these two most basic MTBI concepts, regarding onset of symptoms and patterns of recovery are both inapplicable to the Claimant.

210. The second group of medical providers include Drs. Goldman, Lipkin, Kenneally, Roe, Wilson, Thwaites, Bernton, Reinhard and Weingarten and are referred to as the "Camp B" providers. They are generally evaluating medical providers who did not provide ongoing treatment to the Claimant. These Camp B providers subscribe to the MTG and generally agree that the Claimant is not an outlier or exception to the rule and she has sustained little to no loss of earning capacity and that she is employable.

211. The Claimant was present in person for testimony taken at the OAC on April 19, 2013, August 16, 2013, September 26, 2013 and November 22, 2013. In addition the Claimant was present for the deposition testimony of Dr. Schmitz on April

30, 2013, Drs. Gellrick and Entin on May 6, 2013, Dr. Torres on May 7, 2013, Dr. Thwaites on May 9, 2013, Drs. Bernton and Reinhard on May 10, 2013, and Dr. Zierk and Ms. Antcil on December 6, 2013. The Claimant was also present by phone for the testimony of Dr. Weingarten on May 13, 2013. In prosecuting this issue, the Claimant has demonstrated more of her ongoing capabilities than disabilities. She was in the witness stand testifying for a full day and two half day hearings. These hearings were stressful situations for the Claimant, where you would expect her symptoms to be at their worst. Nonetheless, she exhibited the ability to comprehend the questions being asked of her and to articulate intelligent answers. While she exhibited some intermittent stuttering, this did not interfere with her ability to answer questions in a cogent and understandable manner. Word finding issues were not overtly apparent.

212. Overall, the ALJ finds that the Claimant exhibited a great deal of endurance while testifying and being present at OAC hearings and being present at multiple depositions with medical testimony and discussion of complex issues. She was on time for hearings and depositions and her attendance and participation was reliable and consistent. The Claimant was present for three full days total of lay testimony, much of it her own testimony, ostensibly to support her contention that she is unable to earn wages in the same or other employment. However, in a way, her ability to conduct herself in the manner in which she did during the extended hearing time contradicts that very assertion. During testimony of over the four days of hearing at the OAC, the ALJ observed, and documented in notes, the Claimant's presentation. There are significant discrepancies in what the Claimant says she can do and what she has been shown to do during testimony presented at the hearing. Examples of this include:

- On the second day of testimony in the hearing, the Claimant was on the witness stand for a significant portion of the day. The Claimant did alter positions between sitting and standing several times and was noted to rub her hands together gently. The Claimant also occasionally rubbed her neck. On occasion, the Claimant complained of shooting pains and she rubbed her temples, however, the Claimant was able to continue participating in the hearing and did not leave the courtroom. With respect to stuttering, there was a brief period of time at approximately 9:40 AM when the Claimant was stuttering and having a bit of difficulty with testimony but this resolved quickly and she was able to respond to questions with only mild and intermittent stuttering afterwards. The first break was taken from 10:05 AM for approximately 15 minutes. After the break there was an interim witness and the Claimant was in the courtroom at counsel's table listening to the testimony until she resumed her testimony at approximately 11:20 AM. After having a break from testifying, the Claimant was initially observed to be stuttering more frequently than earlier but was able to testify and, as the testimony wore on, her speech became more and more fluid. At 12:10 PM, the Claimant testified that no one could tell how much pain she was in at that point and her head was "splitting" and her neck and back hurt. When asked why it did not appear that she was experiencing that much pain, the Claimant responded that

she didn't need to present with a scrunched up face and she didn't want to show the world she was in constant pain all the time. Thus, even at a time when the Claimant was complaining of a high level of pain, she continued to function and she was cognizant of how she presented to the public. This is contrary to her testimony and that of family and friends who testified that she would blurt things out and she couldn't help but engage in inappropriate social behaviors. In court, she clearly recognized the need to present herself with steady behavior and observe social norms and she was quite capable of doing this for an extended time period. When testifying in the afternoon of the first day, the Claimant was stuttering again, but she was able to talk and convey her point adequately and she often used her hands for emphasis. At one point shortly before 2:00 PM, the Claimant did become emotional and upset when recalling how she found out that she no longer had her job, and the manner in which this was conveyed to her which she clearly deemed to be very impersonal and a disregard for her feelings.

- On the third day of testimony, the Claimant's stuttering was worse when she began testifying at approximately 1:00 PM, but as she became more focused on the testimony, the stuttering subsided and her speech became more fluid over the course of the rest of the afternoon. Between 1:00PM and 1:30 PM, the Claimant alternated between standing and sitting several times and just before 2:00 PM the Claimant was observed standing and swaying slightly with her left hand held up to her neck on her left side. At approximately 2:40, the Claimant asked for a break. After testimony resumed again, the Claimant spend most of the rest of the afternoon sitting while she testified, with significantly less alteration in position between sitting and standing. After the break until the end of testimony on that day, the Claimant was not observed to stutter very often.
- On the fourth day of testimony, the Claimant alternated her position between sitting and standing more at the beginning of the hearing from 1:00 until the first break at 2:40 PM. She would sit for 5 to 15 minutes and then stand for 15-25 minutes at a time alternately. During this testimony, the ALJ observed the Claimant was speaking clearly with only very slight hesitation and/or stuttering and she did not appear to be having any significant word find problems. After returning from a 12 minute break in testimony at 2:52 PM, the Clamant sat and remained sitting while she testified until 4:13 PM when she stood again. During this time frame, just after 3:00 PM, the Claimant stated that she was having difficulty understanding questions and said her head was really hurting and she put her hands to her temples. She was, nevertheless, able to continue with testimony. At approximately 3:48 PM, the Claimant started to hold and press on her neck and at 4:13 she stood up again and remained standing until testimony concluded for the day. Although the Claimant verbally expressed that she was experiencing pain, specifically that her head was hurting, and she exhibited pain behaviors, she was able to continue testifying and was able to understand and respond to questioning.

- The Claimant testified that she had difficulty reading, and in particular, small print. However, it was clear from the testimony that she had read and reviewed many of the medical records in whole or in parts, including the voluminous reports from Drs. Weingarten, Bernton, Thwaites, Reinhard and Kenneally.
- The Claimant demonstrated a high functioning memory, recent and remote, at one time correcting her attorney regarding the chronology of treatment with Dr. Kenneally. She was able to provide an accurate work history with detailed job descriptions, even being able to recall remote military and real estate test scores. She remembered when she took all her meds and what they were for. The Claimant prepared and took notes with her to the witness stand to help jog her memory, but agreed that she was able to testify by and large from memory without using those notes.

The Medical Treatment Guidelines

213. The Claimant's primary argument is that under MTG C.6.a., she is in a category of 10%-20% of MTBI patients who do not recover within 90 days and may continue to report symptoms for several months or years. The Camp A providers opine that the Claimant fits into this patient class which they describe as "outliers." These providers do not address the remaining language contained in this Guideline section which provides in pertinent part:

> Deterioration over time after mild TBI is uncommon and in situations where patients have worsening complaints after mild TBI, other issues such as psychological or social stressors should be considered in the differential or other unidentified diagnosis.

214. There was persuasive testimony that the 10%-20% of people who don't follow the typical recovery pattern are patients with premorbid neurological vulnerability such as prior concussions, stroke and/or advanced age. Specifically, Drs. Reinhard, Bernton and Thwaites testified that when you are looking at the MTBI patients who do not recover in a predictable fashion, you are looking at patients with preexisting neurological conditions. The Claimant doesn't fall into this patient class as the overwhelming weight of the evidence establishes that prior to her injury on October 15, 2008, the Claimant was functioning at a high level cognitively, both at work and outside of work. Drs. Reinhard, Bernton and Thwaites also agree that delayed recovery can be found in patients at the upper end of the mild traumatic brain injury spectrum for those who have had retro grade amnesia or were in a post injury coma of ten or more minutes. However, these symptoms do not apply to the Claimant. MTG D.4.a. recommends consideration of neuropsychological testing patients at the upper end of the MTBI spectrum which would include a coma greater than ten minutes, post traumatic amnesia for greater than six hours, retrograde amnesia for events of more than thirty minutes before the injury and GCS of less than 15 at two hours post injury. As the medical records establish, none of these symptoms apply to the Claimant. Drs.

Thwaites, Reinhard and Bernton opine that, assuming the Claimant even had an MTBI, it would be in the mildest of the mild category.

215. The MTG provides at C.1.c.III. (page 6), that a patient with a more complicated mild traumatic brain injury demonstrates structural damage visualized on acute neuro-imagining which may result in a slower and incomplete recovery. No evidence, imaging or otherwise, has been presented demonstrating that the Claimant sustained any structural damage to her brain.

216. The Claimant recorded a 15 Glasgow Coma Score (GCS) with both the paramedics and at the emergency room. Drs. Gellrick, Entin and others have discounted this as a meaningless test. Dr. Bernton agreed that this is a gross test as to whether or not the Claimant had a minimal brain injury. However, when there is a situation in which a patient later states that she has gross defects that prevent her from functioning on the basis of a head injury years later, a GCS immediately following an accident is important and useful. Dr. Bernton's opinions are consistent with the MTG D.1.c.II. which provides that a "GCS performed in the field or the ER may aide in grading the severity of TBI."

217. The MTG D.1.d. provides that when diagnosing TBI and/or its severity, that:

> In addition to the individual's self-report, practitioners should attempt to obtain and review any external sources of data, including police reports, ambulance reports, emergency department records, eye witnesses reports, etc., the practitioner should utilize this information to establish or verify the probable degree of trauma involved in the incident and the consistency between these reports and current symptoms.

This is the "generally accepted and widely used practice" for obtaining a thorough history prescribed by the Guidelines (MTG D.1). This should be part of a thorough forensic investigation. The MTG doesn't square with the opinions of the Camp A providers who contend that early medical treatment/diagnostic testing is generally incompetent, that the early medical records are generally unreliable and that a GCS of 15 is meaningless.

Initial Emergency Medical Treatment Records

218. The only direct evidence presented by the Claimant regarding what did or did not take place with the EMTs and the ER personnel was her testimony and the testimony of her husband (although admittedly, he did not arrive until somewhat later). On the one hand the Claimant testified that she felt foggy and disoriented during this time and often could not recall what took place in the ER, while on the other hand, she testified that the right questions were not asked and the correct diagnostic testing were not administered in the ER. Her testimony in this regard is inconsistent and unsupported by the documentation contained in the medical records. The records show that the

Claimant was fully worked up and received the treatment one would expect from a Trauma I center. These medical records are a good indicator of the Claimant's condition at that time and there was no persuasive evidence presented to discount the information contained therein. The initial emergency medical treatment records are found to be reliable and adequately document the Claimant's condition and the treatment she received.

Early Medical Treatment

219. With the exception of headaches which were reported to have begun the morning after the subject accident, the early medical records from Kaiser and Exempla are consistent with what was reported at DHMC. The Claimant contends that symptoms first reported to Dr. Hnida on October 22, 2008 were previously missed because the Claimant was medicated. However, when the Claimant was seen by Dr. Artist at Exempla on October 17, 2008, she reported that she hadn't taken any Valium or Vicodin thus far that day.

220. On October 16, 2008, the Claimant reported to Dr. Woessner she sustained a direct hit on her right hip and behind, the she fell back onto car, the brakes slammed, then she was airborne and fell on the street. The Claimant told Dr. Woessner that she doesn't think she hit her head and that any loss of consciousness would have been brief. The Claimant did report that she had a headache that started at 7am the day after the accident. The Claimant described it as worse than her normal migraine. The Claimant specifically denied confusion, memory problems. As of the day after the accident, the Claimant appeared more concerned with physical issues such as back and neck pain. Even when Dr. Woessner recommended a head CT non-contrast scan to evaluate for a bleed, the Claimant and her husband refused and preferred to monitor closely.

221. Similarly, on October 17, 2008, the second day after the accident, the Claimant continued to deny any loss of consciousness and denied numbness or tingling in her upper extremities. At this point, the Claimant advised that her neck and her back were the most bothersome. She reported that she had a headache at the time of the examination, but not a "migraine type." On this day, Dr. Artist described the Claimant as an "alert, pleasant, healthy appearing female who appears to be fairly uncomfortable, sitting very stiffly and not moving all that much." The Claimant's main complaints were her neck and back and her right hip was not as bad. Dr. Artist also noted that the Claimant's right knee and ankle were stiff and sore. There was no bruising at this point. The Claimant denied numbness or tingling into her hands and upper extremities. Her range of motion was somewhat restricted for her neck and back and ankle. Dr. Artist assessed the Claimant with: "sprain right ankle, contusion and sprain right knee, contusion of ribs and low back, strain of the neck, strain of the back." At this initial worker's compensation medical evaluation, Dr. Artist advised that her symptoms were likely to resolve but "whether a couple more days, a couple weeks or a couple months is difficult to tell at this point." Three days later, on October 20, 2008, the Claimant

reported feeling a little bit better after the weekend. The Claimant reported that she was taking Motrin, Vicodin and Valium in order to resolve headaches she was getting.

222. Yet, by October 22, 2008, when the Claimant saw Dr. Dave Hnida, her reported symptoms increased and she now complained of dizziness, difficulty finding words, processing thoughts. She also reported that she still had neck and lumbar pain. The Claimant reported she was off medication except for ibuprofen. Although Dr. Hnida noted that the Claimant's mini mental status exam was normal, if at times slow and although he reported that the Claimant responded to questions such as her job description and what was done at physical therapy, he assessed the Claimant with a closed head injury and noted she should be off work. He referred her for a CT scan non-contrast of the head. This CT scan performed on October 24, 2008 did not demonstrate any traumatic or focal abnormality. There was no fracture, bleed or discrete brain lesion noted. By October 27, 2008, the Claimant reported her overall symptoms improved but the dizziness was worse. Dr. Artist recommended a neuropsychological evaluation, continued physical therapy and continued medications.

223. On November 10, 2008, the Claimant reported to Dr. Artist that she was trying to be more active but that she fatigues extremely easily. The Claimant's husband came with the Claimant to the visit and he reported that her reflexes and reaction time were markedly slowed and that the Claimant was having difficulty with speech and memory. The Claimant's headaches were better, not as severe, nor as often. The Claimant reported that she was not using Vicodin or Flexeril at all because they made her feel weird. The Claimant also reported dizziness at times for no good reason. Dr. Artist assessed the Claimant with a closed head injury, concussion, persistent symptoms and poor short term memory, neck and back strain-modestly improved and insomnia and headaches-improved. The Claimant's husband indicated that he would like the Claimant to see more specialists as it did not seem to him that the Claimant was getting better very rapidly. Dr. Artist cautioned that the Claimant's issues required time to resolve and perhaps some neuropsych cognitive therapy and continued physical therapy.

224. In the first month after her accident, the Claimant's symptoms at first appeared to be gradually improving and then as the original physical symptoms began to subside, the Claimant increasingly reported cognitive symptoms and new physical symptoms, such as dizziness. By the time the Claimant began to treat with Dr. Caroline Gellrick, the new symptoms were not resolved, so Dr. Gellrick began to refer the Claimant out for a considerable amount of diagnostic testing, including the neuropsychological testing. Now, the Claimant argues that the neuropsychological testing is not reliable in her case.

Neuropsychological Testing

225. The neuropsychological testing in this case has been problematic. The Claimant has undergone four separate batteries of neuropsychological testing in 2008, 2009, 2012 and 2013. In addition other treating and evaluating doctors have analyzed

and prepared opinions about the raw testing data. The conclusions are variable and, as Dr. Schmitz has pointed out, the doctors fall into two camps, one of which opines that there is nothing essentially wrong with the Claimant and that she is functional and able to return to work, the other which has concluded that the Claimant experiences ongoing cognitive, physical and emotional difficulties related to the October 15, 2009 injury.

226. In the November 12, 2008 neuropsychological evaluation report, it was noted that the Claimant was given two psychological tests to assess effort levels and symptom exaggeration. It was reported that, "In both tests, [the Claimant] presented with scores that were significantly below results observed in research samples of individuals with significant brain injuries. This type of profile is suggestive of an individual who is consciously exaggerating the extent and nature of a variety of clinical symptoms or cognitive impairment, and/or an individual who is not putting forth maximum effort." Taking her high level of anxiety into account, the results of the psychological evaluation were considered valid but it was noted that the Claimant's scores on many of the performance scales were estimated to be in the lower range or her usual or normal capabilities and did not represent the Claimant's maximum efforts such that the results were found to represent the "lower echelon" of the Claimant's capabilities. Due to the questions regarding effort, retesting in six months was recommended.

227. Dr. Kenneally administered a second neuropsychological assessment on September 15 & 17, 2009 a prepared a written report dated September 25, 2009. Relating to validity considerations, Dr. Kenneally noted that the Claimant's neuropsychological test results indicate a marked degree of variability that is atypical. This degree of variability in her test results is inconsistent with the pattern of test results seen in individuals with documented traumatic brain injury. Dr. Kenneally reported that the Claimant's test scores on the TOMM were below those seen in, "institutionalized elderly demented patients." Dr. Kenneally found her performance indicative of the intentional production of wrong answers and opined that failure at this level is actually a complex cognitive task requiring the patient to learn both the right and wrong answers to the test materials; and deciding in real time to provide the incorrect answers. Moreover, on other tests the Claimant performed at the mean or above average and given that the Claimant performed successfully on these tests, her failure on the simpler measures is inconsistent since the simpler tests cover items considered "building blocks" to the more complex cognitive tasks tested in areas where she performed better. Dr. Kenneally opined that the Claimant's current test results cannot be interpreted in standard fashion given her failure of validity measures, the marked degree of variability in her test scores and the stark contrast between her impaired test scores and her observed and self-reported level of daily functioning. Dr. Kenneally noted that individuals with documented traumatic brain injuries do not obtain this highly variable pattern of test results. Further, the Claimant's test scores on certain measures, if valid, would indicate that her level of impairment would make it impossible for her to sustain a conversation or independently dress or bathe herself on a daily basis. Dr. Kenneally noted that the testing did indicate that Claimant's depression and anxiety appear to be worsening and this may be having a negative impact on cognition, sleep, pain and recovery. She found that the Claimant's

test results “indicated a marked translation of psychological distress into physical symptomatology” and Dr. Kenneally advised the Claimant’s medical treaters to obtain objective measures of the Claimant’s pain symptom report when possible. Ultimately, Dr. Kenneally found “no objective neuropsychological test data to indicate that the Claimant has cognitive deficits resulting from her work injury on October 15, 2008. Dr. Kenneally’s opinions were credible, persuasive and are found as fact.

228. Dr. Schmitz performed another neuropsychological evaluation and prepared a written report dated November 26, 2012. Dr. Schmitz made a number of behavioral observations regarding the testing including his opinion that (1) the Claimant’s effort was suspect, (2) she displayed an attitude of uncaring and a notable lack of engagement, (3) on a test of fine motor coordination, at times she appeared to have placed the instrument correctly but then turned it to an incorrect position, (4) her performance on purported measures of effort was generally poor and strongly suggestive of her giving incomplete effort, (5) many of her performances on the clinical tests were at or below the 1st percentile and some of her scores had dropped from her previous testing in 2009, (6) her performance on the MMPI-2-RF was strongly indicative of the overreporting of somatic, cognitive, and memory complaints, and (7) in spite of being clearly aware of the importance and necessity of providing good effort on the current neuropsychological test battery, the Claimant’s performance was considerably less than optimal and suggestive of a non-cooperative approach to the assessment process. Yet regardless of these observations, Dr. Schmitz does not believe the Claimant is malingering in her condition. He opines that “fundamentally, [the Claimant] remains incapacitated from functioning effectively at her pre-accident level. As evidenced on the neuropsychological testing her cognitive functioning fluctuates on a daily or even minute by minute basis. She has developed a self-perception of being totally disabled, which clearly exacerbates any physical pain or cognitive difficulties she may be experiencing.” Dr. Schmitz acknowledges that the Claimant represents an “outlier” in her response to a traumatic event, but finds that “but for” the event of October 15, 2008, the Claimant would not be as functionally disabled as she has become. He went on to opine that it is unlikely that the Claimant would experience any considerable improvement in functioning with further treatment and he finds her condition permanent. Dr. Schmitz does concede that, unfortunately, as a result the validity concerns over the testing results, it is impossible to offer a definitive determination of the Claimant’s current level of neurocognitive functioning. He opined that while he found the Claimant did apparently sustain an actual physical injury (including a concussion) as a result of the original accident, it would appear that her “response” to this injury has been quite dramatic and it is likely that these non-organic factors are playing a substantial role in the maintenance of her ongoing complaints. At his deposition, Dr. Schmitz testified that the neuropsychological testing performed in his office and on the three other occasions with other providers merely shows that the Claimant is performing poorly, suggestive of poor effort, and inconsistent with what the Claimant was doing with Ms. Haddow. Dr. Schmitz testified that he finds that other factors are influencing her performance on the neuropsychological testing such as headache, speech problems, dizziness, emotional distress and sleep difficulties.

229. Dr. Thwaites performed a fourth Independent Neuropsychological Evaluation on March 8, 2013. Dr. Thwaites found that the Claimant performed in the significantly impaired range on a formal test of effort and motivation. Dr. Thwaites ultimately concluded that the Claimant's neurologic complaints across time are not associated with a concussion and her neuropsychological test data are not an accurate reflection of her abilities. He opines that she may have mild cognitive error, possibly based on her current medication regimen or based on psychiatric factors and pain. However, Dr. Thwaites concludes that, "we are without objective data that would indicate that she has cognitive impairment within a reasonable degree of probability, even though that is certainly a strong possibility." He finally notes that "it is safe to say that what we are seeing in her presentation does not make sense neurologically based on a minor concussion, a normal MRI, and what is known about her medical history. At his deposition, Dr. Thwaites further testified that when he was with the Claimant for two hours he did not see her lose her train of thought, she wasn't disimpulsive, disinhibitated, and he didn't notice any cognitive errors in his discussion with her. He saw no obvious cognitive problems at the conversational level. Based on the available information, Dr. Thwaites opined that there would be no reason the Claimant would be unable to sit at a computer screen for a sustained amount of time. Dr. Thwaites testified that there was not any objective evidence to suggest that the Claimant couldn't do her prior job from a cognitive perspective. Dr. Thwaites testified that he gave the Claimant the benefit of the doubt in diagnosing a concussion. He found that the early medical records in this case are important because, "there is a convergence of literature that suggests that cognitive symptoms and concussion symptoms are worst generally speaking closer to the time of the accident and improve across time." With this in mind, the records demonstrate that when the Claimant would have been at her worst from a cognitive perspective, she really wasn't displaying or reporting much in the way of cognitive symptomatology. Per Dr. Thwaites, the Claimant's presentation is unusual and not accurate from a neurologic perspective. Dr. Thwaites persuasively testified that he doesn't believe that what the Claimant is reporting and portraying is her true level of brain function. With regard to the validity testing, Dr. Thwaites noted that the Claimant scored worst than people with advanced severe Alzheimer's, people with severe traumatic brain injury, catastrophic brain injury, mental retardation. Dr. Thwaites does not believe it is plausible. While Dr. Thwaites did diagnose the Claimant with a mild traumatic brain injury, he disagrees with some of the Claimant's other medical providers who find that the Claimant continues to have neurogenic-based cognitive difficulties because of her concussion. Moreover, Dr. Thwaites opined that adding symptoms over time is not consistent with a mild traumatic brain injury. The ALJ finds the opinions of Dr. Thwaites to be credible and persuasive and they are found as fact.

230. The Claimant has argued that the neuropsychological testing performed in her case was not reliable and is invalid and that the evaluators, and in particular Mr. Broadhurst and Dr. Kenneally, did not consider confounding factors such as anxiety, depression, chronic pain and sleep deprivation. This is not consistent with the medical evidence and it would not explain why the Schmitz and Thwaites evaluations are invalid. In fact, Dr. Torres testifies that patient observation is a more reliable indication of a

traumatic brain injury than neuropsychological testing. The Respondents, on the other hand, point out the MTG provides:

> Neuropsychological assessments are generally accepted and widely used as a valuable component of the diagnosis and management of individuals with TBI. They include sensitive tests that are used to detect cognitive deficits, severity of impairment, and improvement over time.

231. In considering the most persuasive opinions and looking at the 4 separate batteries of neuropsychological testing as a whole, the ALJ determines that, to the extent that the Claimant's neuropsychological evaluations test results lacked validity, it is because she either exaggerated her symptoms or did not give full effort or both. The ALJ does not credit the Claimant's argument and Dr. Torres' opinion that the Claimant's exaggeration of symptoms and her failure to give good effort in neuropsychological testing is actually a symptom of a closed head injury.

The Claimant's Ability to Drive and Travel

232. Following her accident, the Claimant has been able to drive locally, including but not limited to, driving to medical appointments, 10-15 miles from her house. The Claimant has renewed her driver's license online and no driving limitations have been imposed by Spalding Rehabilitation or the Department of Motor Vehicles. At the hearing, the Respondent emphasized the Claimant's ability to drive, including the introduction of a street map and mileage reimbursement information to illustrate the Claimant's ability to drive distances ranging from 10-15 miles round trip to 20-26 miles round trip on a regular basis to attend medical appointments. This emphasis on driving is placed in the context of the MTG which describes driving at K.1. as:

> Independent driving is considered a complex activity of daily living. An individual's potential for safe driving is influenced by an intricate interaction of physical, cognitive, visual and behavioral components.

Driving is categorized in the Guidelines as an Instrumental vs. a Basic ADL. Instrumental ADLs are defined as activities that, "require higher level cognitive skills, including the ability to plan, execute and monitor performance, as well the ability to evaluate the information and make sound judgments." MTG I.2.a. and b.

233. In this context, Dr. Gellrick's February 26, 2009 clinic note is significant. When Dr. Artist last saw the Claimant on November 25, 2008, he reported that she was "unable to drive motor vehicles." Then, Dr. Gellrick imposed a "no driving" restriction when she initially saw the Claimant on December 8, 2008 and again on December 15, 2008. At no time prior to the February 26, 2009 evaluation did Dr. Gellrick lift the no driving restriction, nor did the Claimant report to Dr. Gellrick that she was driving; short distances or otherwise. The Claimant only disclosed that she was driving to Dr. Gellrick after surveillance video demonstrated her ability to drive. At that point, the Claimant reported to Dr. Gellrick that surveillance video showed her driving at times and she

drives short distances back and forth from the house. Dr. Gellrick reported the Claimant no longer had dizziness and with her headaches clearing she has been able to tolerate driving so Dr. Gellrick cleared the Claimant to drive ostensibly because she no longer had dizzy spells and her headaches were dissipating, clearing. However, the Claimant only disclosed that she was driving when surveillance video gave her no choice. Her driving capabilities have only increased and improved since that time. If the Claimant can drive short distances by virtue of no longer having dizziness and clearing headaches, the fact that she can now drive to medical appointments with Drs. Entin (Greenwood Village), Gellrick (Colorado and I-25), Torres (Cherry Creek), and Wolffe (Porter Hospital), shows that, contrary to her testimony, that dizziness and vertigo are no longer a problem which interferes with her ability to function. The Claimant began Botox treatments with Dr. Wolffe, post MMI, and has acknowledged that this treatment has decreased the intensity and duration of her headaches. This is inconsistent with the Claimant's testimony that she continues getting dizzy spells and has not gone a single day subsequent to her accident without a headache.

234. The surveillance video viewed by the ALJ demonstrated that the Claimant, in each instance of driving, was comfortable and capable of driving over time. Contrary to the Claimant's testimony, she drives the family minivan and drives in snow. She passed a driving evaluation test at Spaulding Rehab and renewed her license (online) with no restrictions of any kind, highway or otherwise. She has not had an accident or a moving violation (with the possible exception of a photo red light ticket). She drives her children around and has even taken out her daughter, who had her permit and was learning to drive, although the Claimant did testify that this made her nervous.

235. In addition to driving, the Claimant has been able to travel by air on her own to out of state destinations which include Kansas, Ohio and Virginia. She has traveled out of state on road trips with family members to destinations which include Kansas, Ohio and Mississippi and she has traveled longer distances with friends and family within Colorado.

236. Based on persuasive evidence to the contrary, largely related to the Claimant's ability to drive on a regular basis, and her ability to tolerate travel, the Claimant's testimony regarding the post-MMI severity and impact of her dizziness and headache symptoms is not credible. It is more likely than not that these symptoms are of a lower severity than she is reporting to her physicians and that they have less of an impact on the Claimant's ability to function and engage in activities of daily living that her hearing testimony would indicate.

Surveillance Video

237. A substantial amount of surveillance video from August 20, 2011 through December 7, 2011 has been submitted to the Court and reviewed by the ALJ. The videos do not demonstrate that the Claimant is significantly limited by any disability, whether it be physical, cognitive, vestibular, psychological or otherwise. In the surveillance video, the Claimant presents as a person who is able to interact with family,

friends and strangers. While the Claimant has argued that the video shows only selective times and highlights when the Claimant is having a good day and shows her only when she is functioning at a higher level, the ALJ finds that there was a significant amount of video taken over a number of days and, while the video fails to capture every waking moment of the Claimant, there is a substantial amount of footage from which reasonable inferences can be drawn.

238. The Claimant reported in March of 2013, continuing cervical, thoracic and lumbar spine symptoms with functional disabilities related to chronic pain, incapacitating headaches and numbness in her arms and right shoulder pain and limitations. None of this is observed in the surveillance. She reported to Pat Anctil that she has difficulty with depth perception, problems judging distances and banging into things and sometimes falls while walking. None of this is observed in the surveillance videos. Neurocognitive and psychological problems are difficult to videotape. However, at no time is the Claimant seen losing her balance or having to hold on to family, friends or inanimate objects to steady herself, other than holding a shopping cart while shopping (which does not appear to be a function of balance issues, but rather a normal grocery shopping behavior). In the Peach Festival video surveillance, the Claimant is seen walking through crowds, moving from a standing to a sitting position and vice-versa, while balancing multiple items using both upper extremities. She is not seen carrying and rubbing her stone, stuffed animals or any other objects nor is she seen wringing her hands as she did during the four days of hearing testimony.

239. Overall, the surveillance video presents the Claimant going about activities of daily living over several months in 2011 which contradicts the Claimant's stated abilities during testimony at the hearing. While the Claimant does not engage in any overly strenuous activities, she is regularly seen driving without difficulty, walking, bending, and picking up and carrying items and engaging in activities that do not correlate with the Claimant's descriptions of her physical and mental limitations. In videotapes of her activities for periods covering August 20, 2011 through December 7, 2011 the Claimant does not appear physically, cognitively, vestibularly, visually, psychologically or otherwise disabled. The Claimant does not appear to have any restrictions and she does not engage in any self-limiting behavior. The Claimant presents as a person able to interact without limitations or hesitation with friends, family and strangers. The Claimant appears to be animated and appropriate in her social interactions. The Claimant is seen at various times engaged in activities that are in excess of limitations assigned by medical providers and are in excess of the Claimant's subjective complaints as self-reported and/or testified to limitations. The Claimant is seen lifting, bending at the waist, crouching/squatting and reaching overhead with both arms. The Claimant is seen out in sunny weather without sunglasses, she demonstrates no balance problems, she exhibits fine motor skills, she is able to tolerate large groups of people and is able to navigate throughout crowds of people. She is able to drive and exhibits no problems with dizziness. From this, in concert with other persuasive evidence, the ALJ draws the reasonable inference that the Claimant has not accurately described her abilities and limitations during testimony at the hearing and to her treating and evaluating physicians. The ALJ finds that it is more likely than not that the Claimant

is able to engage in more activities, for longer durations, with fewer negative consequences, than she has represented in testimony and to her doctors.

Medical and Psychological Opinions Regarding the Claimant's Functional Limitations

240. The Claimant's ability to earn wages in the same or other employment is based in large part on whether she has limitations and what those limitations are.

241. The Camp A doctors include, Drs. Gellrick, Entin, Schmitz, Torres and Zierk. Dr. Gellrick initially assigned restrictions on March 15, 2011 when she and the Claimant completed a physical restrictions form provided by the Claimant's attorney. Those restrictions are no longer applicable. Dr. Gellrick has since modified those restrictions and, in her most recent opinion, at her July 24, 2013 supplemental deposition, Dr. Gellrick testified that "I don't know what she can do today" and recommended a repeat FCE. She agreed that her opinions of restrictions were guess work. Dr. Gellrick continues to maintain her opinion that the Claimant should be limited to no more than a 30 minute working at a computer at one sitting. On November 5, 2011, she reports, "Her work would not involve necessarily computer work because of the vestibular problems with ocular motor dysfunction that she still has" relying on Drs. Lipkin and Politzer. Yet, Dr. Lipkin reported on November 23, 2011 that from an otolaryngological basis, the claimant can return to sedentary and light duty work. Even if you credit Dr. Politzer's opinions (over those of Drs. Roe and Wilson), the claimant's limitation for working at a computer is two hours at a time, not 30 minutes. If you credit the opinions of Drs. Wilson and Roe, who are also both Gellrick referrals, the Claimant has no neurocognitive/visual limitations. Dr. Entin assigned a 10% impairment rating based on impairment of the complex integrated cerebral function, a curious rating in view of his deposition testimony that since all neuropsychological testing is invalid, there is no way to objectively quantify the Claimant's neurological dysfunction. In his opinion, the Claimant's primary problems are headaches and mental fatigue. He doesn't know if the Claimant could work up to 4 hours a day based on what the Claimant told him. He would defer to Dr. Lipkin, the otolaryngologist, on limitations attributable to vestibular problems, vertigo and dizziness. Dr. Schmitz' testimony and opinions are inconsistent. He admitted his bias with regard to the psychological diagnosis of malingering and factitious disorder. As was true with Dr. Gellrick, he misreads and relies on a faulty interpretation of whether the Claimant initially had objective neurological symptoms. Specifically, he testified to his reliance on and misconception of reported neurological symptoms of slurred speech, facial droop and incontinence of urine in the EMTs' report. In Dr. Schmitz' neurological testing evaluation report of November 26, he reported, "[the Claimant's] effort was suspect throughout much of the testing day. She displayed an attitude of uncaring and a notable lack of engagement…Her performance on purported measures of effort was generally poor and strongly suggestive of her giving incomplete effort." He further noted that some of the Claimant's scores had dropped from her previous testing in 2009. He also reported that the claimant performed, "very slowly during a test of fine motor coordination…" and, "At times she appeared to have placed the instrument correctly but then turned it to an incorrect position. Although it is clear

that the Claimant did not give full effort during the November 26, 2012 evaluation, as with the three other neuropsychological evaluations, Dr. Schmitz offers a multitude of excuses for the Claimant's behavior, some of which are not consistent with medical literature and the opinions of other more persuasive evaluators. The restrictions assigned by Dr. Torres are also not reliable. He completed a residual functional capacity statement, provided to him by the office of the Claimant's attorney on March 15, 2013. At his May 7, 2013 deposition, only seven weeks later, he significantly altered those restrictions, without basis. There is nothing in the record indicating that he saw the Claimant during this interim period of time. His explanation for his alteration of restrictions is that he does not like the forms provided by the attorney's office. The revisions set forth in his deposition testimony do not reflect independent opinions. Dr. Torres continued to use the same form to which he raised objections and simply changed his opinion regarding restrictions. He moves restriction severity from one category to another. Additionally, in view of the Claimant's multiple trips to Kansas, Ohio, Mississippi and Virginia, Dr. Torres' placement of the Claimant in the most severely restrictive category for travel, further exemplifies the unreliability of his opinions and assigned restrictions. Dr. Torres' diagnosis of post traumatic stress disorder is not shared by Dr. Entin or Dr. Weingarten. Dr. Torres disagrees that the Claimant has a pre-existing (Axis II) diagnoses of histrionic features. This is at odds with Dr. Entin, Dr. Weingarten and Dr. Zierck. Dr. Torres testifies that there is no mention in the EMT and ER records which would demonstrate a thorough observation relevant to the claimant's cognitive status. This testimony does not square with the information contained within those records or the MTG. Lack of dependability and inconsistency are offered by the Camp A providers, as a primary reasons why the Claimant would be unable to return to work. However, the Claimant's dependability has been consistently demonstrated by her ability to keep her medical appointments. Similarly, the claimant was able to attend the Peach Festival because she was, motivated to do so. Moreover, her attendance and participation in at multiple days of hearing and even more days of deposition testimony demonstrate the fallacy of this argument. As a psychologist, Dr. Zierck reported that the Claimant had a somatoform disorder which is an unconscious exaggeration of symptoms. Somatoform is a differential diagnosis for conscious exaggeration and Dr. Zierck's testing was consistent with symptom exaggeration. He opined that the testing demonstrates that the Claimant has become socially introverted and has little capacity to experience joy and pleasure. These characteristics are not seen anywhere in the surveillance video. Dr. Zierck testified that the two most significant vocational limitations are the Claimant's vestibular and ocular problems. However, once he was made aware of Dr. Lipkin's updated opinions, he agreed that the Claimant did not have any vestibular problems, vertigo or dizziness which would preclude her from returning to pre-injury occupations. He agreed that Dr. Lipkin's November 23, 2011 report put Dr. Lipkin in Camp B. Similarly, Dr. Zierck had not reviewed the reports from Drs. Roe and Wilson, both of whom agreed that the Claimant had no visual limitation to returning to work, whether it be brain related or otherwise. Dr. Zierck agrees that Dr. Politzer had only limited the Claimant from fixing her gaze on a computer screen or printed matter for longer than two hours without the need of resting her eyes. He agreed that while Dr. Politzer indicated that the Claimant's eyes may tend to "fatigue" after gazing at a computer screen or printed matter for more than 30

minutes, the bottom line limitation for sitting at a computer was two hours. Eye fatigue in and of itself would not preclude the Claimant from continuing to work at a computer screen or printed matter.

242. Considering the opinions of Drs. Kenneally, Goldman, Lipkin, Thwaites, Bernton, Weingarten, Reinhard, Wilson and Roe (Camp B), the Claimant has little to no limitations of any kind and is able to earn wages in the same or other employment. She can return to pre claim employment. Many of these Camp B physicians evaluated and/or treated the Claimant on referral from Drs. Artist or Gellrick. They are not traditional litigation-type Independent Medical Examinations. They include Drs. Goldman, Lipkin, Roe, Wilson and Kenneally. The Camp B IME reports and testimony are well-reasoned and in line with the Medical Treatment Guidelines and supported by authoritative scientific sources. Based on the totality of the evidence, the opinions of these Camp B providers are overall found by the ALJ to be more compelling and persuasive.

Ultimate Findings

243. There is considerable conflicting expert testimony and opinions regarding the extent of the Claimant's injuries, her limitations and her ability to earn wages in the same or other employment. As found, the Camp B medical providers, including Drs. Goldman, Kenneally, Lipkin, Thwaites, Bernton, Reinhard, Weingarten, Roe and Wilson, are found to be more persuasive, compelling and are afforded more weight than the opinions of the Camp A medical providers on issues which include, but are not limited to, the claimant's restrictions and employability. The Claimant's activities as shown in the surveillance video and as described in testimony, including but not limited to, her driving activities and post injury travel, are found to be more consistent with the opinions assigned by the Camp B providers.

244. With respect to the vocational rehabilitation expert opinions, the opinion of Ms. Patricia Antcil is found to be more persuasive than that of Dr. Zierk.

245. Considering and weighing all of the lay and expert testimony, the hearing submissions, including but not limited to, the surveillance video, 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).

A huge volume of testimony and documentary evidence was presented in this case and the reader is referred to the extensive and detailed findings of fact, and most especially the conclusory findings of fact, as set for the above, in lieu of redundant recitation of these facts here. Considering and weighing all of the lay and expert testimony, and the hearing submissions, including, but not limited to, the neuropsychological test results and interpretations, diagnostic imaging and testing, and the surveillance video, it is determined that the Claimant has failed to establish, by a preponderance of the evidence, that the Claimant's work injuries prevent her from earning a wage in her previous employment or any other employment. While the ALJ acknowledges that the Claimant suffers from deficits related to her October 15, 2008 injury which may negatively impact her ability to function and to work, the Claimant has sufficient residual function, ability, training and education to obtain and maintain continuous employment in at least a modified, part-time, sedentary position and such employment is available to the Claimant in her commutable labor market.

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.

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: June 25, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-784-196-12

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

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter is presently scheduled for June 18, 2015, 2015, in Denver, Colorado. On June 2, 2015, the respondents filed a Motion for Summary Judgment, which was rejected on the same date for failure to comply with Office of Administrative Court Rules of procedure (OACRP), Rule 17, 1 CCR 104-1. On June 4, 2015, the respondents filed an Amended Motion for Summary Judgment, in compliance with Rule 17. On June 12, 2015, the Self-Represented Claimant filed a Response to Respondents' Amended Motion for Summary Judgment, with at least 100 pages of documents that apparently go the merits of what has been previously adjudicated. On June 16, 2015, the Respondents' Amended Motion and the Claimant's Response were assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for a ruling.

Hereinafter David Valdez shall be referred to as the "Claimant." Alstom, Inc. shall be referred to as the "Employer." All other parties shall be referred to by name.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact concerning whether the Claimant is barred from re-opening his workers' compensation claim when an ALJ previously determined, and the decision was upheld on appeal by the Industrial Claim Appeals Office (ICAO) and the Colorado Court of Appeals, that all of the Claimant's future medical conditions were unrelated to his January 9, 2009 work injury.

The Respondents bear the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant worked as a boilermaker for the Employer. While at work for the Employer on January 9, 2009, the Claimant suffered an admitted aggravation of his pre-existing condition when he fell. Specifically, he sustained admitted compensable aggravations to his neck, back and left shoulder.

2. In December of 2010, the Claimant's authorized treating physician (ATP), Mary F. Burgesser, M.D., placed him at maximum medical improvement (MMI) for the injuries he sustained in 2009. Dr. Burgesser was not a Level II accredited physician and, therefore, Mark Paz, M.D., performed an impairment rating.

3. The Claimant ultimately underwent a Division Independent medical Examination (DIME) with Kathy McCranie, M.D. The DIME physician agreed that the Claimant had reached MMI for his 2009 injuries in December of 2010. Dr. McCranie also provided the following causation determination:

> Based on the evaluation done today, I would agree that [Claimant] has reached maximum medical improvement. I would agree with the date of maximum medical improvement of 12/28/10. I would recommend that he work within the light work category due to his longstanding, chronic pain problems. I do not believe that there is any medical maintenance care required for his injury of 01/09/09, as all of his cervical and lumbar spine complaints, as well as his left shoulder complaints predated his work injury and there are no objective findings to indicate any change in his condition

post injury, any further follow up care should revert back to his only personal physician outside of the Workers' Compensation arena.

4. DIME Dr. McCranie placed the Claimant at MMI on December 28, 2010, with no permanent impairment, determining that any medical conditions were not causally related to the admitted injury after that date.

5. Despite making this definitive causation determination in favor of the Respondents, the DIME nevertheless performed a permanency evaluation with apportionment just to further illustrate that the opinion was correct. Such an evaluation was purely gratuitous. Dr. McCranie ultimately determined that claimant had a 0% impairment rating for the neck and low back and that although there could potentially be a 1% rating for the shoulder, however, she questioned how even that potential rating could be related to the work injury. The ALJ finds that Dr. McCranie's rating exercise was hypothetical in the workers' compensation context.

ALJ Walsh Decision

6. The Claimant did not accept the causation and other opinions provided by the DIME. As a result, a hearing was held in this matter before ALJ Donald Walsh on February 24, 2012. ALJ Walsh provided the following factual findings:

> * "The DIME physician noted that the claimant had returned to base line after the work injury and his ongoing problems were not causally related to the work injury.. . . Even though Dr. McCranie found that the Claimant's ongoing condition was not work-related, she nevertheless performed permanent impairment testing to see if there would be ratings after apportionment. The permanent impairment ratings were essentially 0% after properly performing apportionment."
>
> (ALJ Walsh's Fact Findings, #26 and #27).
>
> * "The ALJ finds the DIME physician's causation, MMI and PPD ratings to be persuasive and the Claimant failed to overcome these opinions by clear and convincing evidence.. . . The Claimant failed to prove an entitlement to ongoing maintenance medical benefits by a preponderance of evidence. Moreover, any treatment that the Claimant requires is causally related to these pre-existing conditions ***as the Claimant returned to his base line condition after the admitted work injury***."

(ALJ Walsh's Fact Findings #35 and #37) (emphasis supplied).

7. As a result, ALJ Walsh specifically made a finding that the Claimant had returned to his baseline condition ***and the ongoing medical conditions were not work-related***. ALJ Walsh also denied the Claimant's request for permanent disability benefits and/ or ongoing workers' compensation benefits.

Appeals of ALJ Walsh Decision

8. The Claimant appealed to the Industrial Claim Appeals Office (ICAO). ICAO affirmed the ruling of the ALJ. In its Order, ICAO held as follows:

> * "In her report, the DIME physician specifically states that "there are no objective findings to indicate any change in his condition post injury.". . . The ALJ interpreted this to mean that claimant returned to baseline from the January 2009 injury and his ongoing problems were not causally related…."

9. After reviewing ALJ Walsh's decision, ICAO specifically affirmed the causation determination made by the ALJ as follows:

> * "The evidence supports the ALJ's finding that the claimant's disabling condition is the result of the pre-existing condition rather than the January 9, 2009 injury and the entirety of the claimant's impairment is attributable to the prior injury.. . . the findings of the ALJ are abundantly supported by the record. Therefore, we are bound by those findings and are not persuaded that the ALJ committed reversible error in finding that the claimant failed to overcome the DIME physician's opinion of permanent impairment."

10. The Claimant subsequently appealed the matter to the Colorado Court of Appeals. In upholding the decisions of ICAO and ALJ Walsh, the Court of Appeals specifically made the following determination:

> "… the DIME physician opined that claimant had not sustained any permanent injuries as a result of the 2009 accident. Her conclusions were corroborated by the employer's retained medical expert. Employer's retained medical expert opined that no objective change in claimant's

> condition could be attributed to the 2009 work-related accident. He also expressly concurred with the DIME physician's methodology in calculating the impairment rating, agreed with the DIME physician's conclusion that claimant sustained a zero percent impairment rating for his 2009 injuries, and noted that the same result would be reached even if claimant's preexisting injuries were assigned a higher impairment rating. This corroborative evidence amply supports the ALJ's finding that the DIME physician's impairment rating was accurate and that claimant's ongoing need for medical care was not causally related to the 2009 accident." (Court of Appeals ruling page 6)

11. The Claimant did not appeal the decision of the Court of Appeals. As a result, the ALJ's original finding that the Claimant did not suffer any permanent injuries and his ongoing medical conditions were pre-existing is final.

Petition to Re-Open

12. On August 8, 2014, the Claimant filed a Petition to Re-Open his 2009, workers' compensation claim due to an alleged change in his medical condition.

13. The Claimant attached a medical report from Robert J. Greenhow, M.D., stating that the Claimant was seen for a follow up with regard to his left shoulder. Dr. Greenhow provided an addendum to his report which states that it was brought to his attention that Claimant's ongoing symptoms are related to an old work injury from 2009.

14. Subsequent to the Claimant filing his Petition to Re-open, he filed an Application for Hearing. In his Application, the Claimant stated that he objected to the Order closing his worker' compensation claim, the he has the legal right to overcome the DIME. In fact, the Claimant attempted to overcome the DIME of Dr. McCranie and ALJ Walsh determined that he failed to do so. ALJ Walsh's decision was affirmed by ICAO and the Court of Appeals. There was **no** timely motion for reconsideration or Petition for a Writ of Certiorari to the Supreme Court. Consequently, ALJ Walsh's decision that the Claimant failed to overcome the DIME of Dr. McCranie became final.

15. The Claimant also alleged that his permanent impairment rating should not have been apportioned with his prior impairment rating. And lastly, he alleges that he has suffered from a change in condition after his MMI date of December 28, 2010.

Ultimate Findings

16. There is no genuine issue of disputed material fact concerning the finally adjudicated fact that the Claimant's medical condition after his MMI date of December 28, 2010 is **not** causally related to the admitted injury of January 9, 2009, thus it follows that it has been finally adjudicated that there was no change in condition or worsening of the admitted work-related injury of January 9, 2009. In sum, there is no work-related matter to re-open.

17. The Claimant's Response to the Respondents' Amended Motion for Summary Judgment, although voluminous, does **not** set forth specific facts rebutting the fact that there has been a final adjudication that the Claimant's medical condition after his MMI date of December 28, 2010, was not causally related to the admitted injury of January 9, 2009.

CONCLUSIONS OF LAW

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

Summary Judgment

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

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the Amended Motion, Response and attachments

show that there is no genuine issue of disputed material fact with respect to the concerning the finally adjudicated fact that the Claimant's medical condition after his MMI date of December 28, 2010 is **not** causally related to the admitted injury of January 9, 2009, thus it follows that there was no change in condition or worsening of the admitted work-related injury of January 9, 2009. In sum, there is no work-related matter to re-open.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in its pleadings, but its response by affidavits or other means must set forth specific facts showing that there is a genuine issue of disputed material fact. C.R.C.P., Rule 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment; contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center, Inc.*, 701 P.2d 114 (Colo. App. 1985). As found, the Claimant's Response to the Respondents' Amended Motion for Summary Judgment, although voluminous, does **not** set forth specific facts rebutting the fact that there has been a final adjudication that the Claimant's medical condition after his MMI date of December 28, 2010, was not causally related to the admitted injury of January 9, 2009, and there is not work-related matter that can be re-opened.

Burden of Proof

d. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, there is no genuine issue of disputed material fact concerning the finally adjudicated fact that the Claimant's medical condition after his MMI date of December 28, 2010 is **not** causally related to the admitted injury of January 9, 2009, thus it follows that there was no change in condition or worsening of the admitted work-related injury of January 9, 2009. In sum, there is no work-related matter to re-open. Therefore, the Respondents have sustained their burden of proof by a preponderance of the evidence.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment is hereby granted in the Respondents' favor, and the Claimant's petition to Re-Open is hereby denied and dismissed.

B. Any and all claims for additional workers' compensation benefits are hereby denied and dismissed.

C. The scheduled hearing of June 18,, 2015 is hereby vacated.

DATED this_____day of June 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. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

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

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

_____
Court Clerk

Wc.sjord

ISSUE

1. Is the intra-articular steroid injection as requested by Dr. Finn reasonable, necessary, and related to the claimant industrial injury of April 5, 2009?

FINDINGS OF FACT

1. The claimant sustained an admitted injury to her low back while employed with the respondent-employer on April 5, 2009.

2. Initially, the claimant treated with Dr. James Hubbard at Emergicare. Under Dr. Hubbard, the claimant received care to include medication and physical therapy. Dr. Hubbard also referred the claimant to Dr. Michael Sparr.

3. An MRI was performed on May 27, 2009, which revealed a small extruded disc herniation on the right at L5-S1 with indentation of the thecal sac but without nerve compression. There was also desiccated disc bulging at L4-5 with shallow annulus fibrosis tearing.

4. On June 11, 2009, the claimant was seen by Dr. Sparr for persistent low back pain. Physical examination revealed spasming in the left paralumbar musculature, limited lumbar range of motion in forward flexion, left sided lumbar pain, and pain on the left side with right and left lateral rotation. Dr. Sparr opined that the claimant's pain at this point appears to be discogenic related to the disc finding at L4-5 and L5-S1 including an annular tear and extruded fragment. Dr. Sparr recommended an epidural steroid injection (ESI).

5. On July 6, 2009, the claimant underwent an ESI at the L5-S1 level. Dr. Sparr's note of July 23, 2009 indicates that the claimant received no relief from the ESI.

6. The claimant was placed at maximum medical improvement (MMI) on October 2, 2009 with a 15% whole person impairment. On March 31, 2010, ALJ Bruce Friend entered an Order awarding the claimant maintenance medical care after MMI.

7. The claimant returned to Dr. Hubbard on May 6, 2010 at which time he

prescribed more pain medications.

8. The claimant was seen by Dr. John Reasoner on November 10, 2012 for continued low back pain. Dr. Reasoner diagnosed the claimant as having a chronic lumbar strain and prescribed medications. The claimant was seen at Emergicare and seen by Dr. Reasoner or Dr. Dean on December 15, 2012, December 18, 2012, February 20, 2012, and March 27, 2013. On each of these dates, the claimant was experiencing low back pain. Physical examination on these visits revealed tenderness of the low back with loss of range of motion. Dr. Reasoner prescribed medication and on February 20, 2013 gave the claimant an intramuscular injection into the right buttock, and prescribed a Lidoderm patch along with physical therapy.

9. The claimant had physical therapy from February 25, 2013 through March 20, 2013. The medical records show that while the claimant noticed decreased pain it never completely resolved. The claimant was given a TENS unit at the March 20, 2013 physical therapy session.

10. Because the claimant was still having ongoing symptoms in her low back, Dr. Reasoner on March 27, 2013 increased the claimant's Amitriptyline, changed the Ibuprofen to Relafen, and referred her to Dr. Finn for further maintenance care.

11. On January 7, 2014, the claimant was seen by Dr. Finn. At that time, the claimant was having low back pain left greater than right radiating to the hip, buttock, and along the back of the leg halfway to the knee with occasional lateral thigh and calf pain. Upon physical examination, Dr. Finn noted reduced range of motion in the lumbar spine and pain with extension as well as with extension in combination with rotation to either side. Dr. Finn also noted mild to moderate spasms in the left side of the lumbar spine. Dr. Finn's diagnoses were chronic lumbosacral spinal pain, posterior element component, and questionable discogenic component. Dr. Finn felt that some of the claimant's pain may be related to the posterior elements given her pain with facet loading and recommended the claimant undergo a diagnostic facet joint medial branch block and if that fails consider reimaging to rule out any further pathology.

12. On January 22, 2014, the claimant had bilateral L3, L4, and L5 facet joint medial branch blocks. The claimant returned back to Dr. Finn on January 31, 2014 and noted that she failed to have a diagnostic result although she had 24 hours of significant pain relief. Because of this, Dr. Finn recommended an MRI of the lumbar spine.

13. On February 22, 2014, the claimant had an MRI which revealed a small paracentral acute to subacute disc herniation at L3-4 displaced caudally causing severe

right lateral recess effacement with proximal L4 nerve root compression. The interpreting radiologist indicated that this finding was not present in the December 22, 2011 MRI. Dr. Finn in his note dated February 25, 2014 wrote that the MRI also revealed some facet arthropathy for which Dr. Finn recommended an intra-articular facet injection to see if this was the source of the pain.

14. The claimant returned back to Dr. Finn on May 1, 2014 without having had the intra-articular facet injection. Dr. Finn wrote in his office note of this date that while the MRI of February 22, 2014 revealed a new right-sided disc herniation with severe right side lateral recess effacement and proximal, he was not convinced that this new disc herniation is contributing to her symptoms. Dr. Finn opined that the claimant continues to demonstrate evidence of a posterior element component to her pain and that intra-articular corticosteroid injection would be a reasonable option for her. Dr. Finn also opined that her current complaints and physical findings are related to the April 5, 2009 injury and so is his recommended treatment.

15. The claimant testified that she injured her low back on April 5, 2009 and as a result had medical care under a variety of physicians including Dr. Hubbard at Emergicare, Dr. Michael Sparr, and Dr. Kenneth Finn. The claimant said that initially she had care to include medication and physical therapy but eventually ended up having epidural steroid injections which somewhat helped relieve symptoms. The claimant went on to testify that since being placed at MMI on October 2, 2009, she has continued to have pain and stiffness in her low back. The claimant testified that she returned back to Emergicare in May of 2010 because of her continued low back problems. The claimant said that insofar as her low back is concerned she has symptoms which wax and wane and these symptoms increase with prolonged sitting, standing, or walking. The claimant went on to testify that when her symptoms increase she takes medication and/or uses a heating pad in an attempt to reduce said symptoms.

16. Dr. Lloyd Thurston, at the request of the respondents, evaluated the claimant on May 9, 2012 and July 2, 2013. Dr. Thurston reviewed the claimant's medical records from Emergicare and Dr. Sparr. In his reports of the above referenced dates, Dr. Thurston opined that the claimant's present low back problems are not related to the April 5, 2009 work injury but are idiopathic partially due to genetic factors. Nonetheless, Dr. Thurston in his May 9, 2012 report recommended further medical treatment consisting of medications in the form of muscle relaxants, NSAIDS, and Tramadol or narcotic medication for comfort along with home exercises and core strengthening. Dr. Thurston did not feel ESI's would be beneficial.

17. In a Rule 16 Chart Review dated March 8, 2014. Dr. Thurston felt that the

inter-articular facet injection as recommended by Dr. Finn is not related to the admitted April 5, 2009 injury. Dr. Thurston bases this on his review of the May 27, 2009 MRI, the December 22, 2011 MRI, and the May 22, 2014 MRI. Dr. Thurston noted that the February 22, 2014 MRI revealed a small posterior paracentral acute to subacute disc herniation at L3-4 displaced caudally causing severe right lateral recess effacement with proximal L4 nerve root compression, which was not present in the 2009 and 2011 MRI's. Dr. Thurston wrote that this L3-4 disc herniation is consistent with the claimant's current right leg symptoms.

18. Dr. Thurston testified in accordance with his reports and chart review. Dr. Thurston reiterated his opinion that the lumbar epidural injections recommended by Dr. Finn were neither related to the industrial injury nor reasonable and necessary. Dr. Thurston felt that the DOWC Treatment Guidelines for repeat epidural injections are not met in light of the claimant's minimal response to the epidural injections given by Dr. Sparr in 2009. Dr. Thurston felt that the claimant's age and body habitus were major contributors to the claimant's symptom complex. Dr. Thurston admitted on cross examination that Dr. Finn was not requesting authorization for an epidural steroid injection but a facet injection which is designed to identify the pain generator and hopefully reduce pain symptoms. Finally, Dr. Thurston acknowledged that the DOWC Treatment Guidelines are not intended to limit post MMI care.

19. Dr. Finn testified by deposition in which he opined that the claimant's current complaints and physical findings in her low back are related to her April 5, 2009 work injury. Dr. Finn bases his opinion on a variety of factors including a paucity of medical evidence revealing any low back problems prior to the date of the injury, no indication of any reinjury subsequent to the date of the injury, and the fact that the claimant has had consistent low back problems since April 5, 2009. Dr. Finn does not believe that the new herniated disc revealed in the February 22, 2014 MRI is contributing to the claimant's symptoms since the herniation is on the right side at L3-4 which is on the opposite side of her primary complaint. In addition, with a disc herniation, the claimant would have pain bending forward which wasn't consistent with her examination. Dr. Finn found that the claimant had pain bending backwards which is consistent with facet mediated back pain. Dr. Finn went on to explain that the temporal relationship between the trauma and the onset of symptoms bolsters his opinion that the claimant's low back problems are related to the trauma as opposed to genetics, lifestyle or body habitus.

20. Dr. Finn further testified that the claimant did not have a typical response to the medial branch block that was done on January 22, 2014 in that there is usually a much more drastic reduction in pain within the first or second hour with a gradual

recurrence of pain over the subsequent four to five hours. According to Dr. Finn, the claimant's pain gradually lessened over the six hours post injection. However, Dr. Finn went on to testify that he has had other patients with similar results and that not everyone has a textbook response to the injections. Based on this, Dr. Finn believes that a one-time corticosteroid injection would be reasonable to try and provide the claimant with much longer pain relief.

21. Upon cross examination, Dr. Finn recognized that Dr. Thurston's records reveal that the claimant had a negative facet exam in 2013 and 2013. Dr. Finn was unable to explain why there were differences but indicated that facet pain can wax and wane. In addition medication can ameliorate facet pain. Finally, Dr. Finn testified that if the steroid injection he is recommending does not provide a reduction of pain, then the claimant's future treatment would likely consist of medication as recommended by Dr. Thurston along with an exercise program.

22. The ALJ finds Dr. Finn's analysis and opinions to be credible and more persuasive than medical evidence to the contrary.

23. The ALJ finds that the claimant has established that it is more likely than not that the treatment recommended by Dr. Finn is reasonable, necessary, and related to the claimant's industrial injury of April 5, 2009.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

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

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead

to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936).

6. The respondents are liable for medical treatment reasonably necessary to cure and relieve the employee of the effects of the injury. Section 8-42-101, C.R.S.; *Grover v Industrial Commission*, 759 P.2d 703 (Colo. 1988). The claimant must prove by a preponderance of the evidence his or her entitlement to benefits. The facts in a workers' compensation case are not interpreted liberally in favor of the claimant or respondents. Section 8-43-201 C.R.S.

7. A preponderance of the evidence is that which leads the trier of fact after considering the evidence to find that a fact is more probably true then not. *Page v. Clark*, 197 Colo. 706, 592 P.2d 792 (1979).

8. The claimant sustained an admitted injury to her low back on April 5, 2009. Initially the claimant received care to include medication, physical therapy, and an ESI at the L5-S1 level. This injection provided no relief. The claimant was eventually placed at MMI as of October 2, 2009 and given a 15% whole person impairment. Since reaching MMI, the claimant has continued to have ongoing low back pain for which she has received treatment consisting of medication, physical therapy, intramuscular injections, and a TENS unit.

9. Eventually, the claimant was referred to Dr. Finn. Based upon his evaluation, Dr. Finn felt that the claimant had a possible facet problem in the lumbar spine and recommended a diagnostic facet joint medial branch block which was done in January 22. 2014. According to Dr. Finn, the claimant received relief from the branch block but it was atypical. However, Dr. Finn testified that he has had other patients with similar results and not everyone has a textbook response to the injection. In addition, the claimant credibly testified that the medial branch block provided pain relief. Based on this, Dr. Finn believes that it is reasonable for the claimant to have the corticosteroid injection he recommends. If it doesn't work, the claimant will have exhausted her reasonable treatment options except for ongoing medication management.

10. It is recognized that Dr. Thurston believes that the claimant's present low back problems are not related to the work injury.

11. The ALJ concludes that the analysis and opinions of Dr. Finn are credible and entitled to greater weight than medical evidence and opinions to the contrary.

12. The ALJ concludes that the claimant has established by a preponderance of the evidence that her present back condition for which Dr. Finn is recommending a corticosteroid injection is related to the initial injury.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that the corticosteroid injection recommended by Dr. Finn is reasonable, necessary, and related to the April 5, 2009 industrial injury.

ORDER

It is therefore ordered that:

The respondent-insurer shall pay for the intra-articular steroid injection as recommended by Dr. Finn

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: June 2, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

I. The sole issue for determination is whether C.R.S. §8-42-107.5 may be applied to allow Respondents to suspend temporary total disability benefits, and take credit for permanent partial disability benefits previously paid prior to reopening, consistent with the decision announced by the Court of Appeals in *Donald B. Murphy Contractors v. ICAO,* 916 P.2d 611 (Colo.App. 1995).

FINDINGS OF FACT

Based upon the evidence presented at hearing and the parties' stipulation, the ALJ enters the following findings of fact:

1. Claimant's date of injury was September 30, 2009. (Clt. Ex. 8, Stipulation 1)

2. Claimant received temporary partial disability ("TPD") benefits and/or temporary total disability ("TTD") benefits intermittently from June 7, 2010 until April 4, 2012. (Clt. Ex. 8, Stipulation 2; Resp. Exs. C, E, H and L)

3. On April 5, 2012, the primary authorized treating physician, Dr. Michael Dallenbach, placed Claimant at maximum medical improvement ("MMI") with an impairment rating of 23% whole person for her cervical spine, and 8% scheduled impairment for her right shoulder. If combined, the whole person impairment rating would be 27%. Prior to reaching MMI, Claimant underwent a two-level fusion for her cervical spine which was authorized, related and reasonably necessary. (Clt. Ex. 8, Stipulation 3; Resp. Ex. B)

4. On April 17, 2012, Insurer filed a Final Admission of Liability ("FAL") accepting Dr. Dallenbach's impairment ratings, and admitting to permanent partial disability ("PPD") benefits in the total amount of $78,587.70. (Resp. Ex. C) The parties subsequently resolved a shoulder conversion issue, and a disfigurement issue, for a total of $7,500 (Resp. Ex. D); the $7,500 was not further broken down for PPD and disfigurement benefits. However, in a Stipulated Motion to Resolve Issues, signed by the parties and dated June 27, 2012, the parties agreed that this $7,500 was in addition to any previously admitted indemnity benefits, and constituted indemnity benefits for the purposes of the cap established by C.R.S. §8-42-107.5. (Clt. Ex. 8, Stipulation 3; Resp. Ex. D, bns 016, 020)

5. On July 9, 2012, Insurer filed a new FAL consistent with the stipulated motion

and order. (Resp. Ex. E) The FAL was otherwise unchanged from the prior FAL. Critical to the issue at hand, Claimant did not object to the July 9, 2012 FAL, and the claim closed on all issues, including MMI.

6. On July 13, 2012, Claimant filed a Request for Lump Sum Payment, seeking $50,000 in PPD benefits still owing be paid in a lump sum. (Resp. Ex. F, bn 037) Insurer honored this request, and on July 20, 2012, Insurer paid Claimant $50,000 in a lump sum, less the lump sum discount (Resp. Ex. L, bn 070); Insurer then filed a Lump Sum Calculation and Proof of Payment.[1] (Resp. Ex. F, bn 038)

7. On September 9, 2012 Insurer filed a Final Payment Notice, documenting that as of that date, $78,587.70 in PPD benefits had been paid. (Resp. Ex. G) Claimant agrees that PPD benefits admitted to were paid in full. (Clt Ex. 8, Stipulation 5) The Final Payment Notice did not reference the $7,500 paid pursuant to the Stipulated Motion to Resolve Issues, and Order granting the same. (Resp. Ex. G)

8. On May 14, 2013 Claimant filed a Petition to Reopen, alleging a worsening of her condition. On September 5, 2013 Insurer filed a General Admission of Liability ("GAL") voluntarily reopening this claim, and authorizing Claimant to undergo a second cervical fusion. Insurer resumed payment of TTD benefits as of May 7, 2013. (Clt. Ex. 8, Stipulation 6)

9. Within the September 5, 2013 GAL, Insurer indicated that it would take credit for PPD previously paid, and it further noted that $86,087.70 represented the previous PPD awarded and paid. (Resp. Ex. H, bns 043, 045) This figure represents the admitted to amount of PPD ($78,587.70), and $7,500 paid pursuant to the June 2012 stipulation and order.

10. Claimant underwent surgery by the authorized surgeon, Dr. Michael Rauzzino on September 23, 2013. The surgery was authorized, related and reasonable and necessary. (Clt. Ex. 8, Stipulation 7)

11. Following the reopening, Respondents continued to pay TTD benefits, to the point that combined TPD, TTD and PPD benefits exceeded $150,000. (Resp. Ex. L)

12. On November 10, 2014, Respondents filed Respondents' Motion to Suspend Temporary Total Disability Benefits, seeking to suspend TTD benefits pursuant to *Donald B. Murphy Contractors v. ICAO*, 916 P.2d 611 (Colo.App. 1995) (Resp. Ex. I) On November 13, 2014, Claimant filed Claimant's Objection to Respondents' Motion to

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[1] Claimant requested two lump sums of PPD benefits. The first lump sum request was dated May 2, 2012 and requested $10,000.00. As noted, the second lump sum request was for $50,000.00 and was dated July 13, 2012. The lump sums were paid and included in the admitted $78,587.70 in PPD benefits paid. (Clt. Ex. 8, Stipulation 8)

Suspend Temporary Total Disability Benefits. (Resp. Ex. J) On November 24, 2014, ALJ Henk issued an Order denying Respondents' motion, without prejudice, and indicating Respondents had the right to set the issue for hearing. (Resp. Ex. K)

13. As of the date of this hearing, Claimant continued to receive TTD benefits because she was not at MMI. No authorized treating physician, including the primary authorized treating physician, Dr. Michael Dallenbach, had placed her at MMI as of the date of hearing. (Clt. Ex. 8, Stipulation 9; Resp. Ex. L)

14. The parties stipulated that as of the date of this hearing Claimant had received in excess of $150,000.00 in combined TTD, TPD and PPD benefits.**2** (Clt. Ex. 8, Stipulation 10)

15. The statutory limit of TPD, TTD and PPD benefits under C.R.S. §8-42-107.5 for Claimant's date of injury is $150,000. (Clt. Ex. 8, Stipulation 11; Resp. Ex. M) As such, as of the date of hearing, Claimant had received in excess of $30,000 in indemnity benefits beyond the $150,000 cap available under C.R.S. §8-42-107.5.

16. None of the provisions for termination of TPD and/or TTD benefits pursuant to C.R.S. §8-42-105(3) currently exist. (Clt. Ex. 8, Stipulation 12)

17. At this time, Respondents are not seeking to terminate TTD benefits, nor are Respondents seeking an order requiring Claimant to reimburse Respondents for any alleged overpayment. The sole issue for determination is whether C.R.S. §8-42-107.5 may be applied to allow Respondents to suspend TTD benefits while taking credit for PPD benefits previously paid, consistent with *Donald B. Murphy Contractors v. ICAO,* 916 P.2d. 611 (Colo. App. 1995). (Clt. Ex. 8, Stipulation 13)

18. The massage therapy recommended by Dr. Rauzzino in his report of March 31, 2015 is authorized, reasonable, necessary and related. (Clt. Ex. 8, Stipulation 14)

CONCLUSIONS OF LAW

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

A. As noted above, the issue for determination is whether, under principles announced in *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office,* 916 P.2d 611 (Colo. App. 1995), Respondents are entitled to suspend payment of additional TTD benefits while taking credit for PPD benefits that Respondents paid in connection with their FAL dated July 9, 2012, in a case where Claimant has already received more than the statutory cap in combined temporary and PPD benefits under

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2 According to Insurer's indemnity benefit printout, as of April 8, 2015, Claimant had received **$180,315.02** in combined TPD, TTD, and PPD benefits. (Resp. Ex. L)

C.R.S. §8-42-107.5. Based upon the evidence presented and the relevant legal authority, the ALJ concludes that Respondents are entitled to suspend TTD benefits while taking credit for PPD benefits previously paid in this case.

I. The Relevant Provision of the Act

B. The issue addressed here involves application of C.R.S. §8-42-107.5, and the impact of the principles of *Donald B. Murphy* to an upper cap case, following reopening of a claim for worsening of condition. In relevant part, C.R.S. §8-42-107.5 holds:

> "[n]o claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined in temporary disability payments and permanent partial disability payments. **No claimant whose impairment is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments**." (emphasis added)

II. The Donald B. Murphy Contractors and Reynal Decisions Announced by the Court of Appeals and Industrial Claims Panel

C. The principles articulated in *Donald B. Murphy* are dispositive to the issue before the court. In *Donald B. Murphy* the respondents sought to suspend TTD benefits under the following facts: (1) the claimant had been paid temporary disability benefits, (2) he then reached MMI, (3) he was provided an impairment rating of less than twenty-five percent whole person, (4) he was paid PPD benefits pursuant to that rating, (5) the combined temporary and PPD benefits paid at that point were capped at $60,000 (the lower cap of C.R.S. §8-42-107.5 or the date of injury for that claim), (6) the claim closed on MMI and PPD, subject only to reopening, (7) the claimant's condition worsened, surgery was required, and his claim was reopened, and (8) the claimant then sought additional TTD benefits which the respondents denied.

D. The respondents in *Donald B. Murphy* argued that no "post reopening" TTD benefits were owing because the claimant had already been paid combined temporary and PPD benefits to the lower cap established by the admitted to impairment rating. After that argument was rejected at the hearing level, and subsequently by ICAP, the respondents appealed to the Colorado Court of Appeals. On appeal, the respondents argued that if they must pay additional TTD benefits, they should be permitted to take credit for PPD benefits already paid, rather than ultimately having to seek to recover an overpayment from the claimant when permanent impairment was again established.

E. The Court of Appeals went through a statutory analysis wherein it considered the reopening statute and the legislative purpose of the statutory cap, concluding that "when further benefits are sought after the twenty-five percent or less limit of section 8-42-107.5 has been applied, the petitioners are entitled to offset any permanent partial benefits paid against temporary total disability benefits." *Donald B. Murphy* at p. 614.

F. In support of its' Order, the *Donald B. Murphy* Court noted that their resolution satisfied several listed principles: (1) it maintained the incentive to employers and insurers to settle or provide PPD benefits; (2) it required the claimant to allocate PPD benefits already paid towards his current inability to earn wages; (3) it eliminated the need for further proceedings where the respondents would need to seek to recover the overpayment created by paying benefits beyond the cap; and (4) it was consistent with the stated purpose of the Workers' Compensation Act to provide benefits to injured workers at a reasonable cost to employers, without the necessity of litigation.

G. After careful review of the evidence presented, the ALJ finds the case at hand to be factually consistent with *Donald B. Murphy*, and its stated principles. Here, as in *Donald B. Murphy*, claimant was paid temporary disability benefits, she was then placed at MMI, she received PPD benefits, and her claim closed, thus legally establishing MMI, and the applicable statutory cap (in this case, $150,000). The claim was subsequently reopened for a worsening of condition, TTD benefits were reinstituted, and the claimant received combined temporary disability benefits and PPD benefits beyond the applicable cap established at on the original MMI date.

H. The only difference between *Donald B. Murphy* and the instant case is that when MMI was originally established in the case at hand, the statutory cap established was the upper cap ($150,000), and not the lower cap. The ALJ agrees with Respondents that this is a distinction without a difference, as the holding in *Donald B. Murphy,* and the principles articulated by the Court of Appeals in support of its decision, hold true to "upper cap" cases as well. *See also Reynal v. Home Depot and American Home Assurance*, WC No. 4-585-674 (ICAO 9/13/11).

I. In *Reynal*, ICAP affirmed ALJ Mottram's order permitting the respondents to suspend payment of TTD benefits in an "upper cap" case factually similar to the case at hand. In *Reyna*l, the claimant had been paid temporary disability benefits, and PPD benefits pursuant to a final admission, and the issues of MMI and PPD were closed, as here, subject only to reopening. The claim was subsequently reopened, and TTD benefits were paid to the point that the combination of temporary disability benefits and PPD benefits exceeded the upper cap. The respondents then sought an order permitting the respondents to suspend further payment of TTD benefits, while talking credit for PPD benefits paid. The claimant argued TTD benefits must continue to be paid despite the fact he had been paid combined temporary and PPD benefits beyond the upper cap. ICAP rejected the claimant's arguments, finding *Donald B. Murphy* dispositive, even in upper cap situations.

J. In reaching their conclusion that *Donald B. Murphy* was dispositive, ICAP recognized that allowing respondents to cease paying TTD while taking credit for PPD could work a financial hardship on the claimant, but *Donald B. Murphy* could not be distinguished on the grounds that claimant was not at MMI following the reopening, or that the claimant had a chance to ultimately be determined permanently and totally disabled. Moreover, the ALJ is persuaded that the principles articulated by the Court of Appeals in *Donald B. Murphy* are even more pronounced in an upper cap case, such as *Reynal*, and the case at hand because in those situations where combined PPD and

temporary disability benefits have already been paid beyond the absolute maximum permitted by statute, the continued payment of TTD benefits without allowing credit for PPD benefits previously paid necessarily results in an overpayment - - potentially a massive overpayment of benefits to the claimant. Such unfair windfalls to Claimant represent added costs to respondents, and a stark defeat of the stated principle of the Act to provide injured workers with benefits they are entitled to at a fair cost to the respondents, and without the necessity of litigation. For these reasons, this ALJ finds *Donald B. Murphy* dispositive, and concludes that an order permitting Respondents to suspend payment of TTD benefits while taking credit for PPD benefits previously paid under the facts of this claim is warranted.

III. Claimant's Mistaken Reliance on C.R.S. §8-42-105(3)(a-d)

K. In Claimant's Objection to Respondents Motion to Suspend Temporary Total Disability Benefits and renewed in his post hearing position statement, Claimant argues that there is no factual basis under C.R.S. §8-42-105(3)(a-d) under which TTD can be terminated. Therefore, argues Claimant, TTD benefits must be continue despite the fact that Claimant has been paid indemnity benefits beyond the upper cap. Because Respondents are not seeking an order to terminate TTD benefits, the ALJ rejects this contention.

L. The Respondents here, as in *Donald B. Murphy*, and in *Reynal*, are not seeking to terminate TTD benefits. Respondents recognize and agree that they do not have a basis at this time to terminate TTD benefits under C.R.S. §8-42-105(3) (a-d). Instead, the Respondents, relying on *Donald B. Murphy*, are seeking an order to **suspend** TTD benefits while obtaining credit for PPD benefits already paid. Based upon the principals announced in *Donald B. Murphy*, the ALJ concludes that suspension of TTD benefits under the circumstances presented in the instant case is warranted. Because Respondents are not seeking a termination of TTD benefits, Claimant's argument that Respondents cannot terminate TTD benefits pursuant to C.R.S. §8-42-105(3)(a-d) is moot and rejected.

IV. Claimant's Mistaken Reliance on United Airlines v. ICAO

M. In her Objection to Respondents' Motion to Suspend Temporary Total Disability Benefits, Claimant, relying on *United Airlines v. ICAO*, 312 P.3d 235 (Colo. App. 2013), argued that since the statutory cap cannot be determined until Claimant reaches MMI, and Claimant is not currently at MMI, Respondents must continue to pay TTD benefits beyond the $150,000. Here, as in *Donald B. Murphy*, the claimant reached MMI, the claimant was provided a permanent impairment rating, the claimant was paid PPD benefits, and the claimant's claim closed on the issue of MMI. It is undisputed that here, as in *Donald B. Murphy*, MMI was legally established, and the claim closed, prior to reopening. It was under these circumstances that the *Donald P. Murphy* Court permitted a suspension of TTD.

N. By contrast, *United Airlines* dealt with a factually distinguishable situation. In

United Airlines, the claimant was paid temporary disability benefits beyond the first cap, at which time she was released to return to work. At that time, the clamant had been paid more than $22,000 beyond the first cap, and the respondents sought an order requiring the claimant to repay the difference which they claimed was an overpayment. The Court of Appeals concluded that the cap did not apply to benefits paid **before** the claimant reached MMI, and therefore it affirmed orders denying the respondents' request for repayment of TTD paid beyond the first cap.

O. The Court in *United Airlines* specifically found that *Donald B. Murphy* and *Rogan v. ICAO* 91 P.3d 414 (Colo.App 2003) did not require a different outcome, because in each of those cases, the claimant had reached MMI and had been paid a combination of both PPD and temporary disability benefits beyond the cap, whereas in *United Airlines*, the claimant was never at MMI, and she had not been paid any PPD benefits from which the respondents could take credit against TTD owing. Because *United Airlines* deals with a factually distinguishable situation, the ALJ concludes that Claimant's reliance on that case is misplaced and he is not persuaded to alter his conclusion that under the facts of the instant case Respondents are entitled to suspend TTD benefits and take credit for permanent partial disability benefits previously paid prior to reopening.

V. Laabs v. Integrated Communication Service and Pinnacol Assurance Decision

P. Recently, the ALJ dealt with another case presenting the question of whether Respondents were entitled to suspend TTD benefits and offset previously paid PPD. In the case of *Laabs v. Integrated Communication Service and Pinnacol*, W.C. No. 4-890-061-02 (ICAO 3/19/15), the undersigned ALJ issued an order granting the request. On appeal the Industrial Claims Appeals Panel ("ICAP") found that the statutory cap did not apply under the unique circumstances presented in that case. Because *Laabs* is factually distinguishable from the case at hand, and *Donald B. Murphy*, it does not change the ALJ's conclusion that Respondents can suspend TTD benefits and take credit for PPD benefits paid in this case.

Q. In *Laabs*, the claimant reached MMI, and was provided an impairment rating of 24% whole person. The respondents admitted to that rating, and began paying what they classified as PPD benefits. However, the claimant requested a DIME, and the DIME determined that the claimant was **never** at MMI. The respondents then reinstituted payment of TTD benefits, admitting that claimant was never at MMI in the first instance. Based upon this factual and procedural history, ICAP held that *Donald B. Murphy* was inapplicable, because unlike *Donald B. Murphy*, Mr. Laabs was never at MMI, so PPD benefits were never actually paid, and since PPD benefits were never paid, the respondents could not rely on *Donald B. Murphy* to take credit for PPD benefits previously paid. Again, the case at hand, and *Donald B. Murphy*, involve cases where the claimant reached MMI, was paid a combination of temporary and PPD benefits, the claimant's claim closed, only to later reopen for a worsening of condition. The claimants in those cases received combined PPD and temporary disability benefits beyond the statutory cap, and the respondents sought orders allowing them to suspend temporary benefits while taking credit for PPD benefits paid. A suspension of TTD

benefits while taking credit for PPD benefits is warranted under that scenario and permitted by the decision of the Court of Appeals in *Donald P. Murphy*. In *United Airlines* and *Laabs*, MMI was never legally established. Consequently, no cap was established, and PPD benefits were never paid. Therefore, the claimants were not paid more than the statutory cap in combined temporary and PPD benefits. As noted above, those cases are plainly distinguishable. Accordingly, under the principles enunciated in *Donald B. Murphy*, and for the reasons outlined above, Respondents request to suspend TTD benefits while taking credit for PPD paid is granted.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents may suspend payment of TTD benefits, while taking credit for PPD benefits previously paid.

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

DATED: June 4, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-871-989-02

ISSUES

- Whether Claimant proved by a preponderance of the evidence that a Sleep Number bed is a reasonable, necessary, and related medical benefit?

- Whether Claimant proved by a preponderance of the evidence that EMGs of his bilateral upper and lower extremities are reasonable, necessary, and related medical benefits?

- Whether Claimant proved by a preponderance of the evidence that observation of his home activities is a reasonable, necessary, and related medical benefit?

- Whether Claimant proved by a preponderance of the evidence that cervical and lumbar MRIs are reasonable, necessary, and related medical benefits?

- Whether Respondents proved by a preponderance of the evidence that Claimant directed his medical care?

SUMMARY OF DECISION

Claimant's ATP recommended a Sleep Number bed, an in-home evaluation of Claimant's activities of daily living, EMG studies, and MRI studies. Insurer denied the recommendations. This decision addresses whether the recommendations are reasonable, necessary, and related medical benefits, and concludes they are not.

FINDINGS OF FACT

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

1. Employer employed Claimant as a boiler inspector on November 17, 2011. Claimant was a passenger in a vehicle that his wife was driving to an inspection site. The vehicle was in was involved in a high-speed rollover motor vehicle accident ("MVA"). Claimant sustained injuries as a result of that accident.

2. Dr. Pineiro treated Claimant and supervised his care following the MVA.

Prior Back Problems

3. Claimant experienced an industrial injury in 2002 which resulted in back pain and tingling pain down the inside of his left leg. Claimant attributed his symptoms to driving, from April 2001 through August 2002, a company car that was too small for him. Claimant treated with chiropractic doctor Decklever three times a week from November 2004 through March 2005.

4. On January 31, 2008, Claimant complained of and medically treated with his private primary care physician, Andrew P. Stoddard, M.D., for low back pain with sciatica. Claimant's complaints arose after he began driving a small company car. On

February 20, 2008, Dr. Stoddard documented Claimant's lower extremity pain in the left leg, which caused tingling and trouble walking ("increased pain from left knee to toes with tingling of the toes."). Dr. Stoddard reported that five years prior, Claimant was evaluated for low back pain and had an MRI showing a broad based L-5 herniation with pressure on the S-1 nerve root. On February 20, 2008, Dr. Stoddard reported Claimant's pain was worse. He continued to treat Claimant for low back pain through March 31, 2008.

5. On November 11, 2011, six days before the MVA, Dr. Rosalinda Pineiro performed a Department of Transportation physical evaluation on Claimant. Claimant denied a history of low back pain.

History of Treatment

6. D. Scott Miner, M.D., treated Claimant in the emergency department at Good Samaritan Medical Center and reported that Claimant had rib fractures of ribs 9 and 10 and atrial fibrillation ("A-fib"). Claimant specifically denied neck pain, upper or lower extremity numbness or weakness, and back pain. Dr. Miner reported that Claimant had full musculoskeletal range of motion.

7. On November 19, 2011, Naveed Ismail, M.D. discharged Claimant, identifying Claimant's medical conditions as "rib fracture and a fib." "A-fib, MVA (motor vehicle accident), chest trauma, rib fracture" were listed as other problems.

8. On November 23, 2011, Claimant treated with Rosalinda Pineiro, M.D., at Concentra Medical Centers ("Concentra"). Dr. Pineiro is an authorized treating provider for the work related injuries. At that appointment, Claimant included an "L-5 herniation w/S1 nerve" in his medical history. He complained of broken ribs, A-fib, and a "spot in spine center of shoulder blades."

9. Claimant underwent a considerable amount of cardiac treatment after the MVA, including two "cardioversion" procedures. He also treated musculoskeletal injuries, including chiropractic care by Dr. Stults beginning on December 8, 2011.

10. On February 8, 2012, Jeffrey A. Wunder, M.D., a physiatrist at Concentra, reported that Claimant had a previous work related injury in 2002 to his low back, and had an MRI that revealed a disk protrusion at L5-S1. Dr. Wunder noted Claimant was reporting low back pain with an onset one month prior (six weeks post injury), spontaneous in onset. Dr. Wunder documented that "he has had some low back pain radiating into the left lower extremity to the lateral calf. He reported that these symptoms are exactly the same that he experienced in 2002 although not as severe at this time. He had no numbness or tingling in the left lower extremity." Dr. Wunder opined that Complaints were not related to the MVA and recommended Claimant start an exercise and stabilization program as he was overweight and "quite deconditioned."

11. Between February 2012 and June 2013, Dr. Pineiro, Dr. Wunder, and Claimant's cardiologists all reported Claimant's conditions were improving. Claimant successfully participated in physical therapy. Dr. Pineiro reduced his work restrictions.

12. Dr. Wunder discharged Claimant from his care on June 26, 2013, opining Claimant had no clear findings on physical examination and his pain appeared to be predominantly postural. Dr. Wunder recommended that the claimant focus on good

posture at all times.

13. As of July 25, 2013, Claimant's lifting and pushing restrictions per Dr. Pineiro were 50 pounds. However, Dr. Pineiro changed these on August 21, 2013, to no lifting or pushing over 40 pounds.

14. On September 11, 2013, Claimant saw Dr. Pineiro and complained of shoulder pain with no mention in her report of back pain. Claimant denied numbness or tingling and Dr. Pineiro diagnosed MVA, A-fib, and shoulder pain.

15. Kristin Mason, M.D., performed an eighteen-month Division IME, and issued a report dated September 26, 2013. She opined Claimant had not reached MMI and needed more treatment. Regarding relatedness, she opined: "Low back complaints similar to those in the past that appeared not particularly temporally related to the motor vehicle accident and are not considered to be related. I agree with Dr. Wunder."

16. On March 31, 2014, Dr. Pineiro reported Claimant had bilateral neck issues. She increased his work restrictions to "no activity" based on her concerns about Claimant's cardiovascular issues.

17. Claimant had a pacemaker implanted on May 6, 2014. He began cardio rehabilitation on July 3, 2014. He attended 10 cardio rehabilitation sessions with various therapists and exercise physiologists, all without reports of symptoms or concerns.

18. On July 18, 2014, Dr. Pineiro reported that Claimant "has improved low back pain and SI pain with treatment." Absent from her assessment were neurological or spinal problems. Despite her documentation of improved back pain and the lack of any back pain assessment, Dr. Pineiro wrote a script for "Sleep # bed for back pain after MVA."

19. On August 8, 2014, Dr. Pineiro recommended EMGs, MRIs, and an in-home evaluation of Claimant's activities of daily living. She reported, "Pt with radicular symptoms since accident evaluation to rule out radiculopathy…Pt who states he cannot do what he could do prior [to] accident. He also states he cannot do simple choirs [chores] around the home. I am requesting an evaluation of activities of daily living to document and see what he can and cannot do. . . . Pt has had back and cervical and shoulder issues with the start of this injury since he is more stable we will request EMG of bilateral lower extremities to rule out L4 and at [left] upper extremity to rule out a C6 radiculopathy." Dr. Pineiro reported, "He also is having bilateral numbness at ball of his feet since accident and Lt hand." She noted "C6 radicular symptoms" and "possible L4 bilateral radiculopathy." Her diagnosis included "radicular low back pain" and "cervical radiculopathy at C6."

Sleep Number Bed

20. Claimant contends that Dr. Pineiro's referral for a Sleep Number Bed is a reasonable, necessary, and related medical benefit.

21. Respondents contend that Claimant directed Dr. Pinero's referral for the bed in violation of C.R.S. section 8-43-503. Subsection (3) of that statute provides: "Employers, insurers, claimants, or their representatives shall not dictate to any

physician the type or duration of treatment or degree of physical impairment."

22. On direct examination, Dr. Pineiro testified inconsistently about when she and Claimant discussed her referral for a bed.

- Dr. Pineiro initially testified that she and Claimant discussed the bed before she prescribed it, but she could not remember when.
- On cross-examination, when asked how she came up with a referral for a Sleep Number bed, she responded, "I can't answer that question, because it's not documented and I can't recall."
- Dr. Pineiro finally testified that the first time she spoke with Claimant about a bed was on July 18, 2014, the day she prescribed it.

23. None of Dr. Pineiro's notes reflect discussion of a bed with Claimant.

24. Claimant testified that he and Dr. Pineiro discussed the need for a bed at the very end of his June 27, 2014 appointment. According to Claimant, Dr. Pineiro told him that "a bed was needed;" she cited the parameters that the bed be adjustable, adequate to relieve his pain, and "do the job that it should do." Claimant offered no persuasive evidence of what that "job" was.

25. Claimant testified that he agreed to research beds for Dr. Pineiro to consider. The extent of Claimant's research was visiting a Sleep Number bed store in Loveland, Colorado on July 7, 2014. There, he spoke with sales people, read marketing materials, and tried to provoke his shoulder and back pain on different beds. Claimant testified that later that day, he dropped off the marketing materials at Dr. Pineiro's office. He included a quote for an "i10" California King bed with two remote controls, a mattress pad, support pillows, pillow protectors, and sheet set. The total price was $11,582.95.

26. Although Claimant denied instructing or suggesting to Dr. Pineiro which bed to prescribe, he provided her materials on only one bed.

27. Claimant testified that he needed the i10 bed by referring to the marketing materials included in Exhibit 10, that the i10 was "the only bed on the market clinically proven to reduce back pain."

28. Claimant testified that his problem is getting up and out of bed, because he has to turn and twist; activities that cause low back pain. He offered no persuasive evidence of how a Sleep Number bed would eliminate his having to turn and twist when getting out of bed.

29. Dr. Pineiro testified that Claimant's condition was deteriorating, with increased complaints of back and shoulder pain. However, her testimony is contradicted by her report of the same date which does not indicate that Dr. Pineiro examined Claimant's back, and notes improved low back pain.

30. Dr. Pineiro's testimony about why she prescribed the bed evolved. Initially she testified that she and Claimant spoke about his back and shoulder pain and how a Sleep Number bed could help his condition. She later testified, "Because these beds move, I thought it would be a little better for him, for his activities of daily living, and for

comfort;" that the purpose of her recommendation was to help him with "all of his complaints." She identified the complaints as "some issues with his low back," and that he "was post-surgical with the afib and everything." She eventually limited the purpose of her recommendation to Claimant's "problems sitting up."

31. Dr. Pineiro's ultimate testimony is not supported by the medical records which contain no documentation of Claimant having trouble sitting up.

32. On July 25, 2014, Claimant's counsel sent a letter to Respondents' counsel enclosing the July 7, 2014 Sleep Number bed quote and Dr. Pineiro's script regarding the bed. Claimant's counsel requested that Respondents' counsel "please arrange for the purchase and delivery of the prescribed bed."

33. On July 29, 2014, Shane B. Rowan, M.D., one of Claimant's cardiologists, reported Claimant had excellent resolution of his A-fib symptoms following AV node ablation and a pacemaker. Dr. Rowan documented that Claimant was spending 10 minutes each on various exercise machines and that biking did not cause the claimant's heart rate to increase. Dr. Rowan did not provide Claimant with any physical restrictions.

34. Dr. Cebrian, Respondents' medical expert, opined that a Sleep Number bed was not medically reasonable or necessary to cure or relieve the effects of Claimant's condition, and therefore was not therapeutic. He also opined that a new bed will not do anything to improve a person's level of function.

35. Dr. Cebrian criticized Dr. Pineiro for not attempting to look at other issues related to Claimant's bed, such as what kind of bed he had and what else had been attempted to improve its function. He also criticized her for prescribing the bed without examining – or documenting the examination of – Claimant's back, especially because three weeks earlier Claimant reported pain of 1/10. Dr. Cebrian noted that the Sleep Number bed materials contained in Exhibit 10 did not refer to a legitimate medical study that supports the assertion that Sleep Number beds have a positive impact on back problems. He described the materials as a marketing device that would not be reliable in making a medical determination.

36. Dr. Pineiro testified that Claimant did not tell her to prescribe the bed or attempt to improperly influence her medical decision making, and that she used her independent medical judgment in doing so.

37. However in her nineteen years of practicing occupational medicine, she had never before prescribed a bed.

38. Dr. Pineiro testified that an evaluation of Claimant's ADLs would help her evaluate what type of bed Claimant needs.

39. She stated she was qualified to help Claimant pick a Sleep Number bed based on the proposed evaluation of his ADLs and her expertise as a family practitioner.

40. The ALJ finds it more likely than not that Dr. Pineiro's prescription for a Sleep Number bed was not medically reasonable or necessary to cure or relieve the effects of Claimant's condition.

41. The ALJ finds it more likely than not that Claimant suggested but did not dictate to Dr. Pineiro the type of treatment he wanted to receive. Such conduct is not statutorily proscribed.

Observation of ADLs

42. Claimant contends that observation of his home activities is a reasonable, necessary, and related medical benefit.

43. Claimant first reported problems with ADLs on June 24, 2014. Dr. Pineiro's notes of that visit document that Claimant's cardio condition was improving as expected, and his musculoskeletal complaints were minimal.

44. On August 8, 2014, Dr. Pineiro requested an evaluation of Claimant's ADLs at his home in response to Claimant's statements that he could not perform simple chores around the house.

45. Dr. Pineiro testified that she was worried about Claimant's ADLs "just because he has a cardiovascular condition." Dr. Pineiro acknowledged that she is not treating Claimant's cardiovascular condition and admitted that no cardiologist had recommended the evaluation.

46. Dr. Pineiro testified that Claimant "didn't have a job at that time, and his home was his job." She was unable to identify what validity criteria would be used during the evaluation. She did not contact Claimant's cardiologist regarding her concerns.

47. Dr. Pineiro testified an evaluation would be "the best way to assess how he's progressed." She did not acknowledge that much of the same information could be obtained by reviewing his physical therapy and cardio rehabilitation reports.

48. Dr. Pineiro did not recall talking to or consulting with any of Claimant's cardiologists. She had no knowledge of whether Claimant's cardiologist, Dr. Oldemeyer had placed Claimant on any restrictions. While she was aware Claimant was participating in cardio rehabilitation, she did not read notes of that therapy, nor did she recall requesting them.

49. Claimant testified he has difficulty with: mowing and edging his lawn, shoveling snow, maintaining the outside of his home, carrying a vacuum cleaner up stairs, and heavy scrubbing. He also identified difficulty shaving or standing for long periods to socialize. Dr. Cebrian testified that these are not activities of daily living because there are not done on a daily or regular basis.

50. Claimant testified that his wife will not let him do much at home, because "when they say 'no activity,' they mean 'no activity.'" And he had a "no activity" restriction.

51. Claimant testified that his doctor's no activity restriction meant he could not engage in activity that caused any pain. It was subjective and something that he could judge.

52. Dr. Cebrian reported that an evaluation of activities of daily living is not reasonable, necessary, or related to the November 17, 2011 MVA because Dr. Pineiro had not adequately documented Claimant's function as defined by basic activities of daily living and instrumental activities of daily living. Further, the medical records are inconsistent regarding Claimant's functional ability given that he underwent cardio

rehabilitation without any problems and Dr. Rowan reported that his A-fib had an excellent resolution of symptoms. There is no cardiac report or opinion that Claimant has failed the cardiac treatment provided to him.

53. Dr. Cebrian also explained that in-home evaluations are typically only prescribed for geriatric and brain injured patients.

54. The ALJ finds it more likely true than not that an in-home evaluation of Claimant's ADLs is not a reasonable, necessary, and related medical benefit.

EMG Studies

55. Claimant contends that EMGs of his left upper extremity and bilateral lower extremities are reasonable, necessary, and related medical benefits.

56. On August 8, 2014, Dr. Pineiro recommended electrodiagnostic testing of Claimant's bilateral upper and lower extremities because Claimant reported numbness and tingling in both upper extremities, and problems with weakness and pain in his lower extremities. Dr. Pineiro included "radicular low back pain" and "cervical radiculopathy at C6" as assessment issues.

57. Dr. Cebrian reported that EMGs are not medically reasonable, necessary and related to the November 17, 2011 MVA because they were ordered for medical conditions that are not related to the MVA, specifically Claimant's cervical spine and lumbar spine complaints.

58. J. Tashof Bernton, M.D., performed an independent medical examination of Claimant (not performed at the request of either party in the workers' compensation claim). On October 15, 2014, Dr. Bernton opined that an EMG/NCV is not related to the workers' compensation claim. Dr. Bernton also opined that Claimant's lumbar complaints were not related to the workers' compensation claim.

59. Dr. Pineiro was unable to opine whether Claimant's low back problems were related to his work injuries. She testified that she did not know the cause of his symptoms and therefore she could not have an opinion. She testified, "I would like a little bit more detail on the structural aspects of the back, and see if there is any change with regard to degeneration or any condition."

60. By that time, Dr. Wunder, a physiatrist in Dr. Pineiro's practice, and Dr. Mason, who performed Claimant's 18-month DIME, had each opined that Claimant's low back problems were not related. Claimant's low back problems were preexisting and not temporally related to the MVA.

61. After Insurer denied the studies, Clamant underwent EMG testing of the bilateral upper and lower extremities in October 2014 with the Veterans' Administration. Clamant requests repayment of his $50 co-pay.

62. Dr. Cebrian's November 17, 2014 report specifically opined that Claimant's lumbar spine complaints are independent, unrelated and incidental to the November 17, 2011 MVA. He opined that associated treatment related to the lumbar spine is not medically related to the MVA. Dr. Cebrian's opinion is consistent with those of Dr. Wunder, Dr. Mason, and Dr. Bernton.

63. The ALJ finds that Claimant has not sustained his burden of proving that the EMG studies were reasonable, necessary, and related medical benefits.

Cervical and Lumbar MRIs

64. Claimant contends that cervical and lumbar MRIs are reasonable, necessary, and related medical benefits.

65. The radiologist's impression of both EMG studies was, "This study is essentially normal with only some prolongation of H-reflexes. There is no evidence suggestive of neuropathy or radiculopathy."

66. On November 4, 2014, Dr. Pineiro reviewed the results of the October EMG testing and reported, "Pt due to his positive finding of the EMG I would like MRI of lumbar spine to see if the disk is causing left peroneal motor. Pt also has constant thumb numbness, a cervical MRI is also [warranted]."

67. Dr. Pineiro's recommendation for MRIs is inconsistent with the radiologist's findings of "no evidence suggestive of neuropathy or radiculopathy."

68. After Insurer denied the MRIs, Claimant had them performed at the Veterans' Administration hospital on January 29, 2015. He requests repayment of his $50 co-pay.

69. At hearing, Dr. Pineiro withdrew her recommendation of a cervical spine MRI. However, she recanted her withdrawal towards the end of her testimony. When asked to clarify whether she was recommending a cervical spine MRI, she testified:

> I would have to see – but, like, [Claimant], because it's almost been three weeks since I last seen him. And if his clinical picture in the visit says so, and I think it's indicated, I will recommend it. At this time, without seeing him, I don't feel confident, and I don't feel knowledgeable to do that determination at this time.

70. Dr. Pineiro testified she requested the lumbar MRI based on the EMG to rule out L4 radiculopathy. And, because the EMG showed a slight decrease in conduction velocity, she wanted to see the structure of Claimant's lumbar spine to see if anything was irritating his peroneal motor nerve. Again, this testimony is inconsistent with the EMG findings of no evidence suggestive of neuropathy or radiculopathy.

71. Dr. Cebrian testified in support of his opinion that Claimant's lumbar complaints are not related, that Claimant obtained a lumber MRI and was then evaluated by surgeon, Dr. Widdell in March 2015. Dr. Cebrian testified that Claimant's L5-S1 level had improved in relation to that disc when compared with an MRI taken 12 to 13 years prior, although there was natural degeneration in the facets.

72. Claimant had preexisting lumbar degenerative problems, and a preexisting disc herniation with an S1 radiculopathy. Thus, Dr. Cebrian testified, there was a lack of objective evidence, of any kind, that correlates Claimant's current lumbar condition to the MVA.

73. The ALJ finds that Claimant has not sustained his burden of proving that

the MRI studies were reasonable, necessary, and related medical benefits.

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 (the "Act"), §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(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. § 8-42-201(1), C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Claimant contends that he is entitled to an EMG, MRI, Sleep Number bed, and evaluation of his activities of daily living related to the November 17, 2011 MVA. Respondents admit that Claimant sustained injuries in the MVA, including two broken ribs, but deny that the medical conditions leading to the recommendations for the EMG, MRI, Sleep Number bed, and evaluation of his activities of daily living are related to the MVA. Further, Respondents contend that even if Claimant's back pain is related to the MVA, Claimant's request for a Sleep Number bed will not cure and relieve the effects of the injury. Finally, Respondents contend that Claimant directed his medical care.

Claimant has obtained EMGs of his bilateral lower extremities and left upper extremity through the Veteran's Administration. Claimant has obtained MRIs of his cervical spine and low back through the Veteran's Administration. The medical benefits that Claimant is requesting and has not received are a new bed and someone to observe his activities of daily living in his home.

Claimant's neck and back complaints and symptoms of upper extremity and lower extremity numbness and tingling did not arise out of his employment or occur within the course and scope of employment. "For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently

related to those functions to be considered part of the employment contract." *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Claimant failed to prove that he suffered any disabling injury to his back, and specifically injury to his neck and low back on November 17, 2011, and failed to prove a causal connection between his physical complaints and the MVA.

As found, Claimant had a history of lumbar back pain. Additionally, Claimant did not report low back pain to his authorized treating physicians until over a month after the MVA and his complaints were consistent with his pre-existing complaints. Furthermore, Claimant did not consistently complain of cervical complaints until years after the MVA, and Dr. Pineiro testified at one point that she was no longer requesting a cervical MRI.

Finally, Claimant's reports of inability to perform ADLs are inconsistent with the medical reports of exercise and cardiac ability to perform such activities. "A person claiming benefits under workers' compensation is entitled to such medical benefits as are reasonably necessary to relieve the claimant from the effects of a work-related injury or illness." *Colorado Compensation Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994); *see also* C.R.S. § 8-42-101(1)(a). The request for a Sleep Number bed, EMG, MRI, and observation of ADLs are not reasonably necessary to relieve the claimant from the effects of a work-related injury or illness.

C.R.S. § 8-42-101(1)(a) provides, in pertinent part, that:

> Every employer, regardless of said employer's method of insurance, shall furnish such, medical . . . hospital, and surgical supplies, crutches, and apparatus 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 from the effects of the injury.

For the apparatus to be compensable, it must be "medical" in nature; "incidental" to obtaining necessary medical treatment, *see Kuziel v. Pet Fair, Inc.*, 931 P.2d 521 (Colo. App. 1996); and provide therapeutic relief from the effects of the injury. *Cheyenne County Nursing Home v. ICAO*, 892 P.2d 443 (Colo. App. 1995).

The Court of Appeals has narrowly construed C.R.S. § 8-42-101(1)(a) when determining whether a particular apparatus or service is medical in nature. *Major v. Auto Collisions Specialists*, W.C. No. 4-497-652 (Nov. 5, 2008), citing *Kuziel v. Pet Fair, Inc.*, supra. In the *Major* case, the claimant requested a reclining chair and a specific mattress, and a treating physician opined that the chair and mattress constituted a matter of medical necessity. *Major v. Auto Collisions Specialists*, W.C. No. 4-497-652 (Nov. 5, 2008). The ALJ concluded that although the reclining chair and king size mattress sought by the claimant might ease some aspects of his condition, the evidence failed to demonstrate that the apparatuses would provide therapeutic relief. *Id.*

In this case, Dr. Pineiro testified that she recommended an adjustable bed to facilitate Claimant getting in and out of bed. Such request does not evidence how a bed would provide therapeutic relief, and there is no persuasive medical evidence regarding how a bed will specifically provide Claimant therapeutic relief for his work-related conditions.

The Act expressly prohibits Claimant from dictating the care he receives from Dr. Pineiro. *See* § 8-43-503, C.R.S. (stating "employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment"). A claimant is not permitted to issue orders or commands to their treating physician regarding the treatment to be given. *See Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009); *see also York. v. Larchwood Inns*, W.C. No. 4-365-429 (ICAO November 7, 2002). Importantly, courts look to whether communications have the "intent or effect of dictating medical care." *Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009). In determining whether a claimant dictated care, the courts look for evidence showing that a claimant: commanded, ordered, or directed the physician to take part in a specific course of conduct; influenced or compelled the physician to take a specific course of conduct, or; altered the course of treatment. *See Teegardin v. J.C. Penney Co.*, W.C. No 4-748-106-02 (ICAO January 17, 2014); *see also Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009).

Many types of scenarios have been held not to be dictating care. The ALJ concludes Claimant's actions are indistinguishable. *See Provo v. Indus. Claim Appeals Office*, 66 P.3d 138, 144 (Colo. App. 2002) (*aff'd in part and rev'd in part on other issues by Dworkin, Chambers and Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003) (holding that the respondent's counsel's advisement not to pay for ordered chiropractic treatment was not directing care); *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 144 (holding that an insurer's refusal to pay for proposed treatment did not constitute dictation of care); *Teegardin v. J.C. Penney Co.*, W.C. No 4-748-106-02 (ICAO January 17, 2014) (holding that an insurer sending correspondence to a referring physician indicating a referral would be denied because of missing work-relatedness details was not dictating care); *Gianzero v. Wal-Mart Stores, Inc.* W.C. No. 4-669-749 (ICAO July 14, 2009) (holding that it was not dictating care for an insurer to send an authorized treating physician another physician's report placing the claimant at MMI and asking whether the authorized treating physician agrees); *York. v. Larchwood Inns*, W.C. No. 4-365-429 (ICAO November 7, 2002) (holding that insurer did not dictate care when its counsel sent a letter to a DIME physician with background information regarding the claimant's medical history).

Here, Claimant shopped for a Sleep Number bed, a process he defined as performing research. He dropped off at Dr. Pineiro's office marketing materials he acquired from the Sleep Number bed store. Eleven days later, Dr. Pineiro prescribed an unspecified Sleep Number bed. Dr. Pineiro testified that she exercised her own independent judgment in prescribing a Sleep Number bed. Both Claimant and Dr. Pineiro testified that Claimant did not instruct or suggest to Dr. Pineiro which bed to prescribe. And although Claimant provided Dr. Pineiro a price quote for a specific bed, the ALJ concludes such conduct rises only to the level of a suggestion, and not to the level of dictation or ordering of treatment. Claimant's counsel's request -- that Respondents provide a Sleep Number i10 California King with sheets, pillows, two remote controls, etc. -- is not prohibited by statute because it was not directed to a physician.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered:

1. Claimant's claim for a Sleep Number bed is denied, as is the claim for a new bed in general, which the claim was amended to during the hearing.

2. Respondents' claim of direction of medical care is denied.

3. Claimant's claim for EMGs of Claimant's bilateral upper and lower extremities is denied, as is reimbursement for same.

4. Claimant's claim for cervical and lumbar MRIs is denied, as is reimbursement for same.

5. Claimant's claim for observation of ADLs is denied.

DATED: June 8, 2015

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

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence that she is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of her December 5, 2011, industrial injury.

FINDINGS OF FACT

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

1. Claimant is a long time employee of Employer. She began working for Employer in February 1999.

2. Claimant was working as an all purpose clerk for Employer on December 5, 2011 when she sustained a compensable injury. On this date, she was working at the self-checkout desk when she went to help a customer that was accompanied by a service dog. As she turned to return to her desk after helping this customer, she tripped over the service dog sustaining injuries to her neck, her head, and her knees.

3. Claimant began treating with Dr. Daniel Peterson at Concentra the day after the incident on December 6, 2011. Approximately two weeks after her injury, Claimant was returned to work in a modified capacity. Dr. Peterson also referred Claimant to an orthopedist, Dr. Wiley Jinkins, on January 24, 2012 when it became evident that the condition of right her knee was not improving. He also referred Claimant for an MRI of her right knee.

4. The MRI was performed on January 24, 2012. The MRI revealed a radial tear of the posterior horn of the medial meniscus.

5. Dr. Jinkins first examined Claimant on January 31, 2012. On February 14, 2012, Dr. Jinkins recommended performing a patellar realignment procedure. Surgery was performed on March 8, 2012. Twelve days after the surgery, Claimant rated her pain at a level of 8 out of 10, despite taking pain medication as prescribed. She testified at hearing that the pain after the first surgery was "devastating" and that it was "just horrible." By May 22, 2012, Claimant experienced no improvement in her pain describing it as a level of 9 out of 10. According to Claimant, it felt like she just had surgery.

6. Claimant underwent a second surgery on September 20, 2012. On this date, Dr.

Jinkins performed an endoscopic debridement followed by endoscopic bone grafting of the proximal tibia. By October 24, 2012, Claimant described her pain as "better," but still rated it as a level of 6 out of 10. A third surgery, a hardware removal procedure was performed on January 10, 2013.

7. Dr. Jinkins indicated that Claimant's symptoms had not changed appreciably by April 1, 2013 so he performed the first of three hyaluronate injections to the knee on that date. Her pain level dropped to 4 out of 10 by April 10, 2013.

8. Dr. Jinkins' records from April 17 and May 1, 2013, indicate Claimant's pain dropped down to 2 out of 10 after the injections. The last injection was performed on April 17. Claimant disputes that her recorded pain levels dropped that appreciably. At hearing, Claimant testified that she does not recall her pain ever dropping below 5 out of 10.

9. Dr. Albert Hattem placed Claimant at MMI on May 14, 2013. Claimant indicated, at this time, that her pain levels were essentially unchanged despite multiple surgeries. Dr. Hattem provided a 23% extremity rating for the right knee. He stated that Claimant should comply with her permanent work restrictions to prevent aggravation of her condition. He stated she should not squat, crawl, or kneel, and that she should work within the sedentary category of work and be allowed to sit, stand, and walk as tolerated.

10. By July 31, 2013, Claimant's pain increased to 7 out of 10, suggesting that the benefit she experienced from the injections had worn off. Dr. Jinkins performed a follow-up examination on July 9, 2014 during which time Claimant's reported pain at a level of 8 out of 10. Dr. Jinkins noted that, "Overall, she is still significantly symptomatic and does have a pronounced limp." He explained that, in all probability, she is going to need a total knee replacement at some point in time.

11. Claimant underwent a Division Independent Medical Examination with Dr. Thomas Higginbotham on August 28, 2013. Dr. Higginbotham agreed Claimant had reached MMI, but stated that she is in need of chronic pain management. She explained to Dr. Higginbotham than her pain was worse than before and that she was experiencing "horrible, horrible pains."

12. Dr. Higginbotham opined that Claimant's right knee rating was 36% scheduled, and that she also had a 17% whole person rating to the lumbar spine. Claimant testified at hearing that it was her opinion that her altered gait from the knee injury is what was causing her back pain.

13. Claimant was terminated from her position on September 22, 2013, approximately 21 months following her industrial injury. Although she was unable to work following surgery for brief periods, Claimant returned to work for Employer in a modified duty capacity working up to eight hours per day in the 21 month time period, despite reported pain levels of five, six, seven and eight out of ten. Based upon the

evidence presented, the ALJ finds that Claimant has earned wages working full-time in a sedentary capacity despite complaints of pain up to seven to ten out of ten.

14. Upon request, Dr. Jinkins addressed Claimant's ability to work on July 22, 2014. According to Dr. Jenkins, Claimant was able to return to work in a sedentary capacity with no weight bearing until he was able to reevaluate her next month. After evaluation on August 6, 2014, Dr. Jinkins opined that, "[Claimant] is not working at the present time." "There is no light duty available to her and she is in enough discomfort that she is not able to work, even in a sedentary capacity." The ALJ infers from this note that Claimant subjectively reported to Dr. Jenkins that she could not work in a sedentary capacity secondary to her reported pain levels. On September 11, 2013, Dr. Jenkins noted that Claimant was "on 100% sedentary work restrictions.

15. Dr. Jinkins filled out a residual functional capacity questionnaire on January 27, 2015. It was his opinion that Claimant's work restrictions were, in part, as follows:

- Sitting up 8 hours per day. No standing or walking.
- Occasionally lifting up to 10 pounds. Never lifting more than 10 pounds.
- Never bending, squatting, crawling, climbing, stooping, crouching, or kneeling.
- Never driving automotive equipment for work.

16. Dr. Jinkins further indicated that because Claimant's pain was severe, it would preclude "activity precipitating the pain" including work activities. The ALJ rejects Claimant's suggestion that the note should be interpreted as precluding all "work activity." To the contrary, the note specifically indicates that Claimant would be precluded from work activities which precipitate pain.

17. Claimant underwent a vocational evaluation on February 27, 2014 with vocational experts Pat Anctil and Katie Montoya. Claimant indicated her subjective functional tolerances were, in part, as follows:

- Standing for up to 15 to 20 minutes
- No kneeling
- No squatting
- Bending to waist level
- Lifting no more than 8 pounds.

18. Ms. Anctil summarized in her initial report that Claimant's "skills and experience" included computer skills, touch typist, supervisory experience, training employees, cash handling, customer service, and operating office equipment. Claimant testified that she would use a computer "every now and then" while working for employer, but that she had no special training on computers and has no training on Excel or PowerPoint.

19. Ms. Anctil's report also indicates that Claimant prepared income taxes after high

school and that she intended to attend H&R Block's tax prep course in September of 2014.

20. Ms. Anctil concluded in her February 27, 2014 report that Claimant would be capable of earning a wage through potential occupations such as being a cashier or clerk in various fields, an insurance rep, a receptionist, an alarm operator, and a tax preparer.

21. In September 2014, Claimant enrolled in an H&R Block tax training course. The training program only lasted three to four hours per day, and an individual could sit or stand during the training as needed. There was no lifting involved, and Claimant could have used a cane or any other assistive device to help her complete the program.

22. Claimant testified that the training program was so difficult she had to go to the emergency room after attending only three sessions. Claimant testified that she stayed at the hospital all night.

23. Claimant did not submit any medical records at hearing supporting her allegation that she went to the emergency room in September 2014. Claimant also did not provide any documentation of this allegation to either Ms. Anctil or to Ms. Montoya. Additionally, Claimant did not report the incident to Dr. Jinkins at her next appointment with him.

24. The ALJ finds that Claimant's testimony that she went to the emergency room as a result of attending the H&R Block training program unconvincing and unreliable.

25. Claimant holds a National Certification Interior Design Qualified ("NCIDQ") certificate in interior design, and she has received formal and one-on-one training in the field. Claimant owns and operates a registered business, "Pretties", out of her home. Claimant is licensed to sell goods as a wholesaler, and she conducts her business by email and through a third-party website, Celebrityhomes.com. Shortly before her February 2014 meeting with Ms. Anctil, Claimant conducted a sale of home décor items out of her house in which she netted approximately $700.

26. Claimant has experience using fax machines, multi-line telephones, scanners, copiers and calculators. Claimant also uses a laptop at home and has been using laptops for roughly twenty years.

27. Claimant testified that her knee is in constant pain. There are never days that she is completely pain free, but there are days that she describes as "tolerable." Conversely, she also has days that are worse than others and she experiences a constant, throbbing, deep pain. She testified that on days like these, almost all she can do is get up and take a shower.

28. Video footage was taken of Claimant driving on February 25, 2015, February 27, 2015, and February 28, 2015. The video demonstrates Claimant shopping at the commissary for more than two hours. Based upon the video tape, the ALJ finds that

Claimant is capable of driving a car, repeatedly entering and exiting it, and standing for more than twenty (20) minutes. The video tape also demonstrates that Claimant is capable of washing her car with the use of a high pressure wand during which time she did not use a cane. On one day captured in the video footage, Claimant drove to three stores over a period of three-and-a-half hours. Based upon the video tape, the ALJ finds that Claimant is capable of walking outside without the need for a cane or other assistive device.

29. Ms. Anctil testified by deposition on April 17, 2015. She explained that, as of her first interview with Claimant in February of 2014, she was of the opinion that Claimant was capable of earning wages. It was her understanding that the restrictions in place through August 8, 2014, indicated Claimant was able to perform work in no more than a sedentary capacity.

30. Ms. Anctil identified thirty-four job positions Claimant could perform within her restrictions. Ms. Anctil concluded that Claimant still has access to sixty-four percent of the jobs she could have obtained prior to her work injury. Additionally, Ms. Anctil reported that there were more than one hundred occupations currently available to Claimant.

31. Katie Montoya issued her vocational assessment dated February 18, 2015. Ms. Montoya noted that, during her initial interview with Claimant in February of 2014, Claimant indicated she wanted to attend the H&R Block tax prep course and Claimant believed she could do it.

32. Ms. Montoya's February 2015 report documents her follow-up conversation with Claimant. Claimant expressed to her that she did in fact attend the H&R Block tax prep course, but was physically unable to complete the program due to her pain levels. "[Claimant] identified that her pain is worse and that she previously thought her pain would get better and it just has not. The difficulty she had with the H&R Program confirmed to her that she has an inability to return to work."

33. Katie Montoya noted in her report that Dr. Jinkins was of the opinion that Claimant's pain was severe enough to preclude all work activities. As noted above, the ALJ rejects this interpretation of Dr. Jinkins January 27, 2015 report. Ms. Montoya explained in her report that, at the time of the 2014 vocational interview, she thought the H&R Block course was a good plan for Claimant. However, "[Claimant] was unable to be successful in that program."

34. Ms. Montoya testified by deposition on April 3, 2015. She testified that Claimant could not return to her work with Employer because the lifting was too much and the position required more standing and walking than she is capable of. She testified that her physical restrictions would preclude her from performing all of her past relevant work.

35. Ms. Montoya testified that the issue of unscheduled absences is something that

comes up frequently in her line of work and that it is something she has analyzed. She explained that it varies by employer and that, generally, an employer will have less tolerance for a new employee than a tenured employee.

36. Ms. Montoya testified that, with a new employee, employers generally allow no more than two or three absences. "Any more than that would be an issue. Even that, on a prolonged basis, for a new employee is an issue." Ms. Montoya noted that Dr. Jinkins indicated Claimant's pain was "severe," which precluded all work activity; however, even if the pain was only "moderate" resulting in three to five absences per month, it would impact her ability to maintain any work. She also stated that employers are even less tolerating of absences during initial training programs because employees need to have the skills that are learned during the training on order to be able to perform the job.

37. Ms. Montoya stated that Claimant has no transferrable skills from her previous tax prep work because a lot has changed since she performed that job briefly thirty-five years ago.

38. Ms. Montoya ultimately concluded, "I think that the limitations, as noted by Dr. Jinkins, eliminate her ability to be able to maintain employment…." Based upon a totality of the evidence, including the video surveillance tape, the ALJ is not persuaded.

39. The ALJ finds the testimony and opinions of Ms. Anctil credible and more persuasive than the contrary opinions of Ms. Montoya.

40. The ALJ credits the testimony of Ms. Anctil regarding Claimant's vocational skills and employment prospects to find that Claimant is capable of sedentary work within the "semiskilled" and "skilled" employment categories and that Claimant is capable of earning a wage. Consequently, Claimant has failed to prove, by a preponderance of the evidence, that she is permanently totally disabled.

CONCLUSIONS OF LAW

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

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

B. The purpose of the "Workers' Compensation Act of Colorado" (hereinafter "Act")

is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence to find that a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether a claimant sustained his/her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). 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.* In this case, the undersigned ALJ concludes that claimant has failed to prove, by a preponderance of the evidence, that she meets the criteria of "permanent total disability" as that term is defined under the Act.

C. Under the applicable law, Ms. Smith 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.* The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *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. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

D. Moreover, there is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Based upon the evidence presented, the ALJ is not persuaded that the restrictions assigned by Dr. Jenkins preclude her from earning a wage in sedentary positions. Claimant's primary argument for her contention that she is unable to work is based on her testimony that she is currently in too much pain to work. However, the ALJ finds this assertion contradicted by evidence presented at hearing including: a) the lack of solid medical evidence to support her current assertions of "severe" pain; b) Claimant earned wages in two different professions after the injury during a period of time when

she testified she was in severe pain; c) the physical activities Claimant demonstrated in the surveillance footage undermine her credibility regarding her complaints of pain; and d) Claimant's own testimony regarding what she is physically able to do. When determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Considering Claimant's unique "human factors", the ALJ is not convinced that she is incapable of earning any wages. Here, both vocational rehabilitation experts involved in this claim have explicitly stated that Claimant possesses the skills necessary to earn a wage in a sedentary capacity. The ALJ credits Ms. Anctil's testimony to find that Claimant retains access to better than 50% (64%) of the jobs she was capable of performing prior to her work injury and that more than one hundred occupations are currently available to Claimant. On the evidence presented, the ALJ is persuaded that the representative sampling of sedentary positions identified by Respondents' vocational expert as being within Claimant's physical/mental capabilities present a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, Claimant considers herself an intelligent person who is capable of learning new skills. She is proficient in using a laptop, has some training in secretarial work, and spent two years in a clerical position at the King Soopers pharmacy. Additionally, Claimant has experience in, an aptitude for, and a desire to perform tax preparation. Based upon the evidence presented, the ALJ concludes that she has failed to prove by a preponderance of the evidence that she is incapable of earning a wage.

ORDER

It is therefore ordered that:

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

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

DATED: July 7, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-887-035-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 21, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 5/21/15, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM).

Claimant's Exhibits1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through M 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, to be submitted electronically within 5 working days. On May 29, 2015, counsel for the Claimant requested an extension of time until June 3, 2015 within which to submit a proposed decision. Counsel for the Respondents had no objection. The Claimant submitted a proposed decision on June 3, 2015, and the Respondents submitted detailed objections thereto on June 5, 2015, at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern average weekly wage (AWW), based on multiple employments; and, temporary partial disability (TPD) and

temporary total disability (TTD) benefits from February 13, 2012, the date of the admitted injury, through May 5, 2014, the date of maximum medical improvement (MMI). Respondents designated the issue of an unemployment insurance (UI) benefit offset. The Respondents did **not** designate the issue of "responsibility for termination," nor was it an issue.

The Claimant bears the burden of proof, by preponderant evidence on all issues, with the exception of the UI offset, wherein the Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

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

2. On July 24, 2014, the Respondents filed a Final Admission of Liability (FAL), admitting for zero temporary disability benefits; a maximum medical improvement (MMI) date of May 5, 2014; 14% whole person permanent medical impairment for a total of $5,852.56 (based on a lower AWW as a component of the formula), however, permanent disability was not designated as an issue nor was it an issue at the hearing, payable at the rate of $150 per week; $40,438.08 in medical benefits to date; and, for causally related and reasonably necessary post-MMI medical maintenance benefits.

3. The Claimant was working as a school bus driver at the time of her injury. Claimant testified that she was able to continue to work as a bus driver but had difficulty performing some of the lifting and reaching duties required of her employment. She continued to work for Employer until she was dismissed from employment on May 22, 2013. The reasons for the Claimant's dismissal are unclear. Suffice it to say, since temporary disability benefits are based on a strict temporary wage loss concept, the Employer, by terminating the Claimant's employment, increased her temporary wage loss.

Medical Status

4. After the admitted injury, the Employer sent the Claimant to Banner Health for treatment, where she was seen by Paulette Carpenter, FNP (Nurse Practitioner). According to the Claimant, Carpenter referred her for an orthopedic evaluation a few months after her injury. Claimant was seen by Robert Benz, M.D., an orthopedic surgeon. According to the Claimant, she was not seen by another physician

until she was seen by Adam Mackintosh, M.D., a Sterling physician, in August 2013. The Claimant denied having been seen by Jeff Bacon, M.D., at Banner Health. The Claimant was also referred to Kenneth Pettine, M.D., Usama Ghazi, D.O., and Gregory Reichhardt, M.D. All of these physicians were within the chain of authorized referrals and, therefore, authorized.

5. The Claimant's medical records from Banner Health reveal that the Claimant was treated by Paulette Carpenter, FPN throughout the course of her medical treatment. With the exception of the period from October 25, 2013 until November 17, 2013, FPN Carpenter indicated Claimant was able to return to full duty work. As found herein below, the ALJ infers and finds that Carpenter's "release to return to full duty work" was improvidently made, based on an inadequate grasp of all of the Claimant's circumstances. The Physician's Reports of Workers' Compensation Injury up until April 16, 2013 were signed by FPN Carpenter. The majority of reports beginning April 16, 2013 were signed or co-signed by Dr. Bacon (who had never seen the Claimant) or Dr. Mackintosh. With the aforementioned exception, all medical reports after April 16, 2013 indicated that the Claimant was able to return to full duty work. Although the Respondents, in lodging objections to the Claimant's proposed findings, rely on these reports to assert that the Claimant had medical full duty releases to return to work almost immediately after the admitted injury of February 13, 2012, the ALJ does not find these "full duty" releases **credible** because they are superseded by the opinions of more credible physicians, including Dr. Mackintosh himself, as found herein below.

6. Dr. Mackintosh testified by deposition on April 10, 2015. He first saw the Claimant in September 2013. He stated that Paulette Carpenter, FNP, provided primary care to Claimant prior to this date. Dr. Mackintosh began seeing the Claimant when nurse practitioners required a physician to sign off on treatment. Dr. Mackintosh stated that he felt the Claimant could perform the regular duties of a bus driver as he understood them to be, and that he was hesitant to place work-restrictions on patients that could impact their employment. Dr. Mackintosh stated that there were physical limitations that the Claimant should have avoided after her injury such as heavier lifting. Dr. Mackintosh did not disagree with the permanent restrictions provided by Dr. Reichhardt because that was Dr. Reichhardt's area of expertise. Dr. Mackintosh stated that the Claimant had medical incapacity after her date of injury and it would not have been unreasonable for the Claimant to have the permanent restrictions provided by Dr. Reichhardt in place from her date of injury until MMI. The ALJ infers and finds that Dr. Mackintosh deferred to Dr. Reichhardt on the issue of medical restrictions, and Dr. Reichhardt, as subsequently inferred and found herein, retrospectively restricted the Claimant to limitation of lifting, pushing, pulling and carrying up to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist to a rare basis four times per hours.

7. The Claimant was seen once by Dr. Benz on or about May 4, 2012 for orthopedic surgical evaluation. In addition to stating the opinion that the Claimant would

not benefit from surgical intervention, Dr. Benz indicated that the Claimant could return to her full duties as a bus driver. For the reasons stated in the findings herein below, the ALJ finds that subsequent medical opinions are more persuasive and credible and these opinions outweigh Dr. Benz's "full duty" release. Therefore, the ALJ does **not** find Dr. Benz's opinion in this regard credible.

8. The Claimant was seen by Kenneth A. Pettine, M.D., on or about March 1, 2013. Dr. Pettine was of the opinion that the Claimant was a candidate for a 2-level fusion procedure. Dr. Pettine also outlined a number of non-operative treatment options. Dr. Pettine stated the opinion that the Claimant should avoid heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. The ALJ finds the opinions of Dr. Pettine to be more credible and persuasive than the opinions of Dr. Benz.

9. The Claimant underwent bilateral L4-5, bilateral L5-S1 facet joint intra-articular injections performed by Scott Hompland, D.O., on September 6, 2012 and December 6, 2012.

10. Claimant was seen by Usama Ghazi, D.O., on or about November 11, 2013. Dr. Ghazi recommended a course of treatment to begin with sacroiliac injections. Dr. Ghazi subsequently performed bilateral sacroiliac injections and a sacrococcygeal joint injection with some improvement. Dr. Ghazi noted that the Claimant was frustrated that her tailbone pain was precluding her from returning to her occupation as a trucker. Although Dr. Ghazi did not specifically comment on work-restrictions, this later evidence of the Claimant's level of function and intensity of treatment is persuasive evidence that she was unable to perform full duty work for the Employer.

11. The Claimant was placed at MMI by Dr. Reichhardt on May 5, 2014. Dr. Reichhardt issued a 10% whole person permanent impairment rating for Claimant's cervical spine and 11% whole person permanent impairment rating for Claimant's lumbar spine (later apportioned to 4%). Dr. Reichhardt recommended 3 years of maintenance treatment and provided permanent work-related restrictions of limited lifting, pushing, pulling and carrying to 20 pounds occasionally, 10 pounds frequently. Limit bending and twisting at the waist "to a rare basis four times per hours." Dr. Reichhardt deferred any opinion concerning the Claimant's temporary restrictions prior to MMI to the Claimant's authorized treating physicians. The ALJ infers and finds that Dr. Reichhardt's permanent work restrictions, at least, equate to her temporary restrictions before MMI. The opinions of Dr. Reichhardt are credible and persuasive. Additionally, Dr. Pettine had prescribed temporary restrictions of avoiding heavy weight lifting, squats and dead lifts as well as extensive lifting, twisting, bending and stooping. All of these restrictions would prevent the Claimant from performing the full range of her job duties with the Employer, with Stops, and with Quizno's.

12. Despite temporary restrictions implicitly prescribed by Dr. Pettine and Dr. Reichhardt, retrospectively, the Claimant continued working at her multiple employments in excess of those restrictions, however, the ALJ infers and finds that she was **not** able to adequately properly perform at any of her multiple jobs, thus she minimized her temporary wage loss. The ALJ infers and finds that based on the Claimant's undisputed testimony, she should not have been working, full duty, at any of her multiple employments unless she had been offered modified duties to accommodate those restrictions. She was **not** offered modified duties at any of her employments.

Multiple Employments as of Admitted Date of Injury

13. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amount to $10, 012.05 divided by 52 = $192.35 per week, as opposed to the admitted AWW of $156.76. This higher AWW would affect the formula for determining permanent medical impairment, however, permanency was **not** a designated issue.

14. On the date of her injury, the Claimant also worked as a driver for Stops Enterprises. She began working for Stops in the early part of 2011 and continued to work for Stops until approximately December 2012. Her job duties at Stops included driving patients to their medical appointments. The Claimant was able to do her job duties after her injury, but had some trouble with longer drives. Her employer stopped sending her assignments in December of 2012. The Claimant implies that the Employer stopped sending her assignments in December of 2012 because of her admitted injury. Regardless of why Stops stopped sending the Claimant assignments, her temporary wage loss increased as of January 1, 2013. Claimant's wage records from Stop Enterprises from July 5, 2011 until January 5, 2012 reveal gross earnings of $2,909.40 for this 185 day period. This would result in a weekly average of $110.09 ($2,909.40 /185 x 7) at Stops.

15. Also on the date of her admitted injury, the Claimant worked at The Reata Petroleum Corporation, which was a Quizno's sandwich shop located at a truck stop. Her job duties were as a sandwich maker. She started working for Quizno's in June 2011 until she stopped working on April 15, 2012. According to the Claimant, she stopped working at Quizno's because she could no longer handle the physical demands of working three (3) jobs. Claimant's employment records from Reata Petroleum Corporation indicate that Claimant started working for Quizno's on June 14, 2011. Her 2011 W-2 from Reata Petroleum (Quizno's) indicates that the Claimant earned $4,512.60 for the tax year of 2011. Based on 201 days from June 14, 2011 until December 31, 2011, these gross earnings would result in a weekly average of $157.16 at Quizno's.

Average Weekly Wage (AWW)

16. As of the admitted date of injury, the Claimant had three concurrent, multiple employments. The Claimant's gross earnings from the Employer herein for 2011 (Claimant's Exhibit 7) amounts to $10, 012.05 divided by 52 = $192.35 per week. Add $110.09 per week from Stops and $157.16 per week from Quizno's, and an overall AWW of $459.60 results. The ALJ hereby finds that the above described methodology for determining AWW from the Claimant's three multiple employments is the fairest and most objective way of determining the AWW herein. Therefore, the ALJ finds that the Claimant's AWW as of the date of injury was $459.60, which is the baseline from which temporary partial disability (TPD) should be measured, based on temporary wage loss.

Unemployment Insurance (UI) Benefit Offset

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

Temporary Disability

18. From the date of the admitted injury of February 13, 2012 until the Claimant was terminated from employment by the Employer herein on May 22, 2013, she continued to earn $192.35 per week from the Employer herein. From February 13, 2012 through December 31, 2012, she continued working for Stops, earning an additional $110.09 per week. From February 13, 2012 through April 15, 2012, she also continued working for Quizno's at $157.16 per week. Consequently, the Claimant had **no** temporary wage loss from February 13, 2012 through April 15, 2012. From April 16, 2012 through December 31, 2012, the Claimant was sustaining a temporary wage loss of $302.44 ($459.60 - $157.16 = $302.44) during this period of time. From January 1, 2013 through May 22, 2013, the Claimant had lost her employment with Stops at $110.09 per week. Consequently, her temporary wage loss during this period of time was $459.60 - $110.09=$349.51 per week. From May 23, 2013 (the date of her termination by the Employer herein) until December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, or a total wage loss of $459.60 per week.

18. In approximately December 2013, the Claimant started to work retail sales for Stage Stores. She continued to work at Stage Stores, averaging between 12-17 hours/week at $8.60 an hour, or an average of 15 hours per week, or $129.00 per week, until after she was placed at MMI on May 5, 2014. From December 2, 2013 through the date of MMI, May 5, 2014, the Claimant was sustaining a temporary wage loss of $330.60 per week ($459.60 - $129.00= $330.60).

Ultimate Findings

19. It is undisputed that Dr. Mackintosh deferred to Dr. Reichhardt on the Claimant's medical restrictions. As inferred and found herein above, Dr. Reichhardt's permanent medical restrictions were at least the Claimant's temporary restrictions after

the admitted injury of February 13, 2012. Also, Dr. Pettine imposed temporary restrictions that would have prevented the Claimant from performing the full range of her duties at her multiple employments. Nonetheless, the Claimant worked at her multiple employments despite her medical restrictions, but she could not perform adequately or properly at any of her multiple jobs. It would be irrational to infer that the Claimant's temporary restrictions before MMI, imposed by Dr. Reichhardt, were less than her permanent restrictions at MMI.

20. The ALJ finds the Claimant's testimony as a whole, credible and un-refuted. Her lay testimony establishes that she could **not** perform properly or adequately at any of her multiple jobs. Also, the ALJ finds the medical opinions of Dr. Pettine and Dr. Reichhardt concerning restrictions persuasive and credible. The ALJ finds the opinion of Dr. Benz lacking in credibility because it is contrary to the weight of the evidence.

21. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Pettine, Dr. Reichhardt and Dr. Mackintosh's ultimate opinion (as found in paragraph 6 herein above), because they are based on substantial evidence, and to reject the opinion of Dr. Benz and FPN Carpenter.

22. The Claimant's AWW from her multiple employments on the date of injury is $459.60, which is the baseline measurement for TPD benefits.

23. From the date of injury, February 13, 2012 through April 15, 2012, the Claimant was working at all three multiple employments and sustained **no** temporary wage loss. As supported by the findings herein above, from April 16, 2012 through December 31, 2012, the Claimant was sustaining a temporary wage loss of $302.44 per week, which yields a TPD rate of $201.62 per week, or $28.80 per day. From January 1, 2013 through May 22, 2013, the date of her termination by the Employer herein, the Claimant was sustaining a temporary wage loss of $349.51 per week, which yields a TPD rate of $233.00 per week, or $33.29 per day. From May 23, 2013 through December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, which yields a temporary total disability (TTD) benefit rate of $306.40 per week, or $43.77 per day. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average of $129.00 per week) through May 4, 2014 the day before her MMI date, the Claimant was sustaining a temporary wage loss of$330.60 per week, which yields a TPD rate $220.40 per week, or $31.49 per day.

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

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 as a whole, was credible and un-refuted. Also, as found, the medical opinions of Dr. Pettine and Dr. Reichhardt, concerning restrictions, were persuasive and credible. As further found, the opinion of Dr. Benz was lacking in credibility because it was contrary to the weight of the evidence. The ultimate medical opinions of Dr. Mackintosh, Dr. Pettine and Dr. Reichhardt on restrictions are essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Pettine, Dr. Reichhardt and Dr. Mackintosh's ultimate opinion (as found in Finding No. 6 herein above), because they are based on substantial evidence, and to reject the opinion of Dr. Benz and FPN Carpenter.

Average Weekly Wage

c. Where an injured worker has arranged **multiple** employments to earn a living, and the injury precludes work altogether, or in one or more employments, a fair computation of the true AWW encompasses all employments. *St. Mary's Church & Mission v. Indus. Comm'n,* 735 P. 2d 902 (Colo. App. 1986); *Jefferson County Public Schools v. Dragoo,* 765 P.2d 636 (Colo. App. 1988); *Broadmoor Hotel v. Indus. Claim Appeals Office,* 939 P.2d 460 (Colo. App. 1996), *cert. denied* July 14, 1997. An AWW calculation is designed to compensate for temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S
An ALJ has the discretion to determine a claimant's AWW, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, a fair and objective determination of the Claimant's AWW from her multiple employments at the time of the admitted injury is $459.60, which is the baseline from which to measure temporary wage loss.

Temporary Disability

d. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage

loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not her fault but the result of undisclosed reasons. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant worked at her multiple employments despite her medical restrictions, but she could not perform adequately or properly at any of her multiple jobs.

e. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring), modified employment is not made available, and there is no actual return to work, TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, from the date of injury, February 13, 2012 through April 15, 2012, the Claimant was working at all three multiple employments and sustained **no** temporary wage loss. As supported by the findings herein above, from April 16, 2012 through December 31, 2012, the Claimant was sustaining a temporary wage loss of $302.44 per week, which yields a TPD rate of $201.62 per week, or $28.80 per day. From January 1, 2013 through May 22, 2013, the date of her termination by the Employer herein, the Claimant was sustaining a temporary wage loss of $349.51 per week, which yields a TPD rate of $233.00 per week, or $33.29 per day. From May 23, 2013 through December 1, 2013, the Claimant was sustaining a 100% temporary wage loss, which yields a temporary total disability (TTD) benefit rate of $306.40 per week, or $43.77 per day. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average of $129.00 per week) through May 4, 2014 the day before her MMI date, the Claimant was sustaining a temporary wage loss of$330.60 per week, which yields a TPD rate $220.40 per week, or $31.49 per day.

<u>Unemployment Insurance Benefit Offset</u>

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

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to an increased AWW and temporary disability benefits through the date of MMI, May 5, 2014.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's average weekly wage is hereby re-established at 4459.60.

B. Any and all claims for temporary disability benefits from February 13, 2012 through April 15, 2012, are hereby denied and dismissed.

C. From April 16, 2012 through December 31, 2012, both dates inclusive, a total of 260 days, Respondents shall pay the Claimant , temporary partial disability benefits at rate of $201.62 per week, or $28.80 per day, in the aggregate subtotal amount of $7,488.00, which is payable retroactively and forthwith. From January 1, 2013 through May 22, 2013 (the date of the Claimant's termination by the Employer herein), a subtotal of 142 days, the Respondents shall pay the Claimant temporary partial disability benefits at the rate of $233.00 per week, or $33.29 per day, in the aggregate amount of $4,727.18, which is payable retroactively and forthwith. From May 23, 2013 through May 31, 2013, both dates inclusive, a subtotal of 9 days, the Respondents shall pay the Claimant temporary total disability benefits at the rate of $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $393.94, which is payable retroactively and forthwith. From June 1, 2013 through November 24, 2013, both dates inclusive, a subtotal of 177 days, the Respondents shall pay the Claimant temporary total disability benefits of $306.40 per week less the UI offset of $64.50 per week, in the net amount of $241.90 per week, or $34.56 per day, in the

aggregate amount of $6,177.12, which is payable retroactively and forthwith. From November 25, 2013 through December 1, 2013, both dates inclusive, a subtotal of 7 days, the Respondents shall pay the Claimant temporary total disability benefits (with no offset) at the rate of $306.40 per week, or $43.77 per day, in the aggregate subtotal amount of $306.39, which is payable retroactively and forthwith. From December 2, 2013 (when the Claimant began employment with Stage Stops at an average of $129.00 per week) through the day before the maximum medical improvement date, May 4, 2014, both dates inclusive, a subtotal of 154 days, the Respondents shall pay the Claimant temporary partial disability benefits at the rate of $220.40 per week, or $31.49 per day, in the aggregate subtotal amount of $4,849.46, which is payable retroactively sand forthwith. In sum, the respondents shall pay the Claimant a grand total of $23,635.70 in net retroactive temporary partial and temporary total disability benefits, including the 100% unemployment insurance benefit offset, through the date of maximum medical improvement, retroactively and forthwith.

D. the Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this_____day of June 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 June 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether the respondents are providing reasonable, necessary, and related medical care to the claimant to cure and relieve her from the effects of her occupational disease.

2. Whether the overpayment alleged by the respondents in their last Final Admission dated December 19, 2014 is accurate.

3. Whether the claimant is owed interest on temporary total disability benefits owed for the period of February 13, 2015 to the date payment was issued by the respondents, May 21, 2015.

STIPULATIONS

1. The parties have stipulated and agreed that the claimant is no longer at maximum medical improvement (MMI) and the respondents have filed a revised general admission admitting for ongoing temporary total disability (TTD) benefits beginning February 13, 2015.

FINDINGS OF FACT

1. The claimant suffered an admitted injury on December 1, 2011. The claimant was placed at maximum medical improvement (MMI) by authorized treating physician Dr. Albert Hattem on August 21, 2014 and assigned a permanent impairment rating. Dr. Hattem did not recommend maintenance treatment. The respondents filed a final admission of liability consistent with Dr. Hattem's impairment rating and claimed an overpayment of $2,158.66.

2. The claimant objected to the final admission of liability and requested a Division Independent Medical Examination (DIME). The DIME was performed by Dr. Miguel Castrejon on November 19, 2014. Dr. Castrejon agreed that the claimant was at MMI as determined by Dr. Hattem. However, Dr. Castrejon recommended that the

claimant undergo additional diagnostic testing as maintenance treatment to either rule out or confirm the diagnosis of chronic regional pain syndrome (CRPS).

3. The respondents filed a final admission for liability on December 19, 2014 consistent with Dr. Castrejon's impairment rating and once again did not admit for maintenance medical benefits. The respondents claimed an overpayment of $3,837.62.

4. Consistent with a referral from Dr. Hattem, the respondents authorized the additional diagnostic testing recommended by Dr. Castrejon.

5. The additional diagnostic testing was positive for the presence of CRPS and the claimant followed up with Dr. Hattem on March 17, 2015. At this evaluation, Dr. Hattem referred the claimant to Dr. Shimon Blau for consideration of a sympathetic block to definitively rule out CRPS. Dr. Hattem also prescribed the claimant 300 mg tablets of Gabapentin 90 tablets, no refills, and did not recommend any other treatment at that time. The claimant's appointment with Dr. Blau was scheduled for May 4, 2015 as this was apparently the earliest available appointment.

6. The appointment with Dr. Blau did proceed on May 4, 2015 and Dr. Blau recommended proceeding with sympathetic blocks. No testimony was presented concerning when the report from Dr. Blau was sent or received by the respondents. However, the report contains a fax time stamp from Rockrimmon Concentra CS of 9:11 a.m. on May 12, 2015. Therefore, it is most likely that the report was faxed at this date and time. The claimant testified that she was notified on May 21, 2015 that the blocks had been authorized. Accordingly, the blocks were timely authorized.

7. The DIME examiner did mention consideration of additional treatment that may include anti-depressive medication, psychological support, and chronic pain management if the claimant was not at MMI. To date, Dr. Hattem has not prescribed any of these treatments and has not yet expressly opined that the claimant is not at MMI despite the stipulation of the parties.

8. No other specific treatment has been requested to date by Dr. Hattem, Dr. Blau or any other authorized treating physician that the respondents have not yet authorized.

9. The claimant has failed to prove that respondents have denied any treatment requested by any authorized treating physician.

10. The claimant was sent an indemnity check for $839.48 for the period December 27, 2013 through January 9, 2014. The claimant did not cash this check but

returned it to the respondent-insurer. The respondent-insurer did not give the claimant credit for this returned check when calculating its FAL of December 19, 2014.

11. The claimant was sent two other checks, each for $839.48, which she cashed but then reimbursed the respondent-insurer by way of a cashier's check made out to the respondent-insurer in the amount of $1,678.96. The respondent-insurer did not give the claimant credit for this reimbursement check when calculating its FAL of December 19, 2014.

12. The ALJ finds that the respondent-insurer paid the claimant $14,977.96 in indemnity benefits up through the filing of the Final Admission of Liability (FAL) on December 19, 2014.

13. Based upon the FAL the respondent-insurer was responsible for paying $15,944.92, which includes a disfigurement award of $1,000.00.

14. The ALJ finds that as of the date of the FAL on December 19, 2014 the respondent-insurer owed the claimant $966.96.

15. The ALJ finds that the respondent-insurer miscalculated the overpayment stated in the FAL of December 19, 2014 and that in actuality they had underpaid the claimant by $966.96.

16. The claimant, per the stipulation of the p[arties, is no longer at MMI as of February 13, 2015. The respondents agree that the claimant was entitled to temporary total disability benefits beginning on that date.

17. Based upon the proffer of counsel the claimant was not paid TTD for the period beginning February 13, 2015 until May 21, 2105.

18. The ALJ finds that the respondent-insurer is liable for interest of 8% on amounts due and not paid when required including the TTD beginning with February 13, 2015 and the underpayment from the FAL of December 19, 2014.

19. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondents are not providing reasonable, necessary, and related medical care for the claimant through her authorized providers.

20. The ALJ finds that the claimant has established that it is more likely than not that the overpayment stated on the December 19, 2014 FAL is incorrect and in fact there is an underpayment of $966.96.

21. The ALJ finds that the claimant has established that it is more likely than not that the respondent-insurer owes the claimant interest at 8% on amounts not paid when due including the underpayment of $966.96 and owed but unpaid TTD beginning with February 13, 2015 until paid.

CONCLUSIONS OF LAW

1. A DIME physician's determination is binding with respect to MMI, impairment, causation and apportionment. Such an opinion must be overcome by clear and convincing evidence. However, a DIME physician is not a treating physician. The DIME physician's treatment recommendations have no binding effect. Once a DIME physician determines a claimant is either at MMI or not at MMI and recommends treatment, the claimant returns to the treating physician and treatment is once again left to the sound discretion of the treating physician. Here, claimant has requested "a blanket order" entitling her to all of the specific treatment recommendations of an independent medical examiner even though no authorized treating provider has requested authorization of any of the treatment at issue. Claimant has offered no legal authority to support such a request. Moreover, the facts do not support this request as Dr. Castrejon only opined that the treatment "may" include the items at issue. He did not state that the treatment shall, should, or must include the items for which claimant is seeking authorization.

2. Case law clearly holds that even after a DIME, claimant bears the burden of proving entitlement to any specific treatment and respondents retain the right to dispute the reasonableness and medical necessity of any specific benefit. *Crowe v. Better Alternative, Inc.,* W.C. 648-372, (February 2, 2007); *See Snyder v. Industrial Claim Appeals Office, 942* P.2d 1337, 1339 (Colo. App. 1997). Respondents' right to challenge specific medical benefits includes those recommended by DIME physicians and a recommendation is not *de facto* reasonable and necessary simply because the DIME doctor recommended it as something that *may* be necessary to bring claimant to MMI.

3. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that she is not receiving reasonable, necessary, and related medical care through her authorized providers to cure and relieve her from the effects of her occupational disease.

4. Whether the respondent-insurer erred in calculating the appropriate amounts stated in the FAL is a mathematical calculation based upon the underlying facts of the claimant's periods of disability, her permanent partial disability, and her disfigurement award.

5. The parties do not dispute the periods of disability as stated in the FAL. The ALJ calculates the ultimate amounts based upon the FAL of December 19, 2015 as the previous FAL even if in error is no longer relevant.

6. As found above, the ALJ concludes that the respondent-insurer erred in the calculation of the overpayment stated on the December 19, 2015 FAL because they failed to credit the claimant with the repayment of amounts made by the claimant by returning a check in the amount of $839.48 that was un-negotiated and by sending a cashier's check in the amount of $1,678.96.

7. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent-insurer underpaid the claimant in the amount of $966.96 as of the date of the December 19, 2014 FAL.

8. The statute on interest, section 8-43-410(2), C.R.S. states that interest at eight percent per annum is due upon all sums not paid by either the date fixed by the director or administrative law judge, or the date the employer or insurance carrier became aware of an injury, whichever date is later.

9. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent-insurer is responsible for payment of interest at the rate of 8% on all amounts due but unpaid per the statute.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for a general order concerning provision of medical benefits to the claimant is denied and dismissed.

2. The respondent-insurer shall pay the claimant $966.96 for the underpayment based upon the December 19, 2015 FAL.

3. The respondent-insurer shall pay interest to the 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: June 17, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-900-242-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Third Party Administrator (TPA),

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 15, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 4/15/15, Courtroom 1, beginning at 8:30 AM, and ending at 10:00 AM).

Respondents' Exhibits A through E were admitted into evidence, without objection. The Claimant relied on the Respondents' Exhibits.

At the conclusion of the hearing, the ALJ established the deadline of April 27, 2015 within which the Claimant should file a written transcript of the evidentiary deposition of Thomas Mann, M.D. (hereinafter referred to as "Mann Depo.," followed by a page number), which was filed on April 24, 2015, and a briefing schedule. The Claimant's opening brief was filed on May 13, 2015. The Respondents' answer brief was filed on May 21, 2015. The Claimant was given 2 working days after the answer brief within which to file a reply brief, if any, or no later than May 26. No timely reply brief having been filed, the matter was deemed submitted for decision on May 27, 2015.

ISSUE

The sole issue to be determined by this decision concerns the causal relatedness (to the admitted right knee injury of June 19, 2012) of the total right knee replacement recommended by orthopedic surgeon, Thomas Mann, M.D.

FINDINGS OF FACT

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

Previous Decision by ALJ Richard Lamphere: January 22, 2014

1. The Claimant claimed that on June 19, 2012, she aggravated a pre-existing degenerative condition in her right knee and lumbar spine in an accident that occurred during the course and scope of her employment with the Employer herein. She requested treatment for those injuries, including surgery on her right knee and injection of the right L5-S1 facet joint and the right greater trochanteric bursa. The Respondent admitted the occurrence of a work-related "incident" on June 19, 2012, but denied that the need for the treatment requested was due to the "incident" of June 19, 2012. Moreover, the Respondent asserted that any need for further treatment was solely related to pre-existing degenerative conditions.

2. Following a hearing on December 11, 2013, before ALJ Lamphere, the issues were determined in favor of the Claimant and adversely to the Respondent. ALJ Lamphere found that, "Claimant has proved by a preponderance of the evidence that she suffered a slip and fall as reported on June 19, 2012, striking her right knee and left back on the floor of employer." (Findings of Fact and Conclusions of Law and Order, January 22, 2014, hereinafter "Lamphere Decision").

3. ALJ Lamphere reviewed the medical records and reports of David Orgel, M.D., who treated the Claimant at Concentra, and John Tobey, M.D., a physiatrist who treated her at Spine West. ALJ Lampere noted that "Dr. Orgel and Dr. Tobey have stated that the most likely explanation for Claimant's right knee condition is an **aggravation of her pre-existing arthritic condition resulting from the reported June 19, 2012, incident"** (emphasis supplied) [Lamphere Decision]. ALJ Lamphere also reviewed the medical records and deposition testimony of Allison Fall, M.D., who performed an independent medical examination (IME) of the Claimant at Respondent's request. Dr. Fall was of the opinion that the Claimant's reported incident of June 19, 2012, did not result in an aggravation of her pre-existing arthritic condition.

4. ALJ Lamphere found that "the opinions of Drs. Mann, Orgel and Tobey

regarding aggravation of pre-existing osteoarthritis as an explanation for Claimant's right knee condition are more persuasive that the contrary opinions of Dr. Fall. The Claimant has proven by a preponderance of the evidence that she suffered a compensable aggravation of her pre-existing condition when she slipped and fell on June 19, 2012 and that this aggravation has result in disability and that the need for treatment, including surgery, is related to this aggravation" (Lamphere Decision). ALJ Lamphere also found that the record failed to demonstrate any right knee pain or treatment prior to June 19, 2012, and that the lack of such evidence further supported the finding that the Claimant's pre-existing degenerative condition of her right knee was aggravated by the accident of June 19, 2012 (Lamphere Decision).

5. ALJ Lamphere made the following Conclusion of Law: "In this case, the totality of the evidence supports the conclusion that Claimant suffered from a latent pre-existing osteoarthritis in the right knee which manifested after Claimant struck her right knee on the floor after slipping in water while performing her work duties... As found, the Claimant has proven by a preponderance of the evidence that she suffered a compensable aggravation of her pre-existing condition when she slipped and fell on June 19, 2012, and that this aggravation has resulted in disability and that the need for treatment, including surgery, is related to this aggravation" (Lamphere Decision). ALJ Lamphere therefore ordered that "Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of her industrial injury, including, but not limited to, right knee surgery, as recommended by Dr. Mann, a right L5-S1 facet injection and a right greater trochenteric bursa injection, as recommended by Dr. Tobey (Lamphere Decision).

6. The Claimant was seen by Thomas Mann, M.D. on October 2, 2012, for an orthopedic consult. He recommended arthroscopic surgery to address the meniscal pathology, chondral debris and the small loose body noted. Authorization for the surgery was denied by the Respondent.

7. On December 5, 2012, the Claimant was seen again by David Orgel, M.D. Dr. Orgel noted her to walk with an antalgic gait. He assessed a low back strain and right knee pain with large meniscal tear following a fall. He stated in his note, "I am unsure why there has been such a delay in getting her knee surgery approved." On January 22, 2014, ALJ Lamphere ordered the Respondent to provide the requested surgery.

Evidentiary Deposition of Thomas Mann, M.D., Re: Recommended Total Right Knee Replacement

8. Dr. Mann is an orthopedic surgeon. He routinely operates on knees and examines knees as part of his orthopedic practice (Mann Depo., p. 4). He has a subspecialty in Sports Medicine and Arthroscopic Surgery (Mann Depo., p. 4).

9. Dr. Mann first saw the Claimant on October 2, 2012, following an MRI (magnetic resonance imaging) which was taken on September 28, 2012 (Mann Depo., p. 6). The MRI showed a large complex degenerative flap medial mensicus tear with extrusion and medial compartment arthrosis. Medical compartment arthrosis means there is arthritis in the medial or midline part of the knee (Mann Depo., p. 7). Because of the size of the tear, Dr. Mann recommended arthroscopic surgery to remove the unstable portion of the meniscus.

10. Dr. Mann next saw the Claimant on February 11, 2014. It had been a couple of years since he last saw her (Mann Depo., pp. 7-8). He did repeat radiographs to see what, if anything had changed in the intermediate time. When he saw the new x-rays and saw that the Claimant's medial compartment had now basically totally collapsed, he **changed** his opinion; he didn't think arthroscopic surgery would be effective (Mann Depo., p. 8, lines 6-11). According to his note, Dr. Mann recommended symptomatic treatment for the knee and anticipated that long-term relief would require a knee replacement (Mann Depo., p. 9, lines 4-7). Dr. Mann indicated that the knee replacement was likely not relatable to the aggravating injury in June, 2012 (Mann Depo., p. 9, lines 7-9). He indicated that normally he would think that the need for a knee replacement would not be related to a work-related accident (Mann Depo., p. 9, lines 11-25).

11. Dr. Mann saw the Claimant again on May 8, 2014 He performed a physical examination and found that the Claimant's knee was in varus, meaning that it was bowed in and had some laxity with it and that she was tender along the medial joint line. Dr. Mann did not find varus in his first examination in October, 2012 (Mann Depo., p. 10, lines 17-24). In his opinion, the most likely cause of the varus was the loss of cartilage on the medial side of the knee, the cartilage being both the articulate cartilage and the meniscal cartilage (Mann Depo., p. 11, lines 5-10). Imaging studies now showed nearly complete loss of the medial compartment (Mann Depo., p. 11, lines 11-15).

12. Between the time when Dr. Mann first saw the Claimant on October 2, 2012, and his last physical examination of the Claimant on November 11, 2014, physical findings showed deterioration in her condition (Mann Depo., p. 12, lines 11-20). Dr. Mann observed that it appeared that the Claimant had lost 20 degrees of extension and 5 degrees of flexion; her alignment went more into varus, or more bow-legged (Mann Depo., p. 12, lines 20-25). Dr. Mann identified Claimant's Deposition Exhibit No. 2 as radiographs of both the Claimant's knees looking from an anterior-posterior view taken on October 2, 2012 (Mann Depo., p. 13, lines 8-14). The format of Exhibit 2 is a printed negative on a white piece of paper (Mann Depo., p. 13, lines 15-21). Dr. Mann identified Claimant's Deposition Exhibit No. 3 as a similar photo of a radiograph printed on white paper and dated November 11, 2014. Mann Deposition Exhibits 2 and 3 are x-rays of both the left and right knee taken simultaneously while bearing weight (Mann Depo., p. 14, lines 5-9).

13. According to Dr. Mann, Mann Deposition Exhibit No. 2 showed degenerative changes in both the right knee and the left knee with narrowing of the medical compartment. There was possibly a bit more joint space in the left knee than in the right knee (Mann Depo., p. 14, lines 10-21). Dr. Mann then compared the changes shown on Exhibit 3 to the earlier x-rays on Exhibit 2. He stated that Mann Deposition Exhibit 3 "demonstrates almost complete loss of the medial compartment with complete varus on the radiograph, the changes on the left knee also show some degenerative changes, but not as advanced as the right" (Mann Depo., p.14, lines 22-25; p. 15, lines 1-9).

14. As of October 2, 2012, the Claimant had osteoarthritis or degenerative joint disease in both knees (Mann Depo., p. 15, lines 12-18). According to Dr. Mann, in the absence of the trauma sustained to the Claimant's right knee on June 19, 2012, he would expect symmetrical progression of the arthritis: "You expect both knees to kind of progress similarly" (Mann Depo., p. 15, lines 22-25; p. 16, lines 1-8). Looking at exhibit 3, the arthritis in [Claimant's] right knee appears to have progressed much more rapidly on the right than on the left" (Mann Depo., p. 16, lines 9-13).

15. Dr. Mann was then asked the following hypothetical question with the following response:

Q.

"Assume that [Claimant] was asymptomatic in her right knee prior to June 19, 2012, assume that there is no history of a prior injury to her right knee and no history of prior medical treatment of her right knee before June 19, 2012, and assume further that there has not been any traumatic injury to her right knee since June 19, 2012. Do you have an opinion to a medical probability as to the most probable cause of the acceleration in the progression of arthritis in the right knee as compared to the left knee since June 19, 2012?"

A.

"I would assume that the - - if she had a documented injury that seemed to happen at that time and if it progressed like this, then that's where I think it would have had a probability of contributing – or causing or being the main cause of this accelerated progression." (Mann Depo., p. 16, lines 14-25; p. 17, lines 1-5).

16. On November 11, 2014, Dr. Mann recommended a knee replacement as long-term care of [Claimant's] right knee (Mann Depo., p. 17, lines 6-10). In Dr. Mann's opinion, the progression of the arthritis that he saw in radiographs was likely related to

the aggravation caused by her work-related trauma of June 19, 2012 (Mann Depo., p. 17, lines 11-17). The ALJ finds that Dr. Mann has expressed an opinion, to a reasonable degree of medical probability, that the recommended total right knee replacement is proximately, causally related to the admitted right knee injury of June 19, 2012.

17. Dr. Mann acknowledged that in his note of February 11, 2014, he indicated that long-term relief "will require a knee replacement, which is likely not directly attributable to the aggravating injury of June, 2012", while following his evaluation and x-rays of November 11, 2014, he indicated that in his opinion, "it is more likely than not that the fall significantly impacted her progression of arthritis (Mann Depo., p. 17, lines 18-25; p. 18, lines 1-5). Dr. Mann acknowledged that this was a change of opinion (Mann Depo., p. 18, lines 6-7). Dr. Mann explained the change in his opinion as follows:

Q.

"Can you explain to us how you came to the change of opinion?"

A.

"I guess, you know, my normal opinion was based on the fact that typically when we see injuries like this common, and usually arthritis is arthritis, and someone hurts themselves and they blame their injury on their arthritis. But we know from radiographs that people have arthritis that maybe is not symptomatic and then they have an injury that flares it up, but it's usually not the cause.

And that is what I initially thought after reviewing the case because that's the typical approach. And it's - -you know, arthritis is a multifactorial problem.

But I guess **my opinion changed when I really studied the progression, and it just did not fall in the typical progression of arthritis that I typically see.** And knowing that **she had this injury that led to a meniscal tear that likely then just allowed more rapid progression** (emphasis supplied) is where, if I looked at her over the course of that two and a half years or that time course, I thought that it likely did contribute.

And I still think it's multifactorial, it's not the only cause. But it became, it seems, the sort of the nidus of her rapid progression, and that - - , and so I think it's still a difficult case, but that's - - I think if there is absence any other injuries or any other change, and that it was the - - I tried to make an objective determination based on the accelerated wear I saw in the right knee versus the left knee, which **I don't typically see that significant a change or asymmetrical change without**

some sort of new injury or problem" (emphasis supplied) [Mann Depo., p. 18, lines 8-25; p. 19, lines 1-14].

18. A knee replacement is not part of Dr. Mann's routine practice. He recommended another surgeon to do it. (Mann Depo., p. 20, lines 9-14). He recommended his partner, who shares overhead expense; but he would not receive any direct compensation from the surgery (Mann Depo., p. 20, lines 15-18).

19. Dr. Mann concluded that the arthroscopic surgery he had recommended on October 2, 2012, was no longer a reasonable treatment option due to the progression of the Claimant's arthritis. He recommended symptomatic treatment for the knee and anticipated that "long term relief will require a knee replacement which is not directly relatable to the aggravating injury of June of 2012." (Respondent's Exhibit B).

20. Dr. Mann saw the Claimant again on May 8, 2014. He states the following in his clinical note of that date: "Unfortunately she had underlying arthritis, but it was aggravated by the trauma and now **we can see some progression of the arthritis of the right knee at an increased pace than the left knee** (emphasis supplied)**...** Long-term for pain and limitations is likely a knee replacement, but as noted she had some underlying arthritis prior to the injury. **The injury has just progressed the problem more rapidly** (emphasis supplied)**"** [Respondent's Exhibit B).

<u>Mark Failinger, M.D.</u>

21. The report of Dr. Failinger, who also evaluated the Claimant on March 15, 2015, at Respondent's request, provides further documentation of the extent to which the Claimant's knee condition has deteriorated since her injury. Dr. Failinger states that the Claimant "has a **very antalgic gait with a bent knee and signicant varus** (emphasis supplied) is noted to the right knee. Her **range of motion is extremely poor** (emphasis supplied). She goes from 30 degrees lacking full extension to approximately 60 degrees of flexion." (Respondent's Exhibit E). Dr. Failinger went on to conclude that, "Given that presentation, what I have reviewed in the medical records, her ambulatory status, and her description of pain, **she does appear to be a candidate for a total knee replacement as the only likely possibility of regaining some functionality and a better ambulatory status** (emphasis supplied). She is quite limited here and it is very difficult for most patients to walk with a flexion contracture of 30 degrees, which she appears to have from the limited examination she allowed me to perform." After reaching this conclusion, Dr. Failinger stated, "This appears to be the classic case of exacerbation of a severe preexisting generative joint disease." He then stated the opinion that "it is with a low probability that any new significant pathology was created by the fall, such as a major meniscus tear or worsening of her arthritis."

22. With respect to the latter opinion, the ALJ finds that Dr. Failinger was under the misimpression that the Claimant did not sustain a direct blow to her knee in her fall. Dr. Failinger specifically stated, "I have not seen the films." This is significant, because Dr. Mann's opinion that there has been a significant exacerbation and acceleration of the Claimant's arthritis **is based specifically on a comparison of x-rays** (emphasis supplied)**.**

Respondent's Independent Medical Examiner (IME) Douglas Scott, M.D.

23. Dr. Scott IS board-certified in occupational medicine. . After Dr. Mann prepared his March 25, 2015, report, Dr. Scott reviewed the records of Dr. Mann from February, 2014, and May, 2014, Dr. Chan's impairment rating and Dr. Failinger's report from March 2015.

24. According to Dr. Scott, the MRI of September 28, 2012, demonstrated a large, complex degenerative flap area of the anterior horn, body and posterior horn of the medial meniscus, which he believed were attributable to the June 19, 2012 injury. In Dr. Scott's opinion, the MRI findings not attributable to the injury included "severe arthrosis of the medial compartment, full thickness chondral loss throughout the anterior posterior weight-bearing medial thermal (*sic*) condyle and tibial plateau; degeneration and fraying of the posterior root of the lateral meniscus; Grade 3/4 chondral loss along the lateral patella femoral joint and median eminence of the patella; and the small to moderate joint effusion with synovitis.

25. According to Dr. Scott, arthrosis is essentially the loss of cartilage overlying the femur in the tibial plateau. Dr. Scott attributed this to a long-standing degenerative process. It is not an acute finding, according to Dr. Scott. In Dr. Scott's opinion, the injury of June 19, 2012, did not aggravate or accelerate the radiologist's findings in Number 2 of the MRI report of September 28, 2012. There was also degeneration of the lateral meniscus which pre-existed the accident, according to Dr. Scott. He testified that there was also, under Finding No. 5 in the MRI report of September 28, 2012, small to moderate joint effusion synovitis; this could be related, in his opinion, to osteoarthritis or to the meniscal tear.

26. Dr. Scott noted that there was a tear, disruption, or evulsion of the medial lateral meniscus which occurred as a result of trauma to the menisci from shearing, torsion or an impact injury in the flexed position. In Dr. Scott's opinion, the June 19, 2012, trauma did not accelerate the progression of the Claimant's underlying arthritic condition in the knee.

27. In Dr. Scott's opinion, the June 19, 2012, trauma did not cause the Claimant's pre-existing, but asymptomatic arthritis to become symptomatic. This opinion is contrary to ALJ Lamphere's Finding of Fact in his decision of January 24, 2014. ALJ Lamphere's finding, which was not appealed, is *res judicata* on this fact.

28. On cross-examination, Dr. Scott admitted that he had not reviewed any actual x-rays or imaging studies before writing his IME report; he did review the MRI report of September, 2012, Dr. Mann's x-ray report of September 2, 2012, and Dr. Mann's x-ray report of November 11, 2014. Dr. Scott stated that he would agree with Dr. Failinger and Dr. Mann that the appropriate treatment for the Claimant would be a total knee replacement (Hearing Transcript, p. 39, lines 2-25; p. 40, lines 1-20).

29. On cross-examination, Dr. Scott agreed that a review of the x-ray of the Claimant's knee taken on October 2, 2012, with the x-ray taken on November 11, 2104, would be necessary to determine if there had been some medial compartment loss or narrowing of the medial compartment. Dr. Scott agreed that a comparison of the October 2, 2012, x-ray taken by Dr. Mann with the x-ray taken by Dr. Mann on November 11, 2014, showed a narrowing of the medial compartment space. Dr. Scott also agreed that it could be inferred that the x-rays showed objective evidence of the progression of arthritis following trauma. Dr. Scott indicated that it was his opinion that the Claimant, at the time of her accident of June 19, 2012, had osteoarthritis in both the left knee and the right knee. He admitted that in reaching his opinions, he had made no comparison of the progression of the arthritis in the left knee with the progression of arthritis in the right knee.

30. On cross-examination, Dr. Scott indicated that if one knee has altered biomechanics, the degeneration of arthritis in that knee might accelerate more rapidly than in the other knee. Dr. Scott agreed that the Claimant had altered biomechanics in her right knee due to a large complex degenerative flap tear involving the anterior horn, body and posterior horn to the medial mensicus related to her work-related injury of June 19, 2012. Dr. Scott agreed that an individual with a meniscus tear is at risk for developing osteoarthritis down the line. Dr. Scott agreed that the delay of 14 months between the time that Dr. Mann recommended surgery until the time the Claimant was able to obtain an Order authorizing the surgery may have contributed to the progression of arthritis in her right knee.

Colorado Medical Treatment Guidelines (MTG), Rule 17, Workers' Compensation Rules of Procedure (WCRP), 7 CCR 1101-3

31. The MTG for Lower Extremity Injury, effective September 1, 2009, note on page 60 that knee meniscus injury, *e.g.* a tear, disruption, or avulsion of the medial or lateral meniscus, occurs occupationally as a result of trauma to the menisci from rotational shearing, torsion, and/or **impact injuries while in a flexed position** (emphasis supplied)**.**

32. The MTG note on page 47 that to establish the occupational relationship of aggravated knee osteoarthritis the provider must establish a change in the patient's baseline condition and a relationship to work activities including but not limited to

physical activities such as repetitive kneeling or crawling, squatting and climbing, or heavy lifting. The MTG also note that **another causative factor for aggravated osteoarthritis to consider is previous meniscus damage which predisposes a joint to degenerative changes** (emphasis supplied)**.** To establish that previous trauma causes joint degenerative changes, however, the prior injury should be at least two years from the presentation of new complaints and **there should be a significant increase of pathology on the affected side compared to the original imaging and/or to the opposite un-injured side or extremity** (emphasis supplied)."

Ultimate Findings

33. Dr. Mann's opinion that there has been a significant progression of post-traumatic degeneration of the Claimant's right knee since her accident of June 19, 2012, is supported by x-rays and her medical records. Dr. Mann's opinion that such progression was more likely than not caused by the trauma of her accident is credible, logical, and consistent with the evidentiary standards contained in the MTG.

34. While Dr. Mann was inconsistent in expressing his opinion he ultimately reached the right answer. It is otherwise difficult to explain the dramatic deterioration in Claimant's right knee condition in such a short time based only on speculation concerning a normal progression of arthritis. To accept the "natural progression" theory, the ALJ would be required to believe that some extraordinary, unknown factor intervened to aggravate and accelerate the Claimant's right knee degeneration more quickly and seriously than the left knee degeneration. When dealing in the realm of reasonable probabilities, the ALJ infers and finds that it is more reasonably probable that the admitted trauma of June 19, 2012, is the known factor that aggravated and accelerated the need for a total replacement of the right knee.

35. The ALJ finds the ultimate opinion of Dr. Mann on causality (concerning the need for a total right knee replacement) more persuasive and credible than the opinion of IME Dr. Scott for the following reasons: Dr. Mann, an orthopedic surgeon who has dealt extensively with knees, has more specific expertise concerning knee surgery than Dr. Scott; Dr. Mann's ultimate opinion is more consistent with the totality of the evidence and plausible inferences to be drawn there from; and, Dr. Mann has dealt more extensively with the Claimant's medical case than Dr. Scott.

36. Between conflicting medical opinions, the ALJ makes a rational choice to accept the ultimate opinion of Dr. Mann concerning the causal relatedness of the total right knee replacement, and to reject the opinion of IME Dr. Scott.

37. The Claimant has proven, by a preponderance of the evidence that the Claimant's present need for a total right knee replacement has been proximately caused by an aggravation and acceleration of the admitted, compensable right knee injury of June 19, 2012.

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 ultimate opinion of Dr. Mann on causality (concerning the need for a total right knee replacement) was more persuasive and credible than the opinion of IME Dr. Scott for the following reasons: Dr. Mann, an orthopedic surgeon who has dealt extensively with knees, has more specific expertise concerning knee surgery than Dr. Scott; Dr. Mann's ultimate opinion is more consistent with the totality of the evidence and plausible inferences to be drawn there from; and, Dr. Mann has dealt more extensively with the Claimant's medical case than Dr. Scott.

Substantial Evidence

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

Causal Relatedness of Present need for Total Right Knee Replacement

c. In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the Claimant has established that the present need for a total right knee replacement is directly and proximately linked to the original, admitted right knee injury of June 19, 2012.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer*

v. Indus. Claim Appeals.Office, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has satisfied her burden with respect to the causal relatedness of the present need for a total right knee replacement.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of all medical treatment for the Claimant's admitted right knee injury of June 19, 2012, including the costs of the total right knee replacement, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of June 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 June 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

Whether Claimant has overcome the Division Independent Medical Examination (DIME) physician's opinion of maximum medical improvement (MMI) and 0% whole person permanent impairment by clear and convincing evidence.

Whether Claimant is entitled to temporary indemnity benefits from June 17, 2014 and ongoing.

Whether the medical treatment recommended by Dr. Healey and Dr. Lichtenberg is reasonable, necessary, and causally related to Claimant's October 6, 2012 work injury.

FINDINGS OF FACT

1. Claimant is a 42 year-old female who worked for Employer as a line cook from 2008 until her date of injury.

2. On October 6, 2012, close to 1:30 a.m., Claimant was cleaning in Employer's kitchen underneath the "line." The "line" is a long metal shelf or counter, approximately five feet tall. Claimant was cleaning under the counter when she raised her head and hit her head on the underside of the "line." Claimant fell backwards, landing on her buttocks and back. Claimant did not lose consciousness.

3. After the incident, Claimant worked the remainder of her shift, between 30 minutes and 90 minutes (varied reports provided by Claimant). She then drove herself home and did not appear confused or disoriented when speaking with her husband after arriving home.

4. Later that day, Claimant sought treatment at approximately 1:00 p.m. at NextCare Urgent Center. *See* Exhibits S, 14.

5. At NextCare, Claimant was evaluated by Debra Salter, M.D. Claimant reported that she hit the top of her head and fell backward at work with no loss of consciousness. Claimant reported she had a moderate headache and pain in the sacrum and coccyx. Dr. Salter noted an unremarkable exam and diagnosed buttock contusion and headache. *See* Exhibits S, 14.

6. Dr. Salter requested and Claimant underwent X-rays of her lumbar spine that showed normal age related degenerative changes. The X-rays showed moderate

degenerative spondylosis of the lumbar spine and multi-level degenerative disc space narrowing, most severe at L4-L5 and L5-S1. No compression fracture or spondylolisthesis was found. *See* Exhibits S, 14.

7. On October 8, 2012 Claimant returned to NextCare and was evaluated by PA-C Marzena Kaczmarczyk. Claimant reported her head pain was getting worse and reported dizziness and double vision. Claimant was sent directly to the emergency department at the Medical Center of Aurora due to her reported symptoms. At the emergency department, Claimant underwent a head CT scan that was negative. *See* Exhibits S, 14.

8. Claimant was evaluated by various providers at NextCare from October 11, 2012 through November 28, 2012. Claimant subjectively reported continued back pain and headache pain that was not improving. Claimant's gait was noted to be normal throughout treatment. Claimant initially reported no radiation of her back pain, and later radiation into her right leg. Claimant's head, ears, eyes, nose, and throat (HEENT) examinations were all normal throughout treatment. Claimant was referred for a neurological examination and was referred to a Level II provider for management. *See* Exhibits S, 14.

9. On December 17, 2012, Braden Reiter, D.O. took over Claimant's care and became her authorized treating provider (ATP).

10. Respondents admitted liability for the October 6, 2012 incident and Respondents have paid for extensive medical treatment and diagnostic testing following the incident.

11. Approximately one month after taking over Claimant's care, Dr. Reiter referred Claimant for psychiatric treatment. Dr. Reiter also noted at that time that he had a guarded prognosis for Claimant's recovery due to multiple issues where her subjective complaints were beyond objective findings. Dr. Reiter believed there were some secondary gain issues, but noted he would continue to work through the specialists' evaluations. *See* Exhibits F, 13.

12. Despite his concern in January of 2013 of secondary gain issues, Dr. Reiter referred Claimant to multiple specialists for evaluation. Based on subjective complaints Claimant reported, the specialists to whom Claimant was referred ordered and performed significant testing to rule out possible conditions.

13. The testing included: CT of her orbits that was normal; MRI of her lumbar spine that showed normal age related mild degenerative disc disease; MRI of her cervical spine that showed normal and minimal age related degenerative changes; MRI of the brain that was normal; and EMG and nerve testing that was normal and showed no evidence of cervical radiculopathy. *See* Exhibits F, 13.

14. Dr. Reiter also referred Claimant for a neurological evaluation. *See* Exhibits F, 13.

15. On January 2, 2013 Claimant was evaluated by Lynn Parry, M.D. Dr. Parry opined based on Claimant's subjective reports that Claimant most likely had suffered a vestibular concussion. Dr. Parry sent Claimant for vestibular testing which showed no abnormalities or evidence of vestibular injury and showed no perilymph fistula. Dr. Perry found no other neurological abnormalities. *See* Exhibits L, 22.

16. On January 21, 2013 Claimant underwent a psychological pain evaluation performed by Rebecca Hawkins, Ph.D. Claimant was assisted by a Spanish language interpreter. Testing performed by Dr. Hawkins suggested Claimant was over reporting and exaggerating her somatic memory and cognitive complaints. Dr. Hawkins opined that symptom magnification could be interfering with Claimant's recovery and that Claimant's presentation was not consistent with the natural history of concussive or mild traumatic brain injury. Dr. Hawkins indicated she wished to rule out malingering versus factitious disorder, but unless there was clear evidence of either, opined that the Claimant would benefit from a course of individual cognitive- behavioral therapy and biofeedback. *See* Exhibits K, 18.

17. Claimant underwent six psychotherapy sessions with Dr. Hawkins but did not yield any subjective or objective benefit from the sessions. Dr. Hawkins did not recommended additional psychotherapy sessions. Dr. Hawkins also opined that transferring care to a different psychologist would not result in further improvement or benefit. *See* Exhibits K, 18.

18. On April 15, 2013 Claimant underwent an Independent Medical Evaluation (IME) performed by Lawrence Lesnak, D.O. Claimant reported to Dr. Lesnak that Dr. Reiter had recently hit her head three times and made her dizzy. She also reported that Dr. Perry told her recently that she had a fracture in her hip. The medical records do not support Claimant's statements. *See* Exhibits B, 9.

19. On examination, Dr. Lesnak noted Claimant exhibited diffuse pain behaviors and non-physiologic findings. She exhibited diffuse entire body cog wheeling, exhibited an inability to stand or walk without assistance from her husband, and appeared to volitionally shake her entire body. Dr. Lesnak noted that examination was difficult at best due to Claimant's unwillingness to participate. When performing rotator cuff testing, Claimant appeared to volitionally almost fall off the stool. Dr. Lesnak opined that Claimant's total body shaking during evaluation made no sense from an anatomic or physiologic standpoint. *See* Exhibits B, 9.

20. Dr. Lesnak opined that Claimant suffered a fairly trivial incident at work with minor initial symptoms and objective findings that dramatically worsened and became much more diffuse within a month or so. Dr. Lesnak opined that Claimant now had a multitude of subjective complaints without any objective findings. Dr. Lesnak opined that Claimant exhibited extensive and diffuse pain behaviors and non-

physiological findings throughout the examination and that a psychological evaluation suggested factitious disorder or malingering. Dr. Lesnak noted despite numerous tests and treatment, Claimant subjectively reported that her symptoms had worsened. *See* Exhibits B, 9.

21. Dr. Lesnak opined that no further diagnostic testing or interventional treatments whatsoever would be necessary or related to the occupational injury. Dr. Lesnak opined that Claimant's subjective complaints were completely unreliable. Therefore, he opined that any recommended treatment or further testing must be based on objective findings and opined that currently Claimant had no objective findings that correlated with her ongoing symptomatology or that were related to the occupational injury. Dr. Lesnak opined that Claimant was clearly at maximum medical improvement (MMI) and that she qualified for no permanent functional impairment related to her injury. *See* Exhibits B, 9.

22. Dr. Lesnak testified by deposition consistent with his IME report. Dr. Lesnak opined that Claimant had progressive, bizarre symptoms that could not be explained even after numerous diagnostic tests. Dr. Lesnak opined that even someone with a severe neurological disorder would not present in the way Claimant presented. He opined that the bump of Claimant's head at work, as she described, was a fairly trivial event while changing positions and standing up a few inches striking an object that didn't move. He opined that the bump of the head was not enough to cause intracranial trauma. He further opined that Claimant's facial swelling on the left, and excessive tearing of her left eye does not make sense as caused by the work injury because there was no soft-tissue injury to the face, vascular compromise, lymphatic compromise, ocular problem, or brain-stem problem caused by the bump to her head.

23. Dr. Lesnak's opinions are found credible and persuasive. His opinions are consistent with other evaluating physicians and are supported by the lack of objective findings that would be consistent with the mechanism of injury Claimant described.

24. On April 22, 2013 Claimant underwent an IME with Stephen A. Moe, M.D. Dr. Moe opined that somatization and excessive illness behavior contributed significantly to the physical symptoms that Claimant attributes to the work injury. Dr. Moe further opined that Claimant's somatization and excessive illness behavior were not caused by the work injury. *See* Exhibits C, 10.

25. Dr. Moe testified by deposition consistent with his IME report. Dr. Moe opined that Claimant's escalation of symptoms was inconsistent with post-concussive syndrome, where symptoms will typically present within hours to days. Dr. Moe further opined that the symptoms of trigeminal autonomic cephalgia (TAC) did not present until approximately five weeks after the work injury, that it was unclear if TAC was work related, and that Dr. Lichtenberg had jumped to a conclusion that TAC was work related and had caused Claimant to have a litany of conditions that were thus also related to the work injury. Dr. Moe further opined that even if TAC were work related, TAC could

only explain some of Claimant's symptoms and not the majority of the progressive bizarre symptoms that she displayed, and that Dr. Lichtenberg was incorrect in attributing all of her bizarre and progressive symptoms to the work injury or to TAC.

26. Dr. Moe's opinions are also found credible and persuasive, are supported by the medical records, and are consistent with several other treating providers.

27. On May 29, 2013 Claimant was evaluated by neurologist Jon Scott, M.D. Claimant reported to Dr. Scott symptoms including memory decline, confusion, reading problems, headaches, depression, insomnia, fatigue, weakness, double vision, blurred vision, speech difficulty, balance problems, shaking and tremors, gait problems, dizziness, numbness, tingling, neck pain, arm pain, back pain, leg pain, bladder incontinence, constipation, and leg swelling. Dr. Scott opined that Claimants level of injury would not cause her subjective and diffuse neurological symptoms. Dr. Scott recommended against further neurologic workup and opined that Claimant's symptoms were not related to the work incident. *See* Exhibits A, J.

28. On June 24, 2013 Claimant underwent an IME with Alan Lichtenberg, M.D. Dr. Lichtenberg made the following work related injury diagnoses: abnormal diagnostics of EMG/NCV of the upper extremities showing evidence of mild bilateral cervical paraspinal muscles compatible with early root irritation; abnormal lumbar spine x-rays showing moderate degenerative spondylosis with disc space narrowing at multiple levels, most severe at L4-5 and L5-S1; post concussion syndrome; post traumatic chronic daily mixed muscle tension and migraine headaches; medication overuse headaches; trigeminal autonomic cephalgia; conversion disorder; astasia-abasia; permanent aggravation of pre-existing lumbar spine degenerative disease; TMJ symptoms due to headache and trigeminal autonomic cephalgia. Dr. Lichtenberg opined that Claimant was not at MMI for the work injury. *See* Exhibit 8.

29. On August 26, 2013 Claimant underwent a Neurologic IME with Marc Treihaft, M.D. Dr. Treihaft gave an impression of concussion with post-concussive syndrome and short-acting unilateral neuralgiform headache with conjunctival injection and tearing. Dr. Treihaft also opined that Claimant had a non-physiologic examination. Dr. Treihaft recommended carotid ultrasound testing to rule out dissection, which Claimant underwent and was negative. Dr. Triehaft noted that Claimant's headaches were improving and did not recommend any further headache treatment, but noted a referral to a headache clinic could be completed if the headaches did not continue to improve. Dr. Triehaft did not perform a causation analysis. *See* Exhibits D, 23.

30. On March 19, 2014 Claimant was evaluated by neurologist Richard Steig, M.D. Dr. Steig opined that Claimant had vascular headaches with some evidence of autonomic dysfunction in the left facial area and conversion or factitious disorder. Dr. Steig opined that there were no physical injuries that resulted from Claimant's work injury in October of 2012. He noted Claimant had undergone very thorough evaluations by multiple specialists with the only objective findings being unrelated imaging and unrelated left Horner's syndrome. He opined the left Horner's syndrome went along

with the diagnosis of vascular headaches and autonomic dysfunction in the left facial area, which was not work related. He recommended Claimant follow up with Dr. Treihaft for treatment of the non-work related vascular headaches and autonomic dysfunction. He opined that Claimant had no physical impairment and was at MMI for the October 2012 injury. *See* Exhibits I, 27.

31. Dr. Steig opined that the constellation of Claimant's symptoms, reviewed with the nature of injury and significant absence of objective findings lended credence to the psychiatric diagnosis of factitious disorder and/or conversion disorder. Dr. Steig opined that further physical testing and treatment would only solidify Claimant's problems. *See* Exhibits I, 27.

32. On June 17, 2014, Dr. Reiter opined that Claimant was at MMI with zero percent impairment. *See* Exhibits F, 13.

33. On June 18, 2014 Claimant underwent an additional neurological evaluation with Alexander Zimmer, M.D. Dr. Zimmer gave an impression of closed head injury in October 2012 that resulted in concussion and post concussion headache syndrome. Dr. Zimmer opined that the intermittent left facial pain with tearing in the left eye was consistent with TAC and opined that this type of facial pain is usually idiopathic. Dr. Zimmer opined that several of Claimant's symptoms including tremulousness, gait abnormalities, and dramatic loss of position sense noted on examination may be on a psychosomatic basis. *See* Exhibits G, 26.

34. On July 14, 2014 Claimant underwent an additional neurological evaluation with Patrick Bushard, M.D. Dr. Bushard opined that Claimant's motor findings and weakness appeared to be if not completely, at least partially psychosomatic in nature given the physical exam findings. He opined that her headaches appeared to be posttraumatic headache with superimposed TAC versus cluster headache. *See* Exhibit 28.

35. On September 19, 2014 Alan Lichtenberg, M.D. performed a medical record review of this case. Dr. Lichtenberg made the following work related injury diagnoses: abnormal diagnostics of EMG/NCV of the upper extremities showing evidence of mild bilateral cervical paraspinal muscles compatible with early root irritation; abnormal lumbar spine x-rays showing moderate degenerative spondylosis with disc space narrowing at multiple levels, most severe at L4-5 and L5-S1; post concussion syndrome; post traumatic chronic daily mixed muscle tension and migraine headaches; medication overuse headaches; trigeminal autonomic cephalgia; conversion disorder; astasia-abasia; permanent aggravation of pre-existing lumbar spine degenerative disease; TMJ symptoms due to headache and trigeminal autonomic cephalgia. Dr. Lichtenberg opined that the October 6, 2012 injury was the proximate cause of all the above diagnoses. *See* Exhibit 8.

36. Dr. Lichtenberg disagreed with the opinions of Dr. Steig and believed Dr. Steig missed the diagnosis of permanent aggravation of pre-existing cervical and

lumbar spondylosis, and was incorrect on a zero permanent impairment rating. Dr. Lichtenberg also disagreed with the opinions of Dr. Reiter and believed Dr. Reiter was incorrect on a zero permanent impairment rating. *See* Exhibit 8.

37. Dr. Lichtenberg opined that Claimant was not at MMI and that Claimant should have further treatment including acupuncture, injection in the lower occipital trigger point at least twice, other injections for spinal pain, a repeat cervical MRI, mental and behavioral counseling by a Spanish speaking female, and referral to a headache clinic. *See* Exhibit 8.

38. Dr. Lichtenberg opined that any provider who states that Claimant should receive no permanent impairment rating is absolutely incorrect. Dr. Lichtenberg opined that Claimant qualified for post-concussion headaches, mental and behavioral disorders, and permanent aggravation of pre-existing cervical lumbar spine disease. *See* Exhibit 8.

39. Dr. Lichtenberg's opinions are a difference of opinion from Dr. Dillon, Dr. Lesnak, Dr. Reiter, Dr. Moe, Dr. Scott, and Dr. Steig. Dr. Lichtenberg's opinions are not found as credible or persuasive as several opinions by other treating physicians who opine that Claimant's injury was more trivial in nature and would not cause the extent of her complaints or symptoms.

40. On November 20, 2014 Jade Dillon, M.D. performed a Division Independent Medical Examination (DIME). Dr. Dillon opined that Claimant reached MMI on June 17, 2014 and that Claimant had a 0% permanent impairment rating as a result of the October 6, 2012 work injury. *See* Exhibits A, 6.

41. At the DIME evaluation, Dr. Dillon reviewed multiple medical records and diagnostic tests including those from several neurologists. Dr. Dillon noted Claimant's continued multiple complaints including constant daily headaches, pain behind her left eyes, redness and watering of the eye, and diffuse all over body pain. *See* Exhibits A, 6.

42. Dr. Dillon agreed with Dr. Reiter as to the date of MMI. Dr. Dillon also agreed with Dr. Steig's opinion that Claimant had vascular headaches with some evidence of autonomic dysfunction in the left facial area. Dr. Dillon agreed with Dr. Steig that the vascular headaches and autonomic dysfunction were not work related. Dr. Dillon opined, similar to Dr. Lesnak and Dr. Scott, that it was not reasonable given the nature and degree of the head injury suffered at work, that Claimant would have such severe unremitting symptoms, unimproved after two years. She also agreed that there was an element of conversion or factitious disorder affecting all symptoms. Dr. Dillon opined that Claimant's headaches and autonomic dysfunction in the left facial area was not a ratable condition and was not work related. *See* Exhibits A, 6.

43. Dr. Dillon opined that Claimant's neck, low back, and lower extremity symptoms showed only subjective complaints with no correlation on diagnostic imaging.

Dr. Dillon opined that complaints in these areas represented at least a gross symptom magnification if not a frank factitious disorder. Dr. Dillon opined that there was no ratable condition for any of these pain complaints. *See* Exhibits A, 6.

44. Dr. Dillon opined that Claimant's shoulder complaints were not related to the work injury in October of 2012. She opined that there was no injury to the shoulders at the time of the occupational injury and that the symptoms appear to be part of the total body pain syndrome. Dr. Dillon opined there was no ratable condition for the shoulders. *See* Exhibits A, 6.

45. Dr. Dillon opined that Claimant's TMJ complaints were not related to the work injury in October of 2012. She opined that the onset of symptoms of TMJ were subsequent to the injury and further opined that there was no TMJ abnormality as Claimant's intra-incisor opening was 35 mm on examination which is considered normal per clinical guidelines. Dr. Dillon opined there was no ratable condition for TMJ. *See* Exhibits A, 6.

46. Dr. Dillon opined that Claimant's visual complaints were not related to the work injury in October of 2012, and additionally, that there was no identifiable abnormality of the eyes shown by testing, and that there was no ratable condition for vision abnormality. *See* Exhibits A, 6.

47. Dr. Dillon's opinions are found credible and persuasive. Dr. Dillon issued her opinions after a total review of the medical records and her opinions are supported by the opinions of Dr. Lesnak, Dr. Moe, Dr. Steig, Dr. Scott and Dr. Reiter. It is not clear that Dr. Dillon erred in her opinions, especially given the support by multiple other treating physicians.

48. On December 31, 2014 Respondents filed a Final Admission of Liability (FAL) consistent with DIME physician Dr. Dillon's report. The FAL admitted for a 0% permanent impairment rating, and provided that Claimant had reached MMI on June 17, 2014. *See* Exhibit 5.

49. On January 15, 2015 Edwin Healey, M.D. performed an examination of Claimant, and provided a provisional impairment rating along with a review of Claimant's case. Dr. Healy noted Claimant reported 10/10 pain to him at examination and he noted Claimant's subjective report of severe debilitating pain. Dr. Healey opined that Claimant was not at MMI and that she needed evaluation and treatment recommended by Dr. Ghazi and Dr. Lichtenberg. Dr. Healey opined that Claimant had post-traumatic headaches caused by her head and neck trauma that she sustained at work on October 6, 2012. He provided a provisional impairment rating of 45% whole person for episodic neurological disorder of such severity as to interfere moderately with the activities of daily living. *See* Exhibit 7.

50. Dr. Healey opined that Claimant's current work related diagnoses were: status post concussion with brief loss of consciousness and post concussive syndrome

manifested by complaints of mild cognitive dysfunction, vertigo, imbalance, and chronic headaches; intermittent left-sided Horner's syndrome with ptosis, increased sweating on the left side of the fact, and conjunctival redness and eye tearing; left occipital nerve neuralgia/neuritis as a cause of post traumatic headaches and trigeminal vascular autonomic cephalgia, rule left C2-C3 facet arthropathy as a cause of her headaches and occipital neuritis; chronic cerviocobrachial myofascial pain with associated autonomic dysfunction; adjustment disorder with depression and anxiety; chronic daily headaches with muscle tension and vascular components; and chronic throacoloumbar pain and coccydynia. *See* Exhibit 7.

51. Dr. Healey noted that Claimant appeared to have a significant psychological overlay, presenting with non-phsysiologic neurological findings including astasia/abasia. He recommended further treatment that included, amongst other things, left C2-C3 facet blocks, and evaluation and treatment with a female Spanish speaking psychologist. *See* Exhibit 7.

52. Dr. Healey offered an opinion that differed from Dr. Dillon. However, Dr. Healey did not address Dr. Dillon's DIME report and Dr. Healey did not opine as to how Dr. Dillon erred in her permanent impairment or MMI assessment.

53. Although many physicians have noted symptoms in Claimant's left eye and cheek area that are consistent TAC, Claimant has presented insufficient evidence to show by clear and convincing evidence that TAC is causally related to her work incident.

54. Claimant is not found credible or persuasive. Claimant initially reported symptoms following her work injury that dramatically increased after approximately one month of treatment without an objective explanation for the increase. This presentation is inconsistent with post concussive syndrome as noted by Dr. Moe and Dr. Hawkins. Further, multiple physicians have opined that Claimant has non-physiological exams and/or psychosomatic findings including: Dr. Lesnak, Dr. Moe, Dr. Hawkins, Dr. Triehaft, Dr. Bushard, Dr. Zimmer, Dr. Ghazi, Dr. Steig, and Dr. Healey. Claimant has exaggerated symptoms on many occasions. Her subjective reports thus cannot be relied upon to any degree of certainty.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). 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 physician's opinions

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's opinions are incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a Division IME physician's opinion, "there must be evidence establishing that the Division IME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (I.C.A.O., Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the Division IME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (I.C.A.O., July 19, 2004); *see also Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (I.C.A.O., Nov. 17, 2000). Whether or not a party overcomes the Division IME is a question of fact for determination by the ALJ. § 8-43-301(8), C.R.S.; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186

(Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998).

Here, Claimant has failed to meet her burden to show by clear and convincing evidence that DIME physician Dr. Dillon erred by finding Claimant at MMI and finding that Claimant suffered no permanent impairment causally related to the work injury. After review of voluminous medical records, diagnostic testing, and multiple physicians' opinions and treatments Dr. Dillon opined that Claimant had no impairment related to the October 2012 work injury. Although Claimant suffers from likely TAC, Dr. Dillon was able to review the reports of multiple neurologists, some who believed TAC to be work related and some who believed TAC was not work related. Dr. Dillon, after review, determined and opined that Claimant did not suffer from any condition related to her October 2012 work injury. In doing so, Dr. Dillon agreed with some of the physicians who opined similarly. Dr. Moe thought it was unclear as to whether TAC was work related. Dr. Lesnak and Dr. Scott reviewed the trivial nature of the bump to Claimant's head at work and opined that such a bump would not cause such significant symptoms as Claimant was presenting with and opined that Claimant's symptoms were not related to the work injury. Dr. Steig opined that although Claimant had headaches that were vascular in nature with evidence of left autonomic dysfunction and possible Horner's syndrome, the headaches and autonomic dysfunction were not causally related to the work injury. The opinions of Dr. Moe, Dr. Lesnak, and Dr. Scott support the DIME physician's opinion.

Claimant argues and points to various places in the medical records that show support for a diagnosis of TAC. The ALJ agrees that these records exist and that Claimant may have TAC. However, even if Claimant suffers from TAC, Claimant has failed to show a causal connection between her TAC and her work injury by clear and convincing evidence. Neither Dr. Healey nor Dr. Lichtenberg have persuasively opined as to how Dr. Dillon erred in assigning zero impairment rating. Although Dr. Healey and Dr. Lichtenberg clearly disagree with Dr. Dillon, their opinions are merely a difference of opinion as to what complaints or what conditions are causally related to the work injury. The ALJ concludes that the more persuasive opinions, as a whole, come from Dr. Reiter, Dr. Lesnak, Dr. Hawkins, Dr. Steig, and DIME physician Dr. Dillon that Claimant is at MMI for the October 2012 injury, that Claimant suffered no permanent impairment as a result of the work injury, and that the mechanism of injury would not cause such diffuse neurologic complaints. As noted by neurologist Dr. Zimmer, TAC is a condition that is usually idiopathic with unknown causes. Dr. Dillon concurred with Dr. Steig's opinion that Claimant's vascular headaches and left sided autonomic symptoms were not work related. It is clear from a review of the evidence and the many physician opinions in this case that it is difficult to identify what causes TAC, difficult to diagnose TAC, and unclear as to whether TAC or a different variety of autonomic dysfunction is Claimant's true diagnosis. The eventual diagnosis of TAC by some physicians in this case and the diagnostic testing was greatly complicated by Claimant's presentation with other exaggerated and non-explainable symptoms. Here, Claimant has shown that several physicians disagree with whether or not her mechanism of injury could cause TAC. However, she has not shown more than this difference in opinion. Claimant has

therefore not met her burden by clear and convincing evidence to show the DIME physician's opinions were clearly erroneous and the DIME physician's opinions have not been overcome.

Further, as found above, Claimant is not a credible witness. Her subjective reporting cannot be relied upon to any degree of certainty. Claimant over-reports, magnifies, and intentionally displays symptoms that have do not have any objective basis. These exaggerated or false symptoms include volitional shaking during examination, volitional cog-wheeling during examination, purporting to almost fall off a stool during examination, and numerous whole body complaints that are inconsistent with significant diagnostic testing. Claimant also reported that her ATP hit her on the head, that she cannot walk without assistance, and that a neurologist told her she had a broken hip which is not supported by the medical records. Throughout the treatment of the claim, Claimant has presented with numerous inconsistencies noted by multiple physicians. Therefore, although Claimant may indeed suffer from headaches and/or TAC, Claimant's testimony that the TAC related symptoms began shortly after the work injury also cannot be relied upon. The physicians who have opined that TAC is work related do so in part based on Claimant's subjective description of injury, description of symptoms, and Claimant's subjective report of when the onset of TAC symptoms began. Although objective support (facial swelling, left eye tearing) for TAC exists, the correlation between TAC and her work injury is based in part upon her reporting which cannot be found reliable in light of her credibility.

The opinion of DIME physician Dr. Dillon that Claimant is at MMI with no permanent impairment rating for the following conditions is also found persuasive and has not been overcome by clear and convincing evidence: Claimant's neck complaints; Claimant's low back complaints; Claimant's lower extremity complaints; Claimant's shoulder complaints; Claimant's TMJ complaints; Claimant's visual complaints; and psychological impairment. The diagnostic imaging pertaining to the above complaints has not shown any objective findings that are abnormal or that could be causally linked to Claimant's work injury. Claimant has not shown that any additional treatment is likely to improve any of the above conditions and has not shown that DIME physician Dr. Dillon erred by finding her at MMI with no permanent impairment for any of these conditions.

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. § 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, the claimant reached MMI on June 17, 2014 and she has failed to overcome DIME physician Dr. Dillon's opinion of MMI. As such, the claimant has failed to prove that she is entitled to temporary total disability benefits from June 17, 2014 and ongoing.

Medical Benefits

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

Claimant requests ongoing psychological and diagnostic/therapeutic treatment as recommended by Dr. Healey and Dr. Lichtenberg. This treatment was recommended to get Claimant to MMI. However, as found above, Claimant was at MMI as of June 17, 2014 and requires no further treatment to reach MMI status. Therefore, the requested treatment aimed at getting her to MMI is not found reasonable or necessary. The more persuasive opinion is that no further treatment is necessary for Claimant to reach MMI for any work related condition. Therefore, the medical care recommended by Dr. Healey and Dr. Lichtenberg including but not limited to psychological treatment with a Spanish speaking psychologist, and further diagnostic testing and injections is not reasonable, necessary, or causally related to Claimant's work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome the DIME physician's opinion that she reached MMI for her October 6, 2012 work injury on June 17, 2014 by clear and convincing evidence.

2. Claimant has failed to overcome the DIME physician's opinion that she suffers from a 0% permanent impairment rating as a result of her October 6, 2012 work injury by clear and convincing evidence.

3. As Claimant reached MMI on June 17, 2014 she is not entitled to temporary indemnity benefits from June 17, 2014 and ongoing.

4. Claimant is not entitled to the medical treatment recommended by Dr. Healey and Dr. Lichtenberg and the treatment recommended is not reasonable, necessary, or causally related to Claimant's October 6, 2012 work injury.

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

DATED: June 5, 2015

/s/ Michelle E. Jones

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that neuropsychological testing and cognitive therapy in Spanish are reasonable, necessary and causally related to her admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer caring for residents in an Alzheimer's facility. She suffered three independent work-related injuries during the course and scope of her employment with Employer. On September 18, 2012 Claimant slipped and fell in an area where air freshener had been sprayed. Claimant struck her head and the right side of her body in the fall. On November 18, 2012 a resident grabbed and violently shook Claimant. Finally, on December 2, 2012 a resident punched, hit and shook Claimant. All three incidents were consolidated for purposes of hearing. As a result of the accidents Claimant has reported headaches, memory loss and dizziness

2. After initially obtaining emergency medical care Claimant received treatment from Authorized Treating Physician (ATP) Franklin Shih, M.D. on January 2, 2013. Claimant reported "headaches and memory problems as her primary concern" as well as a variety of musculoskeletal complaints. Dr. Shih noted that, although Claimant reported significant problems with attention, concentration and learning, it was unlikely that ongoing cognitive deficits were related to her industrial injuries. However, he remarked that if Claimant's cognitive complaints continued he might want her to visit a neuropsychologist.

3. Claimant subsequently returned to Dr. Shih for an examination. He noted Claimant's continuing memory concerns. However, Dr. Shih stated that ongoing memory complaints would be quite atypical and he "would not expect any significant cognitive sequeale in relationship to her fall."

4. Claimant transferred her medical care to ATP W. Rafer Leach, M.D. On January 16, 2013 Claimant visited Dr. Leach for an examination. Dr. Leach diagnosed Claimant with a concussion, a posttraumatic headache, postconcussion syndrome and vertigo. He requested x-rays, physical therapy, chiropractic care, vestibular therapy, injections in the SI joint and a neurological evaluation.

5. Claimant subsequently received neurological treatment with J. Bradley Gibson, M.D. After reviewing Claimant's diagnostic studies he summarized that Claimant suffered from postconcussive syndrome manifested by cognitive dysfunction and associated personality changes. On August 13, 2014 Dr. Gibson discharged Claimant from care because "there is nothing else that I have to offer her from a

neurologic standpoint at this time." Claimant continued to complain of headaches, post concussive symptoms, dizziness and chronic myofascial pain syndrome.

6. On August 5, 2014 Claimant underwent an independent medical examination with Lawrence Lesnak, M.D. Dr. Lesnak concluded that there were no objective findings to support Claimant subjective symptoms. He also determined that a CT scan and brain MRI/MRAs did not correlate with her subjective complaints. Moreover, it was medically inconsistent for Claimant's symptoms from a cerebral concussion or mild closed head injury to have worsened five or six weeks after her injury. Finally, Claimant failed to exhibit signs of improvement over a two year course of treatment. Dr. Lesnak thus concluded that Claimant had reached Maximum Medical Improvement (MMI) without any objective injury. He recommended pain psychology counseling as part of a medical maintenance regimen.

7. On August 11, 2014 and September 8, 2014 clinical psychologist Dennis A. Helffenstein, Ph.D. interviewed Claimant. Claimant had been referred for neuropsychological screening. However, Dr. Helffenstein did not undertake the testing because Claimant suffered a high level of chronic pain, significant fatigue and depression. He noted that the preceding factors would negatively impact Claimant's performance on the neuropsychological screening. Dr. Helffenstein explained:

> [a]t some point in the future, when and if [Claimant's] pain, depression and fatigue are under better control, I would advise against neuropsychological testing utilizing the English language. If at some point formal testing is required to document her cognitive status, it would be possible to administer the testing utilizing a translator. An alternate possibility would be to find a Spanish-speaking neuropsychologist who can administer the testing in her native language.

Dr. Helffenstein also noted that he agreed with Dr. Leach that Claimant warranted cognitive rehabilitation services.

8. On October 16, 2014 Claimant underwent a psychological evaluation with Lupe Ledezma, Ph.D. Dr. Ledezma concluded that Claimant's psychological diagnoses of Major Depression and Generalized Anxiety were related to her industrial injuries. She recommended "neuropsychological testing in Spanish to determine the presence of a neurocognitive disorder and provide treatment recommendations." Dr. Ledezma also remarked that "[i]t is possible that cognitive retraining may be beneficial in improving her ability to learn how to compensate for her cognitive issues."

9. On November 10, 2014 Claimant returned to Dr. Ledezma for an evaluation. Dr. Ledezma reiterated her request for a neuropsychological battery in Spanish and a course of cognitive retraining to address Claimant's complaints.

10. On December 8, 2014 Dr. Lesnak conducted a review of Dr. Ledezma's records. He commented that Claimant's underlying psychosocial factors were influencing her recovery and Claimant did not suffer any physiologic or anatomic

conditions from the industrial injuries. Moreover, Dr. Lesnak explained that cognitive retraining was not warranted because Claimant did not have any symptoms related to a closed head injury and there were no intracranial abnormalities noted in multiple imaging studies.

11. On December 12, 2014 Dr. Ledezma responded to a letter from Respondents' counsel. Dr. Ledezma maintained that neuropsychological testing and cognitive therapy would be reasonable, necessary and related to Claimant's industrial injuries. She explained that Claimant's psychological state had improved but she continued to complain of neurocognitive symptoms.

12. Claimant testified at the hearing in this matter. She remarked that she continues to experience memory problems, balance concerns, dizziness, confusion, headaches and motor control issues on the right side of her body.

13. On April 27, 2015 Dr. Lesnak testified through a post-hearing evidentiary deposition in this matter. He maintained that Claimant's subjective reports are not supported by the medical records. Dr. Lesnak explained that Claimant initially improved following her September 19, 2012 industrial injury but her symptoms began to worsen after October 24, 2012 without explanation. He remarked that the preceding chronology was inconsistent with the typical head injury because symptoms are generally worse at the outset but improve over time. Dr. Lesnak commented that Dr. Shih shared his concerns regarding inconsistent subjective complaints based on the mechanism of injury. He determined that neuropsychological testing would not provide additional information because Claimant simply suffered a mild closed head injury and there are a number of psychosocial factors impacting her condition. Dr. Lesnak stated that cognitive therapy was not warranted because Claimant did not suffer a severe head injury and she has no documented objective findings of a cognitive deficiency. He summarized that neuropsychological testing and cognitive therapy did not constitute reasonable, necessary and related treatment because Claimant did not exhibit evidence of a cognitive deficit or underlying brain disturbance.

14. Dr. Lesnak clarified that neither the November 18, 2012 nor the December 2, 2012 events was responsible for Claimant's worsening condition. Dr. Lesnak noted that Claimant reported worsening symptoms before either event and shaking an adult would not cause a brain injury. He also commented that Claimant had not mentioned either event during his evaluation and the medical records did not reflect that the events caused any aggravation or worsening of symptoms.

15. Claimant has demonstrated that it is more probably true than not that neuropsychological testing and cognitive therapy in Spanish are reasonable, necessary and causally related to her admitted industrial injuries. Subsequent to her industrial injuries Claimant reported headaches, memory concerns and other cognitive deficits. Claimant consistently maintained her complaints during the course of medical treatment. In January 2013 Dr. Leach diagnosed Claimant with a concussion, a posttraumatic headache, postconcussion syndrome and vertigo. He requested x-rays, physical therapy, chiropractic care, vestibular therapy, injections in the SI joint and a

neurological evaluation. By summer 2014 psychologist Dr. Helffenstein could not undertake neuropsychological testing of Claimant because of her high level of chronic pain, significant fatigue and depression. However, he recommended neuropsychological testing in Spanish when her symptoms improved. Dr. Helffenstein also noted that he agreed with Dr. Leach that Claimant warranted cognitive rehabilitation services. Finally, by December 12, 2014 Dr. Ledezma persuasively maintained that neuropsychological testing and cognitive therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. She explained that Claimant's psychological state had improved but she continued to complain of neurocognitive symptoms.

16. In contrast, Dr. Lesnak determined that neuropsychological testing would not provide additional information because Claimant simply suffered a mild closed head injury and there are a number of psychosocial factors impacting her condition. Dr. Lesnak stated that cognitive therapy was not warranted because Claimant did not suffer a severe head injury and she has no documented objective findings of a cognitive deficiency. He summarized that neuropsychological testing and cognitive therapy did not constitute reasonable, necessary and related treatment because Claimant did not exhibit evidence of a cognitive deficit or underlying brain disturbance. However, the overwhelming evidence from psychologists and other authorized medical providers reveals that neuropsychological testing and cognitive therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. Claimant's psychological state has improved but she continues to complain of neurocognitive symptoms. Accordingly, Claimant's need for neuropsychological testing and cognitive therapy in Spanish is reasonable, necessary and causally related to her admitted industrial injuries.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has demonstrated that it is more probably true than not that neuropsychological testing and cognitive therapy in Spanish are reasonable, necessary and causally related to her admitted industrial injuries. Subsequent to her industrial injuries Claimant reported headaches, memory concerns and other cognitive deficits. Claimant consistently maintained her complaints during the course of medical treatment. In January 2013 Dr. Leach diagnosed Claimant with a concussion, a posttraumatic headache, postconcussion syndrome and vertigo. He requested x-rays, physical therapy, chiropractic care, vestibular therapy, injections in the SI joint and a neurological evaluation. By summer 2014 psychologist Dr. Helffenstein could not undertake neuropsychological testing of Claimant because of her high level of chronic pain, significant fatigue and depression. However, he recommended neuropsychological testing in Spanish when her symptoms improved. Dr. Helffenstein also noted that he agreed with Dr. Leach that Claimant warranted cognitive rehabilitation services. Finally, by December 12, 2014 Dr. Ledezma persuasively maintained that neuropsychological testing and cognitive therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. She explained that Claimant's psychological state had improved but she continued to complain of neurocognitive symptoms.

6. As found, in contrast, Dr. Lesnak determined that neuropsychological testing would not provide additional information because Claimant simply suffered a mild closed head injury and there are a number of psychosocial factors impacting her condition. Dr. Lesnak stated that cognitive therapy was not warranted because Claimant did not suffer a severe head injury and she has no documented objective findings of a cognitive deficiency. He summarized that neuropsychological testing and cognitive therapy did not constitute reasonable, necessary and related treatment because Claimant did not exhibit evidence of a cognitive deficit or underlying brain disturbance. However, the overwhelming evidence from psychologists and other authorized medical providers reveals that neuropsychological testing and cognitive

therapy in Spanish would be reasonable, necessary and related to Claimant's industrial injuries. Claimant's psychological state has improved but she continues to complain of neurocognitive symptoms. Accordingly, Claimant's need for neuropsychological testing and cognitive therapy in Spanish is reasonable, necessary and causally related to her admitted industrial injuries.

ORDER

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

Claimant's need for neuropsychological testing and cognitive therapy in Spanish is reasonable, necessary and causally related to her admitted industrial injuries.

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: June 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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-916-050-02

ISSUE

- Whether Claimant has demonstrated by a preponderance of the evidence that his low back and lower extremity condition is related to the subject accident of February 22, 2013.

FINDINGS OF FACT

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

1. Claimant was born on November 24, 1959. He was hired by Employer as a detailer on January 23, 2012.

2. Claimant sustained an admitted left upper extremity injury on February 22, 2013 when he slipped in the company parking lot striking his left elbow and landing on his back. Claimant recalled that he was in the parking lot and the next thing he knew he was looking up at the sky. The first thing Claimant remembered was left arm pain.

3. Shortly after the fall, Employer drove Claimant to the Boulder Medical Center, where he was seen by Dr. Michael Kosta. Dr. Kosta reported that Claimant slipped on ice, fell backwards and landed on his left elbow. Claimant reported pain and swelling in his left elbow but no other areas of pain, including the shoulder, wrist, legs or buttocks. Dr. Kosta assessed Claimant with an elbow contusion, prescribed Norco, and returned him to work. Records of the visit do not indicate that Dr. Kosta evaluated Claimant's back. Dr. Kosta noted that if Claimant's symptoms persisted, he might need to see an orthopedist for a tendon rupture. Claimant was instructed to seek immediate medical attention if his condition worsened in any way after his initial evaluation. Claimant did not seek additional medical care before his next evaluation with Dr. Kosta on February 25, 2013.

4. Claimant's wife, Alicia Higareda, testified that on the night of February 22, 2013 she observed bruising on Claimant's back, mostly on the left side, with a completely swollen and deformed left arm. Ms. Higareda's testimony is not supported by contemporaneous medical documentation.

5. Claimant testified that on February 23, 2013, he woke with pain in his left arm, left shoulder, neck, and back. Claimant testified that he could not get out of bed and had to call out to his wife for help. Claimant testified that he hurt everywhere, including his back, but his left arm bothered him the most.

6. On February 25, 2013 Claimant returned to Dr. Kosta. Dr. Kosta noted that the swelling in Claimant's hand had improved and that Claimant's posterior elbow and proximal forearm were bruised but improved. Claimant reported that he hurt all over. Dr. Kosta did not report any bruising on Claimant's back.

7. On February 26, 2013, Claimant was referred to Dr. Robert Koch, specifically for his left elbow injury. Dr. Koch did not evaluate Claimant's back. Dr. Koch recommended a course of conservative care related to Claimant's left elbow.

8. Dr. Kosta referred Claimant to Pinnacle Physical Therapy for treatment, which began on February 27, 2013. Claimant participated in twelve physical therapy sessions between February 27, 2013 and April 11, 2013. The Pinnacle records contain no report of an injury, symptomology or treatment plan for a low back or lower extremity condition. Kristy Bennett, the therapist, reported Claimant had a sore and painful left shoulder, neck and wrist after falling on ice at work. She reported, "he fell backward and must have broken his fall primarily with the left elbow." She reported that Claimant's neck was stiff due to immobilizing the left arm and left elbow but that Claimant's "Pain levels are Ø if he keeps the hand in the pocket while he is doing light duties at work." Claimant was noted to have a history of right hip bursitis with an exaggerated frontal plane gait. Claimant testified that the focus of his treatment in physical therapy was to rehabilitate his ruptured triceps tendon. Physical therapy did not include treatment of Claimant's back.

9. Claimant spoke to Kendra Welton, Insurer's adjuster, on March 1, 2013. He told her that he fell on his left elbow and that he also had some general soreness through his neck and back which had improved.

10. Claimant's wife testified that on March 11, 2013, she helped Claimant fill out a "Workers Compensation Accident Information Request." Specifically, paragraph 6, asked Claimant to describe the exact area(s) of his body that were injured. Claimant listed left arm, shoulder and elbow, swelling and pain, the whole arm has bruising (dark), shoulder, back . . . . Apparently Claimant's answer was continued onto the back of the form, which was not copied or entered into evidence, thus rendering the word "back" ambiguous, because it is not clear from context whether back was used as a noun or an adjective.

11. Claimant returned to work on February 25, 2013 and worked without interruption until April 11, 2013. During that time, his job duties were limited due to his arm.

12. Claimant's supervisor, Roger Antillon, testified initially that prior to Claimant's injury, Claimant discussed knee, hip, and back problems – old sports injuries – that kept Claimant from working as a mechanic. He also testified that Claimant had a slight limp before the accident; similar to the limp Mr. Antillon observed when he saw Claimant at the first day of hearing. But on further questioning, Mr. Antillon testified that Claimant never complained about his back prior to the accident, only his hip. He further testified that between February 25 and April 11, Claimant did not complain about his back, nor did Mr. Antillon observe anything new or different about Claimant's back. However, on cross examination, Mr. Antillon was asked: "And you testified that he – prior to the incident of February 22, 2013, he complained about back problems?" Mr. Antillon answered equivocally: "We talked about back – about – just injuries in general."

13. Dr. Koch, an orthopedist, performed a left elbow triceps tendon repair on May 1, 2013. He followed Claimant from April 12, 2013 through May 5, 2013. Dr. Koch did not report any low back or lower extremity complaints or symptomology during this

period of time. In his report of April 12, 2013, Dr. Koch reported that Claimant fell directly on his elbow.

14. Claimant's attorneys referred him to Dr. Sander Orent, who became Claimant's authorized treating physician on June 12, 2013. In his initial evaluation report, Dr. Orent reported that Claimant injured other structures of his body that had not been addressed. He reported, "He injured his left shoulder in the course and scope of the fall and he injured his thoracic and cervical spines. He also complains of a sensation of pain running from the greater trochanter of the femur down to the mid-portion of the thigh in both legs." He diagnosed "cervical and thoracic strains unaddressed" and "possible nerve impingement, from surgical positioning, possibly causing symptoms in the lateral femoral cutaneous nerve." The ALJ notes that this report does not refer to problems in Claimant's lumbar spine.

15. Dr. Koch's triceps tendon repair failed and on August 19, 2013, Dr. Conyers performed a repeat triceps tendon reattachment procedure.

16. Dr. Orent saw Claimant in follow-up on September 24, 2013. He reported:

- ever since [Claimant's] first surgery, he has had radiating pain basically from the lateral thigh down to the knee on both sides.
- When I compress the area right around the greater trochanteric bursa, I can produce the pain and numbness that he experiences down the lateral aspect of the leg.
- This sounds very much to be a lateral femoral cutaneous nerve syndrome, again, possibly because of the compression during the initial surgery.
- The patient is quite clear that these symptoms started at the time of the first surgery.

17. On November 9, 2013 Claimant had a lumbar MRI. The radiologist, Dr. Tivorsak's, impression was moderate to severe degenerative disease at L5-S1, with a broad annular bulge and moderate to severe degenerative disc disease in the remainder of the lumbar spine without central canal narrowing or significant nerve root compression.

18. Claimant endorsed Dr. Sander Orent as an expert in occupational medicine and he provided medical opinions regarding Claimant's injuries and requests for treatment of the lumbar spine. Dr. Orent testified based on his knowledge of the medical treatment guidelines and personal knowledge of Claimant and his injuries.

19. Dr. Orent testified that during his initial examination, Claimant arrived in extremis with a very badly damaged left arm. While immediate attention was directed at Claimant's left arm, Claimant "complained about his shoulder hurting; he complained of his back injury, his neck, and his thoracic spine; and then he described this numbness that he had in the front part of both legs starting at about the groin and going distally to that."

20. Dr. Orent testified that it is common for the most severe injury to not only take the patient's primary attention, but the provider's primary attention. By far the greatest concern in this case initially was Claimant's elbow.

21. On November 12, 2013, Dr. Orent reported that the lumbar MRI did not define anything that would clearly explain Claimant's symptomology.

22. Dr. Orent noted difficulty differentiating between radiculopathic and localized pain. He reported Claimant's lumbar MRI showed extensive degenerative changes. Dr. Orent recommended an epidural steroid injection for diagnostic purposes and noted Claimant's positive straight leg raise. On November 19, 2013, Dr. Orent reported that Dr. Wernick performed an injection, which was non-diagnostic for lateral femoral cutaneous nerve compression.

23. On December 4, 2013, in a "SAMMS CONFERENCE NOTE", Dr. Orent reported that causality of the low back was a gray area and that the severity of Claimant's left upper extremity condition may have eclipsed some of Claimant's back symptoms. He reported that when he initially saw Claimant, he thought Claimant had a thoracolumbar strain and that it may be that Claimant had a small herniated disc at L1-2, which could easily be part of the thoracic strain. He recommended an ESI at L1-2.

24. Dr. Orent testified that Claimant's degenerative disc disease was age-appropriate degeneration. Dr. Orent testified that if degenerative disc disease such as Claimant's is asymptomatic until an event like the fall, that the degeneration made him more susceptible to injury.

25. On March 18, 2014, Dr. Orent, contrary to his November 12, 2013 progress note, reported, based on the November 9, 2013 MRI, that he thought the source of Claimant's back symptomology was at L5-S1 where there was a broad annular bulge. He reported, "it only began hurting at the time of the incident and has gotten progressively worse."

26. On April 17, 2014, Dr. Carlos Cebrian performed a Respondents' independent medical examination on Claimant. Dr. Cebrian completed a records review noting in his May 27, 2014 report that, "outside of the unsurprising complaint of his 'body hurt all over' on 2/25/13, there were no complaints related to the lumbar spine or paresthesias in his legs documented until he saw Dr. Orent on 6/12/13. . . Despite multiple injections, medications and evaluations, it is still not clear from the medical records that [Claimant's] medical providers know what the cause of [Claimant's] leg symptoms is." Dr. Cebrian opined that Claimant's current symptoms were "related to lumbar degenerative disc disease and bilateral femoral cutaneous neuropathy and that the need for treatments are independent, unrelated and incidental to the incident of February 22, 2013 or the result of anything that may or may not have happened during Claimant's May 1, 2013 surgery."

27. Dr. Cebrian recommended weight loss and that Claimant undergo an EMG/NCS of his lower extremities outside of the workers' compensation system. Dr. Cebrian opined that lumbar spine surgery was not indicated at that time. He based his causation opinion on (1) Claimant not having lumbar spine complaints until over three months after the incident and (2) his opinion that Claimant's initial complaints were

related to parasthesias in his legs and not specifically the lumbar spine pain. In Dr. Cebrian's opinion, if Claimant had injured his back at the time of the subject accident, "the reasonable expectation would be that the symptoms would have been present within a day or two and continued for the next several months if they were caused by the slip and fall."

28. Dr. Orent testified regarding the spontaneous degenerative injury, and opined that two independent diseases occurring during the same time frame "just doesn't meet the rules of Occam's razor." He testified that the probable cause for the back injury was the fall. Dr. Orent testified that to postulate as the Respondents do that Claimant suddenly developed bilateral nerve impingement in his groin for no reason at all unrelated to the fall would not make sense. (11/24/2015 Hearing Pg. 77)

29. On July 14, 2014, Dr. Kosta reported his clinic notes did not indicate Claimant mentioning any injury other than the left upper extremity at the time he evaluated Claimant and that his "usual and customary questioning during the taking of history always includes allowing any other injury to be expressed other than the symptoms and the main complaints." Dr. Kosta pointed out that he specifically asked Claimant about his wrists, legs and buttocks. Dr. Kosta reported that he physically examined Claimant from his clavicle to his fingers. Dr. Kosta reported that while Dr. Orent had initially diagnosed a lateral femoral cutaneous nerve syndrome, Claimant did not report low back pain until November 5, 2013. Dr. Kosta agreed with Dr. Cebrian's assessment and opinions. Dr. Kosta opined that Claimant's subsequent low back and lower extremity complaints were not related to the February 22, 2013 accident. (R.S. 54-68).

30. On September 30, 2014, Dr. Orent reported that but for Claimant's lumbar spine condition, he was at maximum medical improvement.

31. Dr. Sander Orent testified at the November 24, 2014 hearing. According to Dr. Orent, the mechanism of Claimant's low back condition was that he fell directly on his spine. Dr. Orent acknowledged that Claimant had degenerative disc disease. Dr. Orent testified "if a patient is asymptomatic at the time of the event, then irrespective of what the images show, if the symptoms then arise out of the event, then in my view it may have made him more susceptible to injury." Dr. Orent testified regarding the spontaneous degenerative injury, and opined that two independent diseases occurring during the same time frame "just doesn't meet the rules of Occam's razor." He testified that the probable cause for the back injury was the fall. Dr. Orent testified that to postulate as Respondents do that Claimant suddenly developed bilateral nerve impingement in his groin for no reason at all unrelated to the fall would not make sense.

32. Dr. Orent's opinion on causality is less persuasive because the evidence supports that Claimant fell onto his elbow, and not directly onto his back.

33. According to Dr. Orent, diagnosing the source of Claimant's low back problems was "challenging." He initially thought Claimant's symptoms were due to the way he was positioned during his triceps tendon repair on May 1, 2013. His current diagnosis is lumbar radiculopathy. Dr. Orent admitted that Claimant reported his lower extremity symptoms started, "immediately post operatively to the triceps tendon surgery." His initial diagnosis of a femoral cutaneous nerve impingement syndrome was

based on the history given to him by Claimant that Claimant's lower extremity symptoms started immediately after the surgery. Dr. Orent first diagnosed lumbar radiculopathy on November 13, 2013. The first time Claimant reported to Dr. Orent that he had lumbar pain beginning on the date of injury, was on November 13, 2013. Dr. Orent had reported on September 24, 2013 that he could produce pain and numbness down the lateral aspect of Claimant's thigh when he compressed the trochanteric bursa (femur). This is not a test a doctor would use to diagnose lumbar radiculopathy. Dr. Orent agreed that there was nothing on the November 9, 2013 lumbar MRI which would be clearly diagnostic of a lumbar radiculopathy. He agreed that there was no encroachment or nerve root impingement. Dr. Orent had Claimant undergo an ESI, which was also non diagnostic for lumbar radiculopathy. Dr. Orent acknowledged that after Claimant underwent two diagnostic tests, a lumbar MRI and a lumbar ESI, both of which were non diagnostic for lumbar radiculopathy, he nonetheless changed his opinion that Claimant did not have a lumbar radiculopathy to an opinion that Claimant did have a lumbar radiculopathy.

34. Respondents called Dr. Carlos Cebrian, at the April 13, 2015 hearing to testify that Claimant did not sustain a related back injury. Dr. Cebrian is a board certified family practitioner, a Level II Examiner with the Division of Workers' Compensation, and has practiced occupational medicine exclusively and full-time since 2000. Dr. Cebrian testified that the history Claimant provided was not consistent with Dr. Cebrian's records review. Claimant reported to Dr. Cebrian that he had back symptoms beginning shortly after the subject accident, during the weekend after the subject accident his back was black and blue, and he could not get out of bed without assistance. That Claimant told Insurer's adjuster on March 1, 2013 that his back and neck were sore but that those symptoms improved is consistent with Dr. Cebrian's opinion on causation.

35. Claimant's report of back bruising was inconsistent with Dr. Kosta's records of February 22 and 25, 2015 which bore no indication that Claimant had bruising or contusions of the back, neck or any part of the spine. Nothing in Dr. Koch's records supports the presence of a low back condition or low back complaints, or lower extremity complaints of any kind. The description of Claimant's accident, that he fell directly on his elbow, would not be consistent with a fall directly on the spine. Dr. Kosta's report indicated that Claimant hit his elbow first, which would take the brunt of the impact. After hitting his elbow, gravity would carry Claimant down and he would hit his back, but his back would not be the primary point of impact. It is reasonable to expect that when a person falls, he or she will have aching and pains in different areas of the body which would be consistent with what Claimant reported to Dr. Kosta on February 25, 2013.

36. Kristy Bennett's physical therapy reports do not document low back or lower extremity symptoms. Had Claimant reported low back or lower extremity symptomology to Ms. Bennett, one would expect to see that in her reports. Notably, Claimant reported a pain level of zero in his left upper extremity if he kept his hand in his pocket when he was doing light duty work five days after his fall. This is inconsistent with Claimant's argument that pain from his arm was so severe that it was masking his back pain. If, as Claimant states, the therapist was going to treat Claimant's left upper

extremity and then address the low back later on, one would expect to see that documented.

37. Dr. Cebrian agreed with Dr. Orent's ultimate diagnosis of lumbar radiculopathy at L5-S1.

38. Dr. Orent was able to replicate Claimant's symptoms by tapping on his trochanteric bursa, which is diagnostic of a lateral femoral cutaneous nerve issue but non diagnostic for lumbar radiculopathy. Subsequently, when Dr. Orent ordered the MRI, it showed multi-level degenerative disc disease at multiple levels with some foraminal stenosis but nothing that explained Claimant's symptoms.

39. Dr. Cebrian agreed with Dr. Orent's original opinion that nothing in the November 9, 2013 lumbar MRI explained Claimant's lumbar and lower extremity symptomology. Claimant did not have a positive straight leg test which could be diagnostic for lumbar radiculopathy, until November 19, 2013. The November 9, 2013 lumbar MRI did not show nerve root impingement but did show a broad annular bulge at L5-S1, which is unrelated to Claimant's February 22 fall and is consistent with degenerative changes which would not have been aggravated by the fall, eight and one half months earlier. Claimant's November 9, 2013 lumbar MRI is typical of what one would see in a 59 year old man.

40. Dr. Cebrian agreed with Dr. Orent that L5-S1 injections performed by Dr. Wernick on January 9 and February 19, 2014 were non diagnostic for lumbar radiculopathy. The diagnostic test that Dr. Orent did to recreate the lateral femoral cutaneous nerve irritation, tapping the bursa, was not indicative of radiculopathy at L5 or S1. Dr. Cebrian opined Claimant did have some lateral femoral cutaneous nerve irritation at that time. However, it would not be medically plausible that Claimant's positioning during his elbow surgery would have caused his lateral femoral cutaneous nerve irritation.

41. Dr. Cebrian's ultimate opinion is that Claimant's lumbar spine symptoms and lower leg symptoms are not related to the February 22, 2013 injury. The bases for his opinion is:

- when you look at all the records, the first documentation related to back or leg was on June 12, 2013.
- Dr. Orent diagnosed a lateral femoral cutaneous nerve irritation, which developed immediately after the May 1, 2013 surgery, however, the mechanism of that condition would not be consistent with that surgical procedure.
- Claimant's early complaints were not consistent with or specific to a lumbar radiculopathy.
- There was a significant delay in Claimant's symptoms.

Dr. Cebrian agreed with Dr. Orent that the fall could have potentially led to an injury, but there were no complaints early on. There were no complaints with his back, upper legs or lower legs for several months and with that kind of diagnosis, the reasonable expectation would be that there would have been a complaint much earlier than what was documented by Dr. Orent.

42. Based on the totality of the evidence, the ALJ finds Dr. Cebrian's opinions on causation to be more consistent with the mechanics of Claimant's injury, the inconsistent reports of the timing of Claimant's back problems, and complaints, and delay in diagnosis of radicular radiculopathy.

43. The ALJ finds that Claimant has failed to establish by a preponderance of the evidence that his low back and lower extremity condition is related to the February 22, 2013 accident. The ALJ finds the opinions of Drs. Cebrian and Kosta more persuasive than those of Dr. Orent on issues of medical causation and relatedness.

CONCLUSIONS OF LAW

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

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

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. Proof of causation is a threshold standard that the Claimant must establish by a preponderance of the evidence §8-42-101 C.R.S. *Faulkner,* at 846.

An injury or condition arises out of employment if "there is a causal connection between the duties of employment and the injuries suffered." *Deterts v.Times Pub. Co.*, 38 Colo. App. 48, 552 P.2d 1033 (1976). The Claimant must establish by a preponderance of the evidence that there is a causal connection between his accident of February 22, 2013 and his lumbar condition. *Ringsby Trucklines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971). Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F. R. Ore Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

As found, Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury related to his work accident of February 22, 2013. It is undisputed at this time that Claimant's low back condition and complaints are due to a lumbar radiculopathy at L5-S1. The ALJ finds the testimony of Drs. Cebrian and Kosta, that the Claimant's L5-S1 radiculopathy is the result of underlying, unrelated degenerative disc disease that has progressed over time and which is unrelated to the Claimant's work accident, to be persuasive. Consistent with Dr. Cebrian's opinions and compelling is the fact that there is no documentation of a low back condition in the early medical records from Dr. Kosta, Dr. Koch or from Pinnacle Physical Therapy.

Dr. Orent diagnosed a lateral femoral cutaneous nerve condition on June 22, 2013, based on his diagnostic testing and Claimant's testimony that the onset of lower extremity symptoms started on May 1, 2013, when he had elbow surgery with Dr. Koch. That reported history is inconsistent with the history later reported to Dr. Orent on March 18, 2014, that Claimant's low back began hurting at the time of the accident and has gotten progressively worse. The lack of documentation of a low back condition in the early medical records, coupled with the inconsistent history regarding the onset of symptoms, persuades the undersigned ALJ that Claimant has not met his burden and compels an Order denying and dismissing his claim for benefits associated with his low back condition.

ORDER

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

1. Claimant's lumbar condition is not related to his February 22, 2013 accident and, consequently, all claims for compensation and benefits related to this condition are denied and dismissed.

2. Any issues not resolved in 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 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: June 22, 2015

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

ISSUES

The issues presented for determination are:

- Has Claimant proven by a preponderance of the evidence that the scheduled impairment rating for his upper extremity should be converted to whole person?
- Whether Respondent overcame the DIME physician's opinion regarding impairment by a preponderance of the evidence?
- What is Claimant's average weekly wage?
- What is Claimant's disfigurement and his award?

FINDINGS OF FACT

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

1. On July 29, 2008, Claimant underwent a non-work-related right total shoulder arthroplasty ("TSA"). A medical record dated November 3, 2008 notes Claimant was doing well with excellent motion and continued strengthening.

2. Respondents presented no medical documentation of Claimant's shoulder condition from November 3, 2008 through April 30, 2013.

3. On April 30, 2013, Claimant, a 56 year old male, injured his right shoulder while performing his work activities for Employer.

4. That same day, he presented to Arbor Occupational Medicine where Dr. Sharon Walker evaluated him. Claimant disclosed his 2008 TSA to Dr. Walker and reported he could not describe any limitations, did not notice any difficulties with working out, and did not perceive a reduced range of motion or any pain.

> When asked how his shoulder has been since the total replacement, he states it has been limited, but he cannot really tell me how it is limited. He states he probably has some decreased strength a little bit, but he does go to the gym and does not notice any problem. He thinks probably his range of motion has been limited a little bit, but it has not been noticeable. He has no pain associated with the shoulder prior to this injury. He denies any direct trauma with this [earlier] event.

Dr. Walker concluded, "It is medically probable that [all of] the patient's complaints are the result of [his] job." Given this conclusion, the ALJ infers that Dr. Walker's medical opinion was that Claimant's specific inability to perceive any limitations was more

significant than his general comments, couched in terms of "probably" having limitations.

5. At the hearing, Claimant disagreed with Respondents' counsel's suggestion that Claimant had limitations. Claimant did not recall the conversation with Dr. Walker.

6. Dr. Walker referred Claimant to physical therapy. And when his condition did not significantly improve, she referred Claimant to orthopedic surgeon Dr. Armodios Hatzidakis.

7. Dr. Hatzidakis initially saw Claimant on June 18, 2013. When asked about the condition of his shoulder following his 2008 TSA, Claimant reported "his shoulder did return to 100% normal." Dr. Hatzidakis noted that Claimant's function had returned to normal.

8. Claimant testified that he was not impaired prior to his work injury. He testified that before his 2013 injury, "Nothing bothered me before." Claimant's testimony was consistent with his reports to Drs. Walker and Hatzidakis, and their medical reports.

9. Claimant testified that currently he is unable to care for his lawn and garden, has difficulty with household chores, and can no longer use hand tools. He testified that he had none of those difficulties before his 2013 injury.

10. Claimant testified that before the 2013 injury, he was an exercise fanatic – bicycling daily, lifting his maximum amounts of weight, and working with a trainer twice a week at the gym where he was a member. Since the injury, he has had to cut back on his exercise regimen.

11. Claimant testified he currently feels pain in his right shoulder, up through and across his neck, and down into his back. Claimant's post-revision records document consistent pain complaints; however they are not necessarily located beyond Claimant's shoulder. The ALJ credits Claimant's testimony regarding his current pain status as credible and credits such testimony over the lack of documentation during periods of treatment.

12. On August 7, 2013, Dr. Hatzidakis performed a TSA on Claimant's right shoulder. Because this was the second TSA on that shoulder, it is referred to as a revision.

13. Between November 12, 2013 and January 20, 2013, Claimant reported to Drs. Walker and Hatzidakis that writing and keyboarding increased his right shoulder pain. Claimant advised Dr. Walker that he was doing better after his vacation when he was not using his right arm.

14. On January 20, 2014, Claimant reported to Arbor Occupational that he was unable to use his right arm behind his back.

15. Claimant underwent rehabilitation therapies after his revision TSA including physical therapy, acupuncture, dry needling, functional taping, and intramuscular stimulation. Dr. Gridley performed these therapies between February 12, 2014 and April 16, 2014. Dr. Gridley noted contracture of Claimant's right pectoral girdle, and focused his treatments on Claimant's pectoral region, scapularthoracic

musculature, deltoid, latissimus, teres major and minor, pectoralis minor, rhomboid, levator, and trapezius. During the course of Claimant's treatment Dr Gridley noted "Ropey, tight, and tender muscles at the anterior deltoid, pectoralis minor, and trapezius." Dr. Gridley released Claimant from his care on April 16, 2014. His final report noted limitations with internal and external rotation, consistent with the [revision] arthroplasty."

16. On February 27, 2014, Dr. Jeff Raschbacher, Claimant's then-authorized treating physician (ATP) at Arbor, noted Claimant was progressing but had continued weakness and was using one Oxycodone per day. Acupuncture and therapy were continued. On March 21, 2014 Dr. Raschbacher discontinued Claimant's pool therapy, but continued his land-based physical therapy, and treatments with Dr. Gridley. On April 10, 2014 Dr. Raschbacher continued Claimant on his home exercise program.

17. Dr. Raschbacher placed Claimant at maximum medical improvement (MMI) on April 24, 2014. He noted "no neck tenderness or trapezius tenderness." Dr. Raschbacher rated Claimant's impairment at 36% of the upper extremity, converted to 22% of the whole person. His impairment rating consisted of 30% for diagnosis based impairment for the revision TSA, and 9% for loss of range of motion.

18. Insurer requested Dr. Raschbacher revisit his impairment rating in light of Claimant's initial TSA. In an "Incidental Chart Note" dated May 12, 2014, Dr. Raschbacher apportioned Claimant's rating by backing out the 30% rating for the diagnosis based impairment. He opined Claimant's upper extremity impairment was 6%, which was converted to 4% whole person. The ALJ finds that the revised 6% was a clerical error and should have been the original 9% for loss of range of motion. No persuasive evidence supports a finding that Dr. Raschbacher considered whether Claimant's 2008 TSA was independently disabling on the date of the work injury, as Dr. Raschbacher did not discuss it in his revised rating. He also recommended that the parties check with Dr. Mueller, the medical director of the Division of Workers' Compensation, regarding whether to include the diagnosis based impairment rating.

19. On May 28, 2014 Respondents filed a Final Admission of Liability based on Dr. Raschbacher's second impairment rating.

20. On August 7, 2014, Claimant returned to Dr. Hatzidakis complaining of continued pain in his right shoulder. Even though Claimant's last few evaluations with Dr. Gridley and Dr. Raschbacher revealed essentially no pain, Claimant advised that he believed he was discharged prematurely. Dr. Hatzidakis recommended Claimant increase his strengthening activity. On September 30, 2014, Claimant returned to Dr. Hatzidakis complaining of anterior shoulder pain, along with ongoing numbness and tingling into his fingers. Dr. Hatzidakis assessed Claimant with a painful and dysfunctional right shoulder with a possible ongoing low grade infection.

21. On September 15, 2014 Dr. Christopher Ryan performed a records review, obtained a history from Claimant, and examined him. Dr. Ryan reported Claimant was "doing functionally quite well" following his 2008 arthroplasty. Dr. Ryan noted that Claimant's shoulder had deteriorated dramatically since being placed at MMI, "He has effectively no internal rotation, and significant limitation in flexion, abduction, and adduction. Mild atrophy is noted in the deltoid and rotator cuff musculature." Dr.

Ryan opined that Dr. Raschbacher erred by apportioning the 2008 TSA out from Claimant's rating. He explained that apportionment is only appropriate "when an employee has a non-work-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling." Dr. Ryan concluded: "There is no evidence to show that [Claimant's] non-work-related previous shoulder arthroplasty was independently disabling. Therefore, the impairment rating should not be apportioned."

22. On October 15, 2014, Dr. Stephen Scheper conducted a division independent medical examination (DIME) on Claimant. Dr. Scheper was asked to consider MMI, permanent impairment rating, and apportionment. He reviewed Claimant's medical records, obtained a history from Claimant, and examined Claimant. Claimant's history includes "total shoulder arthroplasty 2008 – after which he did very well without continued pain or functional impairment." On physical exam, Dr. Scheper noted Claimant's right shoulder was depressed with significant scapular protraction; his deltoid, supraspinatus, and infraspinatus were mildly atrophied; and there were trigger points in Claimant's right upper trapezius and rhomboid major.

- **MMI**: Dr. Scheper opined that MMI on April 24, 2014 was reasonable.
- **Permanent Impairment Rating**: Dr. Scheper rated Claimant according to the AMA Guides to the Evaluation of Permanent Impairment, 3rd edition revised. Using Chapter 3 Table 19, Dr. Scheper gave Claimant a 30% upper extremity rating for implant arthroplasty of the shoulder. Dr. Scheper used Figures 38, 41, and 44 to rate Claimant's range of motion deficiencies which combined yielded a 13% range of motion impairment. Dr. Scheper combined the 13% for range of motion impairment with the 30% for arthroplasty, arriving at a 39% upper extremity impairment, which converts to a 23% whole person.
- **Apportionment**: Dr. Scheper agreed with Dr. Ryan that Claimant's arthroplasty from 2008 was not a disabling condition and therefore should not be considered. He remarked, "The claimant had done very well for 5 years after his arthroplasty prior to the injury in question."

23. In November 2014, Respondents challenged the DIME and filed an application for hearing.

24. At the hearing Dr. Barton Goldman testified as Respondents' expert in physical medicine and rehabilitation. Dr. Goldman reviewed Claimant's medical records from February 21, 2007 through October 30, 2014. Dr. Goldman did not examine Claimant, although he testified that physically evaluating a claimant is "certainly preferable."

25. Dr. Goldman issued a report dated February 10, 2015 in which he opined:

- Claimant had a preexisting diagnosis based impairment under the *Guides* of 30% for his 2008 TSA.
- While he had no documentation to support his opinion, he was certain that Claimant had preexisting range of motion deficits.

- Dr. Walker's report of Claimant's "limitations" – which Claimant could not perceive and only "probably" had – "would certainly meet criteria from the Guides perspective of activities of daily living restrictions or limitations."
- Existing reports support the medical likelihood of preexisting "independent disability."
- Claimant did not sustain a functional impairment to a body part not otherwise compensated by the scheduled disabilities.

26. Dr. Goldman testified that a doctor doing an impairment rating for a revision TSA should either not include it in his rating; or include it, but then back it out because it was preexisting. He testified that diagnosis based ratings are given because the authors of the Guides assume that "somewhere down the road" the person will have "a lot more problems than somebody who never had a shoulder replaced."

27. Dr. Goldman acknowledged that Claimant had atrophy of his shoulder musculature, including his anterior and middle deltoid, the posterior cuff musculature at the infraspinatus, and teres major and minor. Dr. Goldman acknowledged that such atrophy was associated with weakness, and acknowledged the atrophy would affect Claimant's ability to use, move, and stabilize his right arm. Dr. Goldman agreed the affected shoulder musculature attaches to the upper back area or the chest area.

28. Dr. Goldman testified that Claimant's 2008 TSA de facto would have rendered Claimant independently disabled. He clarified that while it might be "very mild," that it was "just about unheard of" for an arthroplasty patient not to have some limited range of motion. He testified that it would be medically improbable not to have at least some mild limitations that would increase over time. Dr. Goldman testified that a doctor generally will not release a TSA patient without restrictions of a medium work capacity, and would strongly advise against overhead activity, impact loading, and martial arts.

29. Dr. Goldman opined that Dr. Raschbacher's second impairment rating was correct in terms of the diagnosis based impairment and that Dr. Scheper, the DIME doctor, was incorrect in his handling of the diagnosis based disability.

30. Dr. Goldman acknowledged that he currently teaches doctors to "take into consideration if a condition is independently disabling at the time of the new work-related injury." However, he did not do so here. Rather, he applied a non-rebutable presumption that a patient who had a TSA had to be independently disabled. Rather than weighing Claimant's testimony that he perceived no physical limitations prior to his work-related injury and the multiple medical records in agreement, Dr. Goldman simply presumed Claimant was independently disabled.

31. Dr. Goldman noted that Claimant's testimony of no disability following the original 2008 arthroplasty was solely subjective. The ALJ credits Claimant's testimony over the unidentified study relied on by Dr. Goldman.

32. The ALJ finds that much of Dr. Goldman's testimony misses the mark. The crux issue here is whether Claimant's non-work-related injury was independently disabling to Claimant at the time of the current work-related injury. The Guides define

"disability" as "assessed by nonmedical means, [disability] is an alteration of an individual's capacity to meet personal, social, or occupational demands." Dr. Goldman's opinions address alleged limitations, not disability. The ALJ finds that Dr. Goldman's opinions do not support that Claimant was independently disabled by his non-work injury at the time of his work-related injury.

33. The ALJ finds Dr. Goldman's reasoning to be circular. And finds his opinions to be inconsistent with "Apportionment of Impairment" guidelines, admitted into evidence as Respondents' exhibit AA, which allows for claimants who have previous non-work-related injuries which are identified and treated to not be disabled.

34. Dr. Goldman showed an inherent bias against Claimant.

- Dr. Goldman admitted he was hired by Respondents "to help defend [Claimant's] claim for workers' compensation benefits" – in other words, he viewed his role to be that of an advocate.
- Dr. Goldman's comments in his record review show inherent bias against Claimant. For example, while Dr. Walker reported that Claimant felt best on vacation because he was resting his shoulder, Dr. Goldman offered the following unsupported commentary: "The subjective improvements noted when on vacation indicate a substantial stress component contributing to the patient's perceived pain and disability at this time. Also, the context of this claim versus the patient's prior shoulder surgeries is likely having an unconscious impact in terms of perceived outcome and even unconscious victimization phenomena that are common within disability systems."
- Dr. Goldman accuses Claimant to be acting for secondary gain, although no medical record documents any instance of Claimant exhibiting pain behaviors, magnifying his symptoms, malingering, etc.

35. Dr. Goldman's report contained inaccuracies that diminished his credibility.

- Dr. Goldman's report omitted Dr. Hatzidakis' note that "Claimant returned to 100% normal" following his 2008 TSA. When Claimant's counsel asked him about the omission, Dr. Goldman suggested the omission was of no consequence.
- Dr. Goldman reported Claimant was 62" tall and obese. There is no indication in the medical records to support this. Rather, the record supports a finding that Claimant is 72" tall with proportionate height and weight.
- Dr Goldman assumed without support that Claimant was de-conditioned. Dr. Goldman's assumption was contradicted by persuasive evidence that (1) Dr. Gridley noted Claimant was "well-developed for his age," and (2) Claimant testified that before his work injury he was an "exercise fanatic," bicycling daily, lifting maximum amounts of weight, and working out twice weekly with a personal trainer.
- Dr. Goldman inaccurately noted the date of Claimant's revision surgery.

- Dr. Goldman adopted Dr. Raschbacher's miscalculation of Claimant's range of motion limitation rating when the diagnosis based rating was backed out of his original calculation.

36. Dr. Hatzidakis testified as an expert in the diagnosis and treatment of orthopedic conditions by pre-hearing deposition dated March 10, 2015. He testified that Claimant's report that his shoulder had returned to 100% post the 2008 TSA would indicate that Claimant did not have any disability form the 2008 surgery. He testified that Claimant did not have any symptoms before the April 30 accident.

37. Dr. Hatzidakis testified that he could not contrast the extent of damage to Claimant's musculature from his accident on April 30, 2013, with the condition of his arm prior to that. The ALJ infers from his testimony that such a contrast could not be made.

38. Dr. Hatzidakis noted Claimant's documented difficulty with computer work, keyboarding, and writing. He explained that all of Claimant's shoulder musculature would be implicated in those tasks, including "muscles that attach from the back to the scapula." He also identified the deltoid and the pectoralis, muscles that attach to the chest. Dr. Hatzidakis, referring to Dr. Ryan's report, testified that the muscles Dr. Ryan identified as being functionally involved also attached to Claimant's chest and back.

39. Dr. Hatzidakis testified that he examined Claimant's cervical spine during Claimant's May 22 visit because Claimant continued to have complaints of pain in that area.

40. With respect to limitations form Claimant's 2008 TSA, Dr. Hatzidakis testified that "There are patients who feel like they return to 100%, they feel like it goes back to really good motion. That younger older age group, the people between 55 and 65, tend to do really well because they still have really good musculature and heal well." The ALJ finds this testimony supports Claimant's reports of being unable to perceive any limitations after his 2008 surgery, and his reports of having returned to 100% prior to his injury.

Conversion to Whole Person

41. Claimant seeks to convert his scheduled impairment rating to a whole person rating. To do so, Claimant must establish by a preponderance of the evidence that he sustained functional impairment to a part of the body off the schedule.

42. The ALJ finds Claimant's injury has affected physiological structures beyond the arm at the shoulder, and determines the situs of the functional impairment extends through Claimant' chest and back. Thus, the loss is not one listed on the schedule of disabilities.

43. Based on the totality of the evidence, the ALJ finds it more likely than not that Claimant sustained functional impairment not limited to his upper extremity and that conversion of his impairment rating to a whole person rating is proper.

DIME Impairment Rating

44. Respondent seeks to overcome the DIME physician's opinion regarding impairment. They are required to do so by a preponderance of the evidence.

45. Dr. Scheper, the DIME doctor, opined Claimant's previous arthroplasty was not an independently disabling condition.

46. Dr. Scheper's opinion is supported by those of Dr. Walker, Dr. Hatzidakis, Dr. Raschbacher, and Dr. Ryan, all of whom determined that Claimant was not independently disabled at the time of his work injury.

47. Respondents offered no persuasive prior medical documentation of impairment, range of motion limitations, or restrictions.

48. Dr. Goldman acknowledged inferentially that Claimant's disability did not necessarily exist at the time of his work related injury. He testified: "If you meet one of these diagnosis based criteria, the authors are assuming that somewhere down the road, it may be five years, it may be twenty years, you're going to have a lot more problems than somebody who never had their shoulder replaced."

49. Dr. Goldman opined, contrary to the other doctors, that at the time of Claimant's work related injury, Claimant was independently disabled by his 2008 TSA. The basis for his opinion was that everyone who has a TSA is disabled.

50. This opinion is less persuasive than that of all of the other doctors because it is not based on the more credible actual evidence presented in this case. And it is inconsistent with the Guides and Impairment Rating Tips which recognize and account for the possibility that a claimant could experience a previous, non-work related injury that is identified and treated, yet does not cause a patient to be disabled.

51. The ALJ also finds Dr. Goldman's opinions less persuasive than those of the other doctors because he showed an inherent bias against Claimant, his credibility is diminished by inaccuracies in his report, and he performed only a records review while acknowledging that a physical examination of Claimant would have been preferable.

52. The ALJ finds Dr. Scheper's opinions are consistent with the Guides and Tips; the opinions of Drs. Walker, Hatzidakis, Raschbacher, and Ryan; medical documentation; and Claimant's credible testimony. The ALJ credits the opinions of Dr. Scheper as more credible and persuasive that those of Dr. Goldman.

53. The ALJ finds Respondents have not overcome DIME Dr. Scheper's opinion regarding impairment.

54. Based on the totality of the evidence, the ALJ finds it more likely than not that Dr. Scheper's whole person rating of 23% is proper.

Average Weekly Wage

55. Claimant seeks a determination of his average weekly wage. The correct method of calculating Claimant's AWW would be to divide Claimant's gross yearly wages for the contract period and divide that number by 52 weeks. Claimant's employment contract was from July 1, 2012 through June 30, 2013. The AWW is calculated based on the wages earned during the contract period. Further, while Claimant did not work during various periods of the contract period, Respondent continued to pay benefits, including health insurance, through the entirety of the contract, even during summer months. This evidence supports the finding that Claimant

was under contract during this entire period. Accordingly, with a pay rate of $5447.68 per month, Claimant earned $65,372.16 for the contract period which equals an AWW of $1,257.16.

Disfigurement

56. During the hearing, the ALJ observed a seven inch-long keloidal scar with visible suture marks resulting from his revision surgery.

CONCLUSIONS OF LAW

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

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

Conversion to Whole Person

A claimant is limited to scheduled disability benefits if the claimant suffers an "injury or injuries" described on the schedule. Section 8-42-107(1)(a). If the claimant's "injury or injuries" are not the schedule, the claimant is entitled to whole person benefits. Section 8-42-107(1)(b). "The term 'injury' as used in Section 8-42-107(1)(a) refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Kolar v. ICAO*, 122 P.3d 1075, 1076 (Colo. App. 2005). The Colorado Court of Appeals has held that depending on the particular facts of the claim, damage to structures of the "shoulders" may or may not reflect a "functional impairment" which is enumerated on the schedule of disabilities. *Walker v. Jim Fouco Motor Company*, 942 P.2d 1390 (Colo. App. 1997).

Here, Claimant sustained a physical injury to the muscles supporting and surrounding his shoulder joint which resulted in a loss of range of motion. The ALJ

credits Claimant's testimony that he currently feels pain in his right shoulder up through and across his neck and down into his back. The muscles which cause his pain were documented by Dr. Hatzidakis as causing Claimant chronic cervical pain. Additionally, Dr. Hatzidakis and Dr. Gridley treated musculature in Claimant's chest and back which control Claimant's ability to do computer work, writing, and keyboarding. These include the rotator cuff, the deltoid, and the pectoralis. Dr. Gridley treated Claimant's deltoid and rotator cuff muscles which are very important to power the shoulder and help position the arm in space. Dr. Scheper also noted Claimant's deltoids, supraspinatus, and infraspinatus were atrophied, which would cause weakness, and that there were trigger points in Claimant's upper trapezius and rhomboid major.

Thus, the ALJ concludes that the situs of Claimant's functional impairment and pain extends beyond the glenohumeral joint and into muscles of his neck, chest and back warranting a whole person impairment rating.

DIME Impairment Rating

The ALJ concludes Respondents were not required to overcome by clear and convincing evidence the DIME physician's opinion that the pre-existing TSA was "independently disabling." The ALJ further concludes that a preponderance of the evidence establishes the pre-existing impairment was not "independently disabling" at the time of the April 30, 2013 injury. Therefore, apportionment of the impairment rating is not proper and Claimant is entitled to PPD benefits based on the Dime doctor's 23% whole person impairment. Because Claimant underwent a DIME, the ALJ must first determine whether the impairment is a scheduled injury or non-scheduled one. Whether the Claimant sustained functional impairment to a part of the body off the schedule is a factual question. See *Warthen v. ICAO,* 100 P.3d. 581 (Colo. App. 2004).

Section 8-42-104(5)(b) provides that in cases of permanent medical impairment "the employee's award or settlement shall be reduced:"

> (b) When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury was independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the same body part.

Application of § 8-42-104(5)(b) to the facts of this case requires the ALJ to interpret the meaning of the term "independently disabling. " The ALJ notes that neither party cited any current cases that interpret the term. The ALJ is also required to determine whether a DIME physician's opinion that a prior medical impairment was not "independently disabling" must be overcome by clear and convincing evidence.

A court should effect the legislative intent of a statute by first looking to the "plain and ordinary meaning" of the language used in the statute. If the meaning is ambiguous

or unclear the court may look to other aides to interpretation including the legislative history, the context in which the legislation was adopted and the consequences of various interpretations. *See Weld County School District RE-12*, 955 P.2d 550 (Colo. 1998); *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991).

When the General Assembly amends a statute a presumption arises that the legislature intended to change the law as it existed prior to the amendment. *Arenas v. Industrial Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000). There is also a presumption that the General Assembly was cognizant of judicial precedents addressing the subject matter of the inquiry. *Weld County School District RE-12, supra.*

Section 8-42-104(5)(b) was adopted in 2008 and became effective on July 1 of that year. For the period July 1, 1999 to July 1, 2008 § 8-42-104(2)(b), C.R.S., provided that when benefits were awarded pursuant to "section 8-42-107, an award of benefits for an injury shall exclude any previous impairment to the same body part." Section 8-42-104(2)(c) stated that this apportionment applied to awards of permanent partial disability. Prior to July 1, 1999 § 8-42-104(2), C.R.S., provided that in cases of "previous disability" the disability for a "subsequent injury" was to be determined by "computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury." This provision expressly applied to awards of permanent partial disability."

In *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996) the court interpreted the meaning of the term "previous disability" as that term was used in the pre-1999 version of § 8-42-104(2). The court observed that the Act did not define the term "previous disability." However the court stated that § 8-42-107(8)(c), C.R.S., requires the use of the AMA Guides when determining impairment and that the rating of impairment "necessarily includes the decision to apportion such impairment." The court then observed that the AMA Guides define the term "impairment" as "an alteration of an individual's health status that is assessed by medical means." In contrast, the AMA Guides state that "disability" is assessed by nonmedical means and is "an alteration of an individual's capacity to meet personal, social, or occupational demands." The court emphasized that under the AMA Guides "a person who is impaired is not necessarily disabled." *Id.* at 1337.

In *Askew* the respondents sought to apportion an impairment rating for a back injury based on a pre-existing degenerative back condition. However, the facts demonstrated that prior to the industrial injury the degenerative back condition was asymptomatic and did not hinder the claimant's ability to meet any demands. The court reasoned that under the "plain language of § 8-42-104(2)" apportionment was improper. It reasoned that the claimant's preexisting degenerative condition may have been an "impairment" under the AMA Guides, but it was not a "disability" because it did not limit his capacity "to meet the demands of life's activities." *Id.* at 1337; *see also Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656 (Colo. App. 1998).

Later, in *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001) the court applied the *Askew* analysis to affirm a denial of apportionment

based on a prior industrial impairment that was not disabling at the time of the subsequent industrial injury. Significantly, the court determined that under the *Askew* decision the "apportionment principles triggered under § 8-42-104(2) do not concern causation, but instead pertain to the status of a claimant's preexisting impairment." Specifically the court was required to determine if the pre-existing impairment rose to the level of a disability that continued to affect the claimant at the time of the subsequent injury. Moreover, the *Public Service* court ruled that the question of whether prior impairment was "disabling" at the time of the subsequent injury presented a question of fact for the ALJ to determine under the preponderance of the evidence standard, and the ALJ was not required to give any "presumptive weight" to the DIME physician's opinion on this issue.

As noted above, the General Assembly amended § 8-42-104(2) effective July 1, 1999. The legislature deleted any reference to the term "disability" and provided an award of PPD benefits was to exclude "previous impairment to the same body part." In *Martinez v. Industrial Claim Appeals Office, supra*, the court of appeals held that the statutory change rendered immaterial the distinction between "the type of apportionment authorized under former § 8-42-104(2) and the type of apportionment required by the AMA Guides as part of the rating process." The court stated that under the July 1, 1999 version of the statute apportionment constituted a "pure medical determination, which when made by the DIME physician is subject to the clear and convincing standard of § 8-42-107(8)." 176 P.3d at 828.

Section 8-42-104 was again amended in 2008 to include the provisions of subsection (5)(b). Subsection (5)(b) conditions apportionment of "nonwork-related previous permanent medical impairment" on a finding that the previous medical impairment was "independently disabling" at the time of the subsequent industrial injury. The ALJ concludes that the 2008 adoption of subsection (5)(b) evidences the General Assembly's intent to alter the law of apportionment as it existed from July 1, 1999 to July 1, 2008, by reincorporating into the statue the requirement that a previous medical impairment be "disabling" at the time of the subsequent industrial injury.

The ALJ further concludes that when the General Assembly used the term "independently disabling" in subsection (5)(b) it did so with full cognizance of the *Askew* decision and its progeny. Specifically, the ALJ infers the legislature was aware that *Askew* held the plain and ordinary meaning of the phrase "previous disability" referred to "an alteration of an individual's capacity to meet personal, social, or occupational demands" as determined by nonmedical means. Consequently, the ALJ infers that in 2008 when the General Assembly reinserted the term "disabling" into subsection (5)(b) its intent was to condition apportionment of pre-existing non work-related medical impairment on a finding that such impairment limited the claimant's capacity to meet personal, social or occupational demands at the time of the subsequent industrial injury. Moreover, the General Assembly intended to legislatively repeal the holding in *Martinez v. Industrial Claim Appeals Office, supra* that apportionment is strictly a "medical determination" and the DIME physician's opinion on apportionment must be overcome by clear and convincing evidence. Rather, use of the term "disability" in subsection (5)(b) signals an intent to readopt the *Askew* court's view that, as provided in the AMA

Guides, the existence of "disability" is determined by nonmedical means. Further the ALJ infers the General Assembly intended to adopt the *Public Service Co.* court's view that the existence of "disability" is determined under the preponderance of the evidence standard and the DIME physician's opinion is not entitled to any "presumptive weight" on this issue.

The ALJ further concludes that the foregoing analysis is consistent with WCRP 12-3(A) and (B). WCRP 12-3(A) pertains to injuries "prior to July 1, 2008" and states the rating physician "shall apportion any preexisting medical impairment, whether work-related or non work-related, from a work-related injury or occupational disease using the" AMA Guides.

In contrast WCRP 12-3(B) applies to dates of injury "on or after July 1, 2008" and states the rating physician "may provide an opinion on apportionment of any preexisting work related or non work-related permanent impairment to the same body part" using the AMA Guides where "medical records or other objective evidence substantiate preexisting impairment." The rule also provides that if the rating physician apportions based on a prior non work-related impairment the physician "must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated." Significantly, WCRP 12-3(B)(1) states the "effect of the Physician's apportionment determination is limited to the provisions in section 8-42-104."

The ALJ infers from WCRP 12-3(B)(1) that the rule reflects a recognition by the Director of the DOWC that the legal "effect" of a rating physician's opinions concerning apportionment, including an opinion concerning whether a previous impairment was independently disabling at the time of the subsequent industrial injury, can have no more legal consequence than is contemplated by § 8-42-104. As determined above, the ALJ concludes that § 8-42-104(5)(b) contemplates that a DIME physician's opinion concerning whether or not prior medical impairment was "independently disabling" at the time of the industrial injury is not entitled to "presumptive weight" and is of no greater legal consequence than any other physician's opinion on this subject.

A preponderance of the credible and persuasive evidence establishes that Claimant's 39% upper extremity impairment rating cannot be apportioned based on his pre-injury condition because the prior condition was probably not "independently disabling" at the time of the April 30, 2013 injury. As determined, the credible and persuasive evidence establishes Claimant's condition prior to the injury was probably not "independently disabling." Claimant's credible testimony, as corroborated by the history he gave to various medical providers, establishes that by April 30, 2013 he had returned to work at full duty, without any documented restrictions, perceivable limitations, or pain; and was engaged in a vigorous exercise program. Although Dr. Raschbacher opined, after prompting by Insurer, that Claimant's 2008 TSA required him to deduct the 30% diagnosis related impairment, that opinion is not persuasive. Dr. Goldman's opinion that Claimant's impairment rating should be apportioned also is not persuasive for the reasons stated.

The specific issue determined here is that apportionment of the DIME physician's overall rating based on Claimant's pre-existing non work-related medical impairment is not proper under § 8-42-104(5)(b) because the prior impairment was not proven, by a preponderance of the evidence, to be "independently disabling" at the time of the April 30, 2013 injury. Therefore, Claimant is entitled to PPD benefits based on the DIME physician's overall rating of 23% whole person impairment without apportionment.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's AWW based on his earnings at the time of injury as measured by Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. 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.*

Claimant contends he is entitled to the maximum average weekly wage by calculating his gross wages for the school year and dividing that amount by ten months. This is not the most accurate determination. Claimant testified he was under contract for one year with Employer and remained an employee of Employer for the 12 month period. He received payment in the form of one-twelfth of his annual salary and health benefits during the two summer months. Because Claimant received salary and benefits during each of the twelve months, it is most fair and accurate to calculate the average weekly wage by taking Claimant's gross wages for the contract year and dividing by 12 months, the length of the contract. The ALJ concludes that the correct average weekly wage is $1,257.16.

Disfigurement

The ALJ finds and concludes that as a result of Claimant's April 30, 2013, work injury, Claimant has a visible disfigurement to the body consisting of a seven inch-long keloidal scar with visible suture marks. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

The ALJ orders that Insurer shall pay Claimant $2,100 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

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

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

2. Insurer shall pay Claimant PPD benefits in accordance with the statutory formula based on a 23% whole person impairment.

4. Insurer shall pay Claimant compensatory benefits based on an average weekly wage of $1,257.16

5. Insurer shall pay Claimant $2,100 for his disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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: June 12, 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 established, by a preponderance of the evidence, that his scheduled upper extremity impairment rating should be converted to a whole person impairment rating.

- Whether Claimant has proven, by a preponderance of the evidence, that his portion of his health insurance premium should be considered in the calculation of his Average Weekly Wage (hereinafter "AWW") and, if so, the appropriate method of calculating the revised AWW.

- Whether Claimant is entitled to additional temporary disability benefits based upon an adjustment to his AWW.

FINDINGS OF FACT

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

1. Claimant sustained a work-related left shoulder injury on January 3, 2011 while working as a residential driver on a single man trash collection route. On this date, Claimant was dumping a rolling "toter" filled with heavy garbage when he felt a painful pop in his left shoulder.

2. An MRI performed November 4, 2011 demonstrated a full thickness tear of the supraspinatus tendon at its insertion with retraction of the torn fibers, but without muscle belly atrophy. Claimant attempted, but ultimately failed conservative care. Consequently, he underwent surgery with Dr. Ronald Royce on March 13, 2014. During the arthroscopic procedure, Claimant was discovered to have a prominent subacromial bone spur prompting Dr. Royce to perform a subacromial decompression, followed by removal of 5 mm of bone from the anteroinferior portion of the acromion. Arthroscopic evaluation also revealed "prominent hypertrophy and spurring of the distal clavicle" which Dr. Royce elected to remediate by performing a distal clavicle resection to include removal of 11 mm of bone from the distal acromioclavicular joint.

3. Claimant was referred for post surgical rehabilitative care following his March 13, 2014 arthroscopy. Approximately eight months later, Claimant was placed at MMI by his primary authorized treating physician (ATP), Dr. Daniel Peterson on November 4,

2014. Dr. Peterson assigned a 20% scheduled upper extremity impairment rating, which converts to 12% whole person impairment.

4. Prior to being placed at MMI, Respondents referred Claimant to Dr. Ridings for an independent medical examination (IME) on September 29, 2014. Following this examination, Dr. Ridings opined that Claimant was approaching MMI. Dr. Ridings projected that Claimant would reach MMI at the end of October; however, he indicated that he would "defer" to Dr. Peterson should he assign an earlier date of MMI during Claimant's October 22, 2014 follow-up appointment. Dr. Ridings also assigned an "advisory" impairment rating of 19% upper extremity, which converts to 11% whole person impairment. Finally Dr. Ridings opined that Claimant's symptoms and examination did not qualify him for any additional impairment for the cervical spine.

5. Upon careful inspection of Dr. Ridings' impairment rating report, the ALJ finds that Dr. Ridings utilized the same methodology as did Dr. Peterson to compute Claimant's impairment, including the decision to assign 10% scheduled impairment for Claimant's distal clavicle resection. The only difference between the impairment ratings of Dr. Ridings and Dr. Peterson is a slight variation in the range of motion measurements of the shoulder.

6. At the IME with Dr. Ridings, Claimant reported persistent pain in the superior aspect of the left shoulder, specifically in the upper trapezius and extending laterally to the mid cervical region. He also complained of "discomfort", i.e. 2/10 pain at rest and more intense 5/10 pain with use of the left shoulder. Claimant described increased pain with prolonged posturing of the left arm when in any position other than at his side. He also reported that his left arm "goes to sleep" if he sleeps with his shoulder elevated. Finally, he reported weakness of the arm at shoulder level but none distally.

7. Respondents admitted liability for the 20% scheduled impairment assigned by Dr. Peterson. A Final Admission of Liability (FAL) was filed on November 25, 2014. In response, Claimant filed an Application for Hearing and amended the same on December 31, 2014. Claimant endorsed conversion of his scheduled upper extremity impairment rating to impairment of the whole person and requested a determination of his AWW related to termination of his health insurance benefit as issues for hearing.

8. At hearing, Claimant testified that he experiences pain and stiffness on the top of his shoulder that refers laterally to the bottom of his neck with additional pain traveling into his upper back. Claimant described the pain as a discomfort that he works through. Although Claimant testified that he currently has no formal work restrictions, he complained of a 60% reduction in the strength of his left shoulder. Moreover, while the testimony of Fred Kiger confirms that Claimant has returned to work approximately 45 hours per week, Claimant lost his residential trash collection route and is currently working a recycle pick-up route which he testified is "considerably lighter" than picking up trash every day.

9. Claimant testified to having constant neck pain and stiffness. He described this as a "crook" in his neck which limits this range of motion. According to Claimant, he has

difficulty looking over his left shoulder to use his mirrors while driving his trash truck. Claimant testified that he does not feel pain while performing arm curls or other exercises/activities requiring the use of his arms below shoulder level. He is able to care for his children, including a two year old, whom he lifts and plays with. He assists with household chores such as vacuuming and cutting a "little bit of grass here and there." However, anytime Claimant lifts too much above his head he feels clicking and popping pain in his neck.

10. Claimant's medical records from Concentra Medical Centers contain the following references:

- November 4, 2014: "Chief Complaint: The patient presents today with pain in left shoulder and neck." "Review of Systems-Musculoskeletal: "joint pain, muscle pain, back pain, neck pain, joint stiffness, muscle weakness and night pain, but no joint swelling.

- September 22, 2014: "EE c/o some neck stiffness." "Neck pain." "Trouble sleeping at night. "Wakes up with a crook in his neck." "Tenderness … AC joint, bicipital groove, trapezius muscle and supraspinatus muscle"

- May 30, 2014: "The patient presents with complaints of neck pain (left side)." "Sleep is off pt states, uncomfortable for pt to sleep."

- Included in the pain diagrams completed at Concentra wherein Claimant was asked to identify the area of his body where he felt sensations are diagrams dated 7/25/14 and 7/29/13. The ALJ finds these diagrams to depict pain that encompasses the area of the posterior left shoulder between the shoulder and the neck.

11. Based on the aforementioned medical records, the ALJ finds Claimant's testimony regarding his ongoing pain and functional limitation beyond the left shoulder consistent, credible and convincing. While Claimant can work and otherwise engage in child care activities, the ALJ finds the performance of Claimant's current work for Employer and lifting his two year old to require bending his arms at the elbows rather than reaching and lifting overhead. Moreover, vacuuming and cutting the grass are activities performed with the arms below shoulder level. Consequently, the ALJ finds Claimant's ability to engage in the aforementioned activities has no bearing on whether he has functional impairment beyond the arm at the shoulder.

12. Dr. Ridings was offered and accepted as a Level II accredited expert in physical medicine and rehabilitation (PM&R) at hearing. Dr. Ridings testified that the AMA guides allow for impairment of the shoulder to include range of motion loss as well as additional "add on" impairments for crepitus, severe arthritis and/or distal claviculectomies. Dr. Ridings testified that neither he nor Dr. Peterson provided Claimant with an additional rating beyond that provided for shoulder range of motion loss and the impairment for the distal clavicle resection.

13. Dr. Ridings testified that the clavicle "extends from the sternum . . . across to the acromion" where it forms the acromial clavicular (AC) joint "directly in front of the glenohumeral joint. According to Dr. Ridings, the clavicle "has some role in the stability of the shoulder joint particularly as it attaches at the AC joint. Dr. Ridings testified that the clavicle is part of the shoulder and he "would not call it a bone." The ALJ finds that Dr. Ridings probably misspoke when he testified that the clavicle was not a bone based upon the March 13, 2014 operative report of Dr. Royce, an orthopedic specialist, indicating that 11 mm of "bone" was removed from the AC joint region during the distal clavicle resection. Based on Dr. Ridings' testimony that the AC joint is directly in front of the glenohumeral joint, the ALJ infers and finds that the AC joint is located on the front of the body but medial (more towards the center of the body) to the glenohumeral joint in the sagittal plane. Consequently, the ALJ finds that the AC joint and the clavicle are anatomic structures beyond the glenohumeral joint and not part of the arm itself.

14. Based on the evidence presented, the ALJ finds that Claimant suffers from pain extending from the top of the shoulder, into the upper trapezius and cervical musculature. Following his IME, Dr. Ridings documented that "[Claimant's] primary left shoulder pain is in the superior aspect of the shoulder, pointing to the left upper trapezius, extending up to the mid-cervical region laterally." Dr. Ridings' physical examination confirmed that "[Claimant] has tenderness from the base of the left neck across the left upper trapezius to the point of the shoulder" and that "the upper trapezius on the left does have increased myofascial tone." More probably than not, the residuals from Claimant's full thickness supraspinatus tear in addition to his subacrominal decompression and distal clavicle resection are causing referred pain and weakness into the adjacent scapular and cervical musculature. This is consistent with Claimant's hearing testimony and the content of the medical records submitted into evidence. The top of the shoulder as well as the cervical and upper scapular musculature are not part of the "arm." Furthermore, on the evidence presented, the ALJ finds that Claimant's referred pain, stiffness and weakness limits the function of his neck and upper back rather than his arm.

15. The preponderance of the persuasive evidence presented demonstrates that Claimant's permanent impairment extends beyond his left arm. Accordingly, the ALJ finds that conversion of Claimant's scheduled impairment to impairment of the whole person is warranted in this case.

16. At the time of his injury, and thereafter until March 9, 2014, Claimant and his dependents were covered by the Employer's group health insurance plan. Both Claimant and Employer contributed a portion of the monthly health insurance premium. Claimant's portion was deducted from his regular paychecks. When Claimant was taken off work after surgery on March 13, 2014 and placed on TTD, he could not afford to pay his portion of the health insurance premium which was previously paid through payroll deduction. Consequently, Claimant testified that he stopped paying his share of the health insurance premium. Wage records submitted at hearing substantiate that Claimant Employer stopped receiving Claimant's insurance premium payment.

17. Employer sent Claimant several notices beginning May 10, 2014, informing him of his overdue balance for his portion of the health insurance premium. Claimant also received notices in June and July of 2014. The notices informed Claimant that his health insurance would be canceled if he did not pay the accrued balance. The most recent notice, dated July 10, 2014, indicated that a minimum payment of $2,890.36 had to be received by 07-17-2014 to avoid cancellation of coverage. Claimant testified that he was never able to catch up on the past-due insurance premiums. Based upon the evidence presented, the ALJ finds that Claimant's health insurance coverage was canceled due to his failure to pay his portion of the total premium cost.

18. Dora Akers, Employers' Human Resources Manager, testified that Claimant's local "site" continued to "pay" Employer's portion of the health insurance premium throughout the period Claimant was out of work receiving TTD. Ms. Akers explained that the local site paid the corporate parent for the Employers portion of the health insurance premium. Wage records submitted into evidence reflect that Employer continued to pay for their portion of Claimant's health insurance premium without interruption from January 3, 2014 through March 27, 2015.[1] Ms. Akers testified that Employer did not send Claimant a COBRA notice informing him that he was eligible for COBRA due to non-payment.

19. Respondents have admitted to an AWW of $985.00 exclusive of the value of Claimant's health insurance premium. Based upon the evidence presented, Claimant's portion of the health insurance premium was $154 per week when the controversy concerning whether inclusion of his health insurance premium should be considered in the calculation of his AWW. Conversely, Employer's portion was $221.53 per week.

20. Claimant has failed to prove by a preponderance of the evidence, that he is entitled to an increase in his average weekly wage and TTD rate.

CONCLUSIONS OF LAW

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

I.

General Legal Principals

A. 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).* Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. *C.R.S. § 8-43-201*. A

[1] The records submitted indicate that Employer paid $221.53 weekly from 1/3/14 through 1/9/15 for what Ms. Akers testified was the premium cost for Claimant's health insurance. Beginning 1/16/15 the cost increased to $236.54, which amount was paid by Employer through 3/27/15.

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*.

B. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). In determining credibility, the ALJ, acting as fact finder, should consider, among other things, the consistency or inconsistency of a witness's testimony and/or actions; the reasonableness or unreasonableness of a witness's testimony and/or actions; 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). The fact finder is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959).

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 P.3d 385 (Colo. App. 2000).

II.

Conversion of Claimant's Scheduled Impairment

D. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S.* However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). 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.*

E. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. 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. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.*

F. It is true, as Claimant points out, that "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, as noted by Claimant "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, *s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of 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 his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office, 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.*

G. In this case, the ALJ agrees with Claimant that the persuasive evidence warrants conversion of his scheduled impairment to impairment of the whole person. As found, both the AC joint and the distal clavicle are structures beyond the "arm." Consequently, the subacromial decompression and distal clavicle resection, which permanently altered these anatomical structures, were performed above the glenohumeral joint and therefore, above the "arm." *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008)(finding that subacromial decompression was done at the

acromion and the coracoacromial ligament to relieve the impingement, which was related to the scapular structures above the level of the glenohumeral joint"); *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO, April 13, 2006) (finding that distal clavicle resections are proximal to the glenohumeral joint and therefore, on the trunk of the body). Furthermore, the consistent and convincing evidence establishes that Claimant suffers from pain, stiffness and weakness on the top of the shoulder, in the musculature of the upper back, including the upper trapezius and the cervical musculature which affects his sleep, limits his ability to perform activity above shoulder level and interferes with his ability to turn his head, particularly when driving his route. In concluding that Claimant is entitled to conversion of his scheduled impairment to impairment of the whole person, the ALJ finds the opinion of the Industrial Claim Appeals Panel in *Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (ICAO, January 11, 2012) and *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (ICAO, March 27, 1986) instructive. In *Steinhauser,* the Panel affirmed the conclusion of the ALJ that pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment. Similarly, in *Franks* pain affecting the trapezius and difficulty sleeping on injured side supported the ALJ's finding of whole person impairment. On the evidence presented, the ALJ concludes that the instant case is analogous to *Steinhauser* and *Franks*. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that he sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which warrants conversion of his scheduled impairment to whole person impairment.

III.

Average Weekly Wage

H. AWW is calculated based upon the monthly, weekly, daily, hourly, or other compensation which the injured employee was receiving at the time of the injury in accordance with C.R.S. § 8-42-102. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* Sections 8-42-102 (3) and (5) (b), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. *R.J.S. Painting v. Industrial Commission of State*, 732 P.2d 239 (Colo. App. 1986).

I. C.R.S § 8-40-201(19)(b), provides: 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…. ***If, after the injury, the employer continues to pay any advantage of fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage of the cost of the conversion of health insurance coverage, that advantage or benefits shall not be included in the determination of the employee's wages so long as the employer continues to make payment*** (emphasis added).

J. The Court in *Midboe v. Industrial Claim Appeals Office,* 88 P.3d 643 (Colo.App.2003), construed the definition of "wages" to exclude healthcare benefits when an employer continued to contribute to the insurance premium. The claimant in *Midboe* suffered a substantial injury at work, but he continued to work for his employer after the injury. As a result, the employer continued to pay its share of the claimant's health insurance premium while the claimant paid his share. *Id*. When calculating the claimant's benefits, the ALJ concluded that the claimant's premium payments should be included in his average weekly wage. However, the ICAO reversed. It held that when an employer continues to pay health insurance benefits, the average weekly wage should not include either the employee's or the employer's contribution to the health insurance premium because the "wages" statute explicitly bars such inclusion. Specifically, the ICAO relied on the last sentence of § 8–40–201(19)(b), which states, "If, after the injury, the employer continues to pay ... the cost of health insurance coverage ... such advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make such payment."

K. In *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006), the Colorado Supreme Court granted certiorari to resolve a conflict between the court of appeals decisions in *Midboe* and *Ray.* In overruling Midboe to the extent it was inconsistent with the decision reached in Ray, the Court clarified as follows: "The narrow issue in *Midboe* was simply whether the amount a claimant pays as his share of the premium for group health and dental insurance coverage must be included in the calculation of his average weekly wage when the employer continues to pay its share of the premium. In *Ray* the issue decided was whether C.R.S. § 8-40-201(19)(b) required claimants who lost their jobs to purchase continuing or converted health insurance under the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 in order for their average weekly wage to be increased by the cost of continued health insurance. The Court's holding in *Ray* that C.R.S. § 8-40-201(19)(b) does not require a claimant to purchase continuing coverage or convert to a similar plan does not resolve the question presented here, which is whether Claimant's share of the premium for continued coverage should be included in the average weekly wage when the employer continues to pay its share. The Court in *Ray* expressly stated that the answer to this question is in the negative.

L. Additionally, in *Laura Plute v. Home Depot,* W.C. No. 4-631-629 (ICAO, January 16, 2007) a hearing was held on the "sole issue of whether the claimant's average weekly wage should be increased by the amount of her health insurance premiums." The issue presented to the ALJ in *Pulte* was whether a temporarily disabled Claimant was entitled to an increase in her average weekly wage by the amount of her portion of the health insurance plan premium, where the employer and claimant continued to pay the health insurance premium after claimant was placed on an unpaid leave of absence, and coverage under the plan continued. The ALJ found that the claimant was not "put to any additional expense in order to continue her coverage. Consequently, the ALJ concluded that the claimant's cost of continuing coverage under the health insurance plan during the leave of absence should not be included in her average weekly wage. Relying on their decision in *Salas v. NCR Corp.*, W.C. No. 4-166-217 (ICAO, March 26,

1996), and *Midboe*, *supra* the Panel affirmed the ALJ. In *Salas,* claimant was provided with group health insurance coverage. Similar to the instant case, employer paid a portion of the total cost of the group health insurance premium. Claimant was then placed on long term disability, but the employer continued to pay its portion of the premium. Nonetheless, the ALJ concluded that claimant's AWW should include employer's portion of the premium. The Panel reversed stating that the "unambiguous effect of the statute is to exclude from the wage calculation the cost of health insurance if the employer continues to pay its share of the cost after the injury." In reversing, the Panel concluded that the plain and ordinary meaning of the term "any" as used in § 8-40-201(19)(b) meant "one, some, every, or all without specification." *Salas, supra* citing *The American Heritage College Dictionary* (Third Edition 1993). Accordingly, the Panel concluded that "if the employer continues to pay 'some' of the cost of the claimant's health insurance, health insurance is excluded from the average weekly wage calculation until the employer discontinues payment."

M. Claimant argues that *Pulte* and *Salas* are factually distinguishable from the instant case, because there is no proof that the Employer continued to "pay" their portion of the health insurance premium in the sense of actually making premium payments to the health insurance carrier and because, contrary to the situation in Pulte and Salas, Claimant's coverage in this case was canceled for nonpayment. Regarding continued payment by Employer of their potion of the health insurance premium, Claimant asserts that the evidence established simply that Claimant's local site continued to "pay" the corporate parent in an accounting sense. In so doing, Claimant argues that Employer was merely transferring money from one of its accounts to another. Concerning continued coverage, Claimant argues that, unlike the circumstances in *Pulte* and *Salas* his health insurance was not continued since he was unable to pay his portion of the premium and his insurance was canceled. Accordingly, Claimant argues that Employer did not continue to "pay" for his coverage, because the coverage was no longer in effect. Based upon the evidence presented, the ALJ is not persuaded. The ALJ concludes that Respondents established at hearing that they continued to pay their portion of the health insurance plan premium and that the coverage was cancelled because Claimant failed to pay his portion of the premium not vice versa. Because Employer continued to pay "some" of the cost of Claimant's health insurance, the ALJ concludes that C.R.S. § 8-40-201(19)(b), in addition to the decisions announced in *Midboe, Salas* and *Pulte* support a conclusion that Claimant is not entitled to an increase in his average weekly wage.

IV.

Adjustment of TTD benefits

N. Because the Court concludes that Claimant is not entitled to an increase in his AWW based on the cost of his health insurance, the ALJ concludes that he is not entitled to an adjustment in TTD benefits for the admitted period of TTD extending from March 10, 2014 to November 3, 2014.

ORDER

It is therefore ordered that:

1. Claimant's left upper extremity scheduled impairment rating of 20% is converted to 12% whole person impairment.

2. Insurer shall pay permanent partial disability benefits consistent with a 12% whole person disability rating pursuant to C.R.S. § 8-42-107(8)(d).

3. Claimant's request for an increase in his AWW is denied and dismissed as Respondents continued paying their portion of the insurance premium. Consequently, Claimant's request for an adjustment in his TTD rate is also 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.

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: June 15, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issue for determination is whether the claimant's left lower extremity scheduled rating of 25% should be converted to a whole person rating of 10%.

FINDINGS OF FACT

1. The claimant is a police patrol officer for the respondent-employer and has been employed by the respondent-employer for 17 years.

2. In this position the claimant needs to be physically active while engaged in making arrests and various other police activities.

3. The claimant additionally participates as soldier in the Army Reserves where he is a platoon Sergeant in a Military Police unit. He has been involved in Army activities for almost 20 years.

4. In 2010 the claimant was deployed to Afghanistan with the Army. Prior to his deployment eh claimant had no low back problems and was physically active with no restrictions.

5. In addition to his normal police duties the claimant was also a member of the police department's SWAT unit and would also work out on his own while off duty.

6. Upon the claimant's return from Afghanistan he returned to his full duties with the respondent-employer without any restrictions.

7. On August 16, 2012 the claimant sustained a compensable on-the-job injury to his left knee.

8. The claimant had surgery for this injury and shortly thereafter returned to modified light duty. The claimant ultimately transitioned back to full duty.

9. The claimant reached maximum medical improvement (MMI) for this injury on June 18, 2013. The claimant was given an impairment rating of 14% for the left lower extremity and was released to full duty with no permanent restrictions.

10. On November 22, 2013 the claimant again suffered a compensable industrial injury to his left knee when he slipped on ice while getting into his patrol car.

11. The claimant sustained a complex tear of the posterior horn of the medial meniscus and tearing of the lateral meniscus with an intact ACL graft. The claimant underwent surgery for this second knee injury on December 26, 2013.

12. The claimant reached MMI for this second injury on April 15, 2014.

13. Subsequent to the MMI finding the claimant underwent a division independent medical examination conducted by Jeffrey Jenks, MD.

14. Dr. Jenks determined the claimant sustained a 25% left lower extremity permanent impairment after applying apportionment for his first knee injury. This rating converts to a 10% whole person rating.

15. Dr. Jenks noted that the claimant

16. continues with intermittent left knee pain. He has a lot of pain in the lateral aspect of his left knee. This occurs particularly with running and prolonged standing. At times his knee swells and can become quite stiff. He complains of constant numbness along the lateral aspect of his left knee.

17. The claimant had no significant issues while he was on light duty. When the claimant transitioned back to full duty in the March/April 2014 timeframe the claimant's range of motion deficit affected the way he walked and by extension the way he has to run. The claimant's activities vary from day to day and he cannot predict when or what will affect the functioning of his knee.

18. When the claimant's knee hurts it affects his low back and his back gets stiff.

19. Specifically, when the claimant is running he gets low back pain and aching. This did not occur prior to his injury of November 22, 2103. The claimant states that he has flare-ups approximately 6 times a month.

20. When the claimant has flare-ups it also affects how long he can stand.

21. The claimant's condition has also had an effect upon his military status as he now is under a running profile and is not allowed to run.

22. The ALJ finds the claimant to be credible.

23. The ALJ finds that the claimant has established that it is more likely than not that the situs of the claimant's functional loss extends beyond the lower left extremity and into his low back as well as the functioning of his entire body as it relates to running.

CONCLUSIONS OF LAW

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

2. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

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

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

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

6. The question of whether the claimant sustained a loss of a leg at a hip joint within the meaning of Section 8-42-107(2)(w), C.R.S. or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question the ALJ must determine the situs of

the claimant's functional impairment, and the situs of the functional impairment is not necessarily the situs of the injury itself. *See Langton v. Rocky Mountain Health Care Corp.* 937 P.2d 883 (Colo.App. 1996); *Staunch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996).

7. The "loss of a leg at the hip joint" is on the schedule of injuries listed under Section 8-42-107 (2)(w), C.R.S. Depending on the particular facts of the claim, damage to the structures of the leg may or may not reflect a functional impairment which is enumerated on the schedule of injuries under Section 8-42-107 (2), C.R.S.

8. An impairment rating issued under the AMA Guides is relevant, but not dispositive of whether the claimant sustained a functional impairment beyond the schedule. *Staunch v. PSL Swedish Healthcare System, supra.* Further, pain and discomfort, which limits the claimant's ability to use a portion of the body, may be considered functional impairment for purposes of determining whether an injury is on or off the schedule. *See Vargas v. Excel Corp., W. C. NO. 4-551-161 (April 21, 2005).* Functional impairment of the leg beyond the "leg at the hip joint" is probative evidence of whole person impairment.

9. As found above, the ALJ concludes that the claimant's testimony was credible and supported by the medical record.

10. The ALJ concludes as found above, that as a result of his work-related injury the claimant has functional impairment of the leg, and the claimant has functional impairment in areas beyond the leg. As a result of his work-related injury, the claimant has functional impairment that is located beyond the leg; it is located in the low back and in the entire body as it relates to the claimant's ability to run. As a result of his work-related injuries the claimant's functional impairment is not limited to the leg at the hip joint.

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that his lower extremity impairment rating should be converted to a whole person impairment rating.

12. The ALJ concludes that the claimant suffered 10% permanent impairment of the whole person.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent shall pay the claimant permanent partial disability benefits based upon a 10% whole person impairment rating.

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

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

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

DATE: June 15, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant has established by clear and convincing evidence that she is not at maximum medical improvement (MMI) for her May 7, 2013 compensable injury.

2. If the claimant is at MMI, whether the claimant has overcome the impairment rating by the Division IME, Dr. McFadden by clear and convincing evidence.

FINDINGS OF FACT

1. The claimant works as a food server and bus aide for the respondent-employer.

2. On May 7, 2013, the claimant sustained a low back strain while twisting and unhooking a student from a seatbelt who was restrained in a bus.

3. On May 24, 2013, the claimant was seen at CCOM by Kenneth Ginsburg, P.A., an authorized provider, who, after taking a history and evaluating claimant, assessed a right sacroiliac strain. The claimant was prescribed medication and referred for chiropractic care.

4. On June 3, 2013, the claimant returned to CCOM, where the records document the following: "Her pain is localized to her right buttocks and there is no radiation to her leg or paresthesia or numbness in her leg."

5. Dr. Terrence Lakin, D.O., an authorized treating physician, evaluated the claimant on June 4, 2013. Dr. Lakin took a history from the claimant, performed a physical examination, and diagnosed a low back strain, right sacroliitis, and a right hip strain.

6. Dr. Lakin ordered an X-ray and MRI of the low back and hip, prescribed medications and a home exercise program, and issued temporary work restrictions. The claimant rated her pain an 8 out of a 10 at that time.

7. The claimant was seen by Dr. Lakin on June 20, 2013, where "she is improved greatly and is not using a walker now. She walks relatively comfortable. She still complains of a catch in her hip."

8. With respect to MRI's, Dr. Lakin noted: "Lumbar shows some L5-S1 disc herniation and crowding of right and left S1 nerves and multilevel mild degenerative changes. She does not have exhibit any significant lumbar issues." (Id.). Dr. Lakin diagnosed WC sacroiliitis, right, and a right hip strain.

9. On July 8, 2013, the claimant was seen by Dr. Charles Hanson, M.D., who took an initial history, evaluated the claimant, and stated: "Presently, the patient complains of fairly constant sharp pain in her right upper buttocks area. The pain is intensified by standing and ambulation. Quiet rest, use of heat, ice and flexeril provides only partial benefit. She has had no radicular leg pain, leg paresthesias, leg weakness or sphincter problems." The claimant began physical therapy in mid-July.

10. On September 17, 2013, the claimant underwent a right SI joint injection with Dr. Finn. The claimant had 90% improvement from the SI injection.

11. Dr. Caughfield performed EMG studies on October 10, 2013, and noted that there was "no evidence of radicular or peripheral nerve entrapment, but he also noted that [the claimant] had bilateral peroneal motor nerve slowing, likely due to foot trauma."

12. On October 16, 2013, Dr. Floyd Ring, M.D., performed a physician advisor review based on a request for an epidural injection at L5-S1. Dr. Ring noted that the MRI "shows evidence of an L5-S1 disc herniation; however, there is no evidence of any nerve root compression or canal stenosis. She was also referred for EMG studies. These were performed on 10/10/13. They showed no evidence of lumbar radiculopathy or peripheral nerve entrapment."

13. Dr. Ring went on to state: "Based upon the fact that the patient has had 90% improvement of her pain complaints following the SI injection this would point more towards a pain generator in that area." Dr. Ring noted that the EMGs and MRIs did not support the need for an epidural injection. He recommended denying the L5-S1 injections and continuing to have therapy that addresses the SI joint.

14. Dr. Lakin also noted that when considering the EMG results that "she has no evidence of lumbar radiculopathy or peripheral nerve entrapment syndromes."

15. The claimant was released without work restrictions on October 29, 2013.

16. On October 30, 2013, Dr. Lakin placed the claimant at maximum medical improvement, without permanent impairment. The claimant's conditions were noted to be improved, and Dr. Lakin states she is doing very well "after her injections by Dr. Finn in the SI joint." Dr. Lakin goes on to state: "She has significant degenerative changes. She has L5-S1 herniated disc with left SI nerve impingement. Degenerative disc disease at multiple levels in her right hip appears like a degenerative tear in the labrum. It does not seem medically likely that both of these injuries were done by her mechanism of injury. She concurs with closing case and returning to full duties."

17. Dr. Lakin stated that the claimant is free to pursue treatment for nonoccupational degenerative changes, and highly encouraged her to work at conditioning and weight loss."

18. The claimant returned to Dr. Finn on October 31, 2013, who administered a right L5-S1 epidural injection. The claimant did not get any relief from the L5-S1 injection.

19. The respondents filed a final admission of liability on October 31, 2013, reflecting $16,988.23 paid in medical benefits, to date.

20. The claimant objected to the final admission of liability and began the Division Independent Medical Examination process.

21. On January 21, 2014, the claimant is seen by Dr. Lakin who notes that her condition has deteriorated and now includes in her diagnoses radiculopathy, muscle weakness, and loss of strength.

22. On January 30, 2014, the claimant returned to Dr. Lakin, who noted lumbar pain with radiculopathy, and an overall increase in pain complaints. Dr. Lakin states: "I have reservations of this [her industrial injury of May 7, 2013] MOI [mechanism of injury] causing L5-S1 disk bulging, and now with advancement of DDD with L3-4 bulge, DDD of right hip labrum with cam defect, she did improve and closed case, then on vacation in Mexico while walking has exacerbation or advancement of symptoms." At this point Dr. Lakin recommended an IME be performed to sort out her causation issues. He also referred the claimant to Dr. Sung for a surgical evaluation.

23. On February 25, 2014, Dr. Jeffery Raschbacher, M.D., performed a physician advisor review. In relevant part, Dr. Raschbacher states: "[t]he medical record indicates that she had a non-work related event, while on vacation. The treating physician, Dr. Lakin, requested an IME. It appears reasonable to conclude that with a non-work-related aggravation that further care should not be on the basis of her workers' compensation injury claim but rather outside of work, as it appears the aggravating event was fairly clearly not work-related." Dr. Raschbacher felt that it would still, however, be reasonable to obtain an IME.

24. On June 9, 2014, Dr. Elizabeth Bisgard, M.D. performed an IME, and issued a report.

25. Dr. Bisgard indicated that the claimant's pain reporting was not consistent with her presentation, and subsequently noted that the ATP, Dr. Lakin, noted this same inconsistency. ("On January 29, 2014, Dr. Lakin reevaluated [the claimant], noting that she was complaining of 10/10 pain and was using a walker but that she appeared to be in no acute distress.")

26. Dr. Bisgard stated that "the initial injury, which involved an SI strain, has now evolved into lumbar radicular pain, which is not consistent with her mechanism of injury or the EMG/NCV." She went on to note that the claimant has well documented degenerative disease in the lumbar spine and hip which, in addition to her obesity and deconditioning, is more likely than not the cause of her worsening condition and objective findings on the MRI.

27. Dr. Bisgard documented via report as follows:

> a.) [The claimant] was treated for unrelated right plantar fasciitis and placed in a cast which in and of itself can lead to gait disturbance and SIJ dysfunction, unrelated to her work injury.
>
> b.) [The claimant] was appropriately treated for her SIJ dysfunction related to the unbuckling the child from the harness. I agree with Dr. Ring that with 90% relief after the SIJ injection in September 2013, the likely pain generator was the SIJ and not the lumbar spine. Her symptoms improved and she was appropriately placed at MMI by Dr. Lakin.
>
> c.) I am very concerned by her pain behaviors and nonphysiologic findings, which indicate that there may be a significant somatoform component to her reported pain. She has a preexisting history of depression.
>
> d.) [The claimant] has an undisputed issue with morbid obesity, as well as significant underlying degenerative joint disease in her hip and degenerative disc disease in her back, which clearly predated her work injury and were not aggravated or accelerated by that injury. Her back symptoms were not consistent with her MRI findings, and they substantially worsened after her vacation to Mexico.
>
> e.) [The claimant's] subjective reporting is not reliable or consistent.

28. Lee McFadden, M.D., was selected to perform the Division Independent Medical Examination (DIME), which took place on October 9, 2014. Dr. McFadden examined the claimant and reviewed all the medical records associated with her claim.

29. Dr. McFadden issued a DIME report on October 29, 2014.

30. Dr. McFadden diagnosed the following in his DIME report:

> a.) SI joint inflammation, related, on a more probable than not basis, to the industrial injury of May 7, 2013.
>
> b.) Chronic low back pain, unrelated, on a more probable than not basis to the underlying industrial injury May 7, 2013.
>
> c.) Diffuse axial spine spondylosis and degenerative disc disease, pre-existing and unrelated to the industrial injury May 7, 2013, on a more probable than not basis. Neither temporarily nor permanently aggravated by the

industrial injury of May 7, 2013.

d.) Morbid obesity, pre-existing and unrelated to the industrial injury of May 7, 2013.

31. With respect to the issue of maximum medical improvement (MMI), Dr. McFadden states:

> I opine that the claimant has reached maximum medical improvement with regard to her industrial injury of May 7, 2013. Her industrial injury was a relatively innocuous event where she sustained a temporary aggravation or sprain of her right sacroiliac joint. Her low back evaluation was relatively benign at the time of her initial evaluation after her industrial injury of May 7, 2013 and she responded to a sacroiliac joint injection with approximate 90% relief of symptoms. She has had an intervening fall as well as exacerbation of her low back symptoms while vacationing since her industrial injury. She had reached maximum medical improvement and was returned to work without permanent impairment or workplace limitations by Dr. Lakin on October 30, 2013. I agree with this assessment.

32. With respect to the claimant's pain complaints, Dr. McFadden states:

> The claimant currently presents with pain out of proportion to objective findings primarily related to her axial spine. Her axial spine radiographs demonstrate chronic degenerative changes that have not, on a more probable than not basis, been either temporarily or permanently aggravated by her industrial injury of May 7, 2014. Her physical examination had significant pain behaviors and pain out of proportion to objective findings limiting the reproducibility and accuracy of any subjectively impacted measures such as range of motion or strength. Despite the inaccuracy and lack of reproducibility of her objective measures, this is a moot point regarding this evaluation as I opine that she has not sustained any permanent partial impairment with regard to her lumbar spine related to her industrial injury of May 7, 2013.

33. Dr. McFadden concluded his DIME report by noting:

> Her current symptom complex likely represents a combination of natural progression of disease process (diffuse spondlyosis and degenerative disk disease), the impact of morbid obesity on the stresses placed on her skeleton, and chronic pain.
>
> She has no focal findings related to her sacroiliac joint and I do not opine that she would require any further treatment to maintain maximum improvement for her transient SI joint aggravation sustained on May 7, 2013.

34. Dr. Timothy Hall testified at the hearing.

35. Dr. Hall opined as follows:

a.) Dr. Bess's assessment of the claimant was L5-S1 right sided degenerative disk herniation.

b.) Dr. Bess recommended a right sided L5-S1 laminotomy, discectomy, lateral recess decompression, and foraminotomy.

c.) Based on his understanding of the claim, he attributes Dr. Bess's assessment and recommendation for disk surgery to her May 7, 2013, industrial injury.

d.) The claimant was not treating for back problems prior to May 7, 2013.

e.) The claimant did not have any psychiatric history prior to May 7, 2013.

f.) The claimant consistently reported shooting radicular leg pain that has been getting progressively worse, since May 7, 2013.

g.) That he spent "about 20 minutes" reviewing the medical records in this matter, and formed his opinion based on the claimant's subjective history, and the records he reviewed.

36. It is not clear what, if any, records Dr. Bess relied on in forming his surgical opinion, and/or to what extent he relied on the claimant's subjective reporting of her history of injury and symptoms, in forming his opinion.

37. The post-hearing deposition of Dr. Elizabeth Bisgard, M.D., was taken on May 22, 2015.

38. Dr. Bisgard opined as follows:

a.) The claimant's symptoms do not correlate with her MRI findings.

b.) The claimant's symptoms were consistent with right sacroiliitis dysfunction following the May 7, 2013 injury.

c.) The claimant's MRI findings show that she had degenerative changes consistent with age related progression, and that this finding is not uncommon in individuals of her age group.

d.) A herniated disk does not explain her symptoms following the May 7, 2013 industrial injury. Rather, they are more indicative of a SI joint problem.

e.) If the claimant had a symptomatic herniated disk immediately following the industrial injury, we would see far more sensory changes in the S1 distribution, more leg symptoms, more diminished reflexes and strength along the muscles.

f.) The SI injection done by Dr. Finn on September 17, 2013,

provided claimant 90% relief. If the SI joint was not the pain generator and not the issue, she wouldn't have gotten that significant relief. The SI injection confirms that this is a SI joint issue and not a disk issue.

g.) Dr. Hall makes no mention in his testimony anything about her two subsequent intervening events.

h.) She has reviewed the records and agrees that the claimant was appropriately placed at MMI without permanent impairment by the ATP, Dr. Lakin.

i.) She has reviewed the DIME report and agrees with Dr. McFadden that the claimant was appropriately placed at MMI without permanent impairment.

j.) Dr. Hall is incorrect in stating that the claimant was consistently reporting pain shooting into her legs from May 7, 2013. On the contrary, the claimant was not reporting pain shooting into her legs from May 7, 2013. Rather, the claimant reported pain shooting into her legs months later, and after she had two intervening events, including her trip to Mexico where she had an increase in symptoms. Moreover, her condition had improved significantly at the time she was placed at MMI, and later deteriorated.

k.) That she spent three hours reading the detailed medical records. The 20 minutes that Dr. Hall spent to review all of these records, is not an adequate time to get a thorough understanding of this case. Dr. Hall's opinion is based on an inaccurate and/or incomplete understanding of the medical records.

l.) That the claimant had non-physiologic findings, which were also documented by the treating physician, as well as the DIME physician.

m.) Dr. Hall was incorrect in stating that the claimant did not have any psychiatric history. The records demonstrate that the claimant did in fact have a psychiatric history going back 12 years. The claimant was taking medication (Prozac) for this condition.

n.) The claimant's two intervening events, more likely than not, are responsible for her current symptoms, and that the claimant had subjective symptoms that do not match up with her objective findings.

39. The ALJ finds that Dr. Hall's analysis and opinions only rise to the level of establishing a difference of opinion and do not show any clearly erroneous analysis or opinions of the DIME physician Dr. McFadden.

40. The ALJ finds that the opinions of Dr. Bisgard, Dr. Lakin, and Dr. McFadden are more credible and persuasive than medical opinions to the contrary.

41. The totality of the documentary evidence and diagnostic testing is more reliable than the claimant's testimony.

42. The claimant is noted to have non-physiologic findings by the ATP Dr. Lakin, the DIME Dr. McFadden, and the IME Dr. Bisgard.

43. The ALJ finds that the claimant has failed to prove that Dr. McFadden was clearly in error when he opined that the claimant was at MMI on October 30, 2013.

44. The ALJ finds that the claimant has failed to prove that Dr. McFadden was clearly in error when he opined that the claimant suffered no permanent impairment.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado in §8-40-101, et. seq. C.R.S. (2013) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers without the necessity of litigation. See §8-40-102(1).

2. A worker's compensation case is decided upon its merits. See §8-43-102, C.R.S.

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

4. The Judges' factual findings concern only evidence that is dispositive of the issues involved: the Judge cannot address every piece of evidence that might lead to a conflicting result. See *Magnetic Engineering, Inc. v. ICAO*, 5. P.3d 285 (Colo. App. 2000).

5. When determining credibility the fact finder should consider among other things the consistency or any inconsistencies of the witnesses testimony or actions; the reasonableness or unreasonableness (probability or improbability) of the testimony or actions; the motive of the witness: and whether the testimony would have been contradicted and bias, prejudiced, or in any. See *Impure Prudential Insurance Co. v. Coin*, 57 P.2d 1205 (1936)

6. The findings of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. § 8-42-107(8)(c), C.R.S. "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO October 8, 2008), *citing Dilco v. Koltnow,* 613 P.2d 318 (1980). A mere

difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625, ICAO May 24, 2010).

7. The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). "[A] mere difference of medical opinion does not constitute clear and convincing evidence that the DIME physician's opinion is incorrect or in error." *Patterson v. Comfort Dental East Aurora*, (W.C. No. 4-874-745-01, ICAO February 14, 2014); *See also Javalera v. Monte Vista Head Start, Inc.,* (W.C. No. 4-532-166, ICAO July 19, 2004); *Gonzales v. Browning Industries of Colorado*, (W.C. No. 4-350-356, ICAO March 22, 2000).

8. As found above, the ALJ concludes that the medical opinions of the DIME physician, Dr. McFadden, have not been overcome by clear and convincing evidence, as Dr. Hall's opinions only amount to a difference of opinion.

9. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the DIME physician, Dr. McFadden was clearly wrong when he assessed the claimant to be at MMI on October 30, 2013.

10. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the DIME physician, Dr. McFadden was clearly wrong when he assessed that the claimant suffered no permanent impairment as a result of her industrial injury of May 7, 2013.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's challenge to the DIME with respect to MMI and impairment is denied and dismissed.

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

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

DATE: June 17, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-938-729-01

ISSUES

- Did Claimant prove by a preponderance of the evidence that her lumbar spine problems are related to her claim, and that lumbar-directed injections are reasonable, necessary, or related to her claim?

- Did Claimant prove by a preponderance of the evidence that platelet-rich plasma ("PRP") injections and/or stem-cell injections are reasonable, necessary, or related to her claim?

FINDINGS OF FACT

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

1. Claimant is a 59 year old former employee of Employer. On November 14, 2013, she stood up from her chair and fell on her right hip after her foot was caught in the chair. Brandon Reiter, D.O. evaluated Claimant at HealthOne that day. Claimant complained of pain in her hip and difficulty with weight-bearing. There is no reference to low back pain. X-rays of Claimant's hip were negative. Dr. Reiter diagnosed a right hip strain.

2. On November 20, 2013, Claimant began physical therapy at HealthOne. Claimant's pain complaint was noted to be located in the right hip. Claimant made no recorded complaints as to her back. Treatment is only noted to have been directed to Claimant's right hip.

3. On November 21, 2013, Claimant continued to complain to Dr. Reiter of pain across her hip, into her thigh, and also radiating to her right knee. There is no discussion of back pain. On November 27, 2013, Claimant continued to report severe right hip pain at physical therapy. Therapy was directed to Claimant's right hip, hamstring, quad and IT band.

4. On December 2, 2013, Cheryl Parent, PT noted for the first time Claimant complained of back pain. Despite characterizing the complaints as "continued pain in the right hip, buttock, and back," therapy is noted to actually be directed to the lumbar spine for the first time.

5. On December 16, 2013, Dr. Reiter referred claimant for an MRI of the right hip due to her continued complaints of right hip pain. Dr. Reiter commented on December 30, 2013, that the MRI showed a displaced right femoral neck fracture with some degenerative changes. He referred Claimant to an orthopedist, Michael Hewitt, M.D. On January 6, 2014, Dr. Reiter noted Dr. Hewitt wanted Claimant to stay off her leg and was hopeful the hip would heal on its own without surgery.

6. On February 24, 2014 Claimant complained to Dr. Reiter of tingling and needle sensations in her lateral hip and buttock region on the right side. Dr. Reiter noted Dr. Hewitt had recommended Claimant start physical therapy or pool therapy and that she try to wean off crutches.

7. On March 3, 2014, Dr. Reiter noted for the first time that Claimant complained of pain in her right lumbar paraspinal muscles with decreased range of motion in her lumbar spine. This was on Claimant's tenth visit with Dr. Reiter. Dr. Reiter did not analyze or opine whether he felt Claimant's low back pain was work-related. Claimant also complained of pain in her right hip. Dr. Reiter referred her to pool therapy.

8. On March 27, 2014, Claimant reported continuing spasms in her hip and back to Dr. Reiter. He noted that Dr. Hewitt recently again had recommended continued pool therapy and weaning off crutches. Dr. Reiter referred Claimant for a lumbar MRI on April 10, 2014.

9. The lumbar MRI occurred on April 18, 2014. It showed scoliosis, mild spondylosis, a protrusion at L2-3 resulting in mild left inferior foraminal stenosis, a bulging annulus at L3-4 which was combing with arthritis resulting in stenosis, a foraminal protrusion and annular fissure at L4-5 with mild stenosis, and arthritis at L5-S1. On April 24, 2014, Dr. Reiter noted reviewing the MRI and referred Claimant for a physiatry evaluation with Dr. Usama Ghazi.

10. Dr. Ghazi first evaluated Claimant on April 30, 2014. Dr. Ghazi noted Claimant had a healing right hip fracture, had been referred to pool therapy which caused increased buttock pain that radiated into her lower extremity, and still had pain complaints over her hip, lateral thigh, and radiating pain down her leg. Dr. Ghazi performed an ultrasound which revealed evidence of bursitis with fluid in the subgluteal/trochanteric bursa and fluid around the gluteus medius tendon. Dr. Ghazi diagnosed a right-sided trochanteric and gluteal bursitis, right-sided iliopsoas tendinitis, right-sided lateral femoral cutaneous neuralgia/meralgia paresthetica, and right-sided SI joint pain with piriformis syndrome. Dr. Ghazi referred Claimant for osteophathic treatment and acupuncture, he prescribed Gabapentin and a topical compounding ointment, and he noted bursa injections may be indicated in the future.

11. On June 10, 2014, Dr. Ghazi noted Claimant could not tolerate NSAIDs and had allergies which precluded attempting steroid injections. She had pain over the hip and lower back with tightness at the iliotibial band. He prescribed massage therapy and continued physical and pool therapy.

12. As of August 26, 2014, Dr. Ghazi recommended anesthetic only injections without steroids. Dr. Ghazi noted that, other than the anesthetic-only injections, her "only options" would be PRP injections which Dr. Ghazi noted would require multiple injections and cause post-injection flares of pain "that might be cruel and unusual to have her go through that many injections with increased discomfort." Despite saying PRP and anesthetic-only injections were her only options; he then discussed amniotic stem cell injections as another, more expensive, option. He noted such injections "have been used in studies on inflammatory conditions such as knee arthritis," and he had used them in his clinic.

13. On October 14, 2014 Dr. Ghazi's office requested authorization for two stem cell injections, at an apparent cost of $7,000 per injection. In a letter to Dr. Reiter dated October 15, 2014, Dr. Ghazi recommended the stem cell injections to the trochanteric bursa and gluteal bursa in conjunction with his finding that she had fluid on her ultrasound in that area. He then for the first time noted that, "If all else fails, we can try diagnostic medial branch blocks with anesthetic only and then pursue the rhizotomy from the right side for the lumbar facets and sacroiliac joint." Dr. Ghazi does not appear to have analyzed the relatedness of the back complaints in his treatment notes, nor does he reference any conclusion that he felt the complaints were related.

14. Dr. James Lindberg, M.D. performed a DOWC Rule 16 review of the request for prior authorization of the stem cell injections and issued a report dated October 20, 2014. Dr. Lindberg noted that stem cell injections and PRP injections were not recognized treatments in the *Medical Treatment Guidelines*. He also pointed out that Claimant's continued pain raised some concern as to the presence of nonunion or avascular necrosis, and a repeat MRI should first be done before performing any additional therapies.

15. Dr. Ghazi noted reviewing Dr. Lindberg's recommendation for denial on October 29, 2014. On that date, he documented that Claimant complained of her low back at L4-5 and L5-S1 being her most painful body part, which is expanded from his initial diagnosis of SI pain only. Dr. Ghazi recommended injections into the L4-L5 and L5-S1 facet joints. The ALJ notes that just the appointment before, Dr. Ghazi referred to the medial branch blocks as a potential "last ditch" option if all else failed. While it is not clear to the ALJ why branch blocks to treat a back condition would be a last ditch effort if hip injections failed, Dr. Ghazi shifted course and recommended the branch blocks before completing his pursuit of the hip injections. Dr. Ghazi noted his disagreement with Dr. Lindberg's opinion. He stated Claimant's limited treatment options were stem cell injections or PRP injections. He did state, though, that he would follow-through with Dr. Lindberg's recommendation for a repeat MRI.

16. On October 30, 2014, Dr. Ghazi submitted a request for authorization of L4-L5 and L5-S1 facet injections without steroid or dye. Dr. Lindberg reviewed the requests for authorization and recommended denial of the injections because no MRI had been done to determine the existence of lumbar pathology. He also noted in reference to the hip recommendations that the repeat hip MRI and not yet been done, and a local injection of anesthetic into the bursa had not been done as a diagnostic tool.

17. On November 14, 2014 Claimant's right hip MRI occurred. The MRI was read as normal. Dr. Ghazi next evaluated Claimant on November 26, 2014. He noted the normal MRI findings were "interesting" since he had found fluid in the trochanteric and gluteal bursa during his prior ultrasound examination. Dr. Ghazi administered the anesthetic-only injection into the bursa. He also noted following through with Dr. Lindberg's recommendation to order the lumbar MRI. However, he stated he would proceed with the medial branch blocks once the lumbar spine MRI was completed, without showing any regard to whether the results would affect his opinion. He also stated he would request authorization for the stem cell injections into the trochanteric and gluteal bursa as well once the lumbar MRI was completed. The ALJ notes he

apparently planned to do so without first receiving any report of the effect over time of the anesthetic-only injection.

18. The lumbar MRI occurred on December 11, 2014 and was compared MRI with her April 18, 2014 MRI. The latter showed moderate lumbar scoliosis, normal soft tissues, and no changes since the April 2014 MRI at all levels. The impression was a stable moderate scoliosis with degenerative disc and joint changes and a mild dural sac indentation.

19. On December 19, 2014, Claimant reported to Dr. Ghazi that she received 100% relief from the anesthetic injection for 10 hours. Dr. Ghazi again recommended the stem cell injections. PRP injections were again listed as an alternative treatment option, but he preferred stem cell injections due to the probable lack of a painful inflammatory response. Dr. Ghazi stated Claimant's lumbar MRI showed "facet arthrosis without severe stenosis" and he reiterated his request for lumbar facet injections. He submitted the request for authorization of the stem cells on December 22, 2014.

20. Dr. Lindberg reviewed the new requests on December 26, 2014. He noted the MRI of the hip showed no abnormalities. He stated there was considerable doubt as to whether the stem cell injections, and also possibly PRP injections, would be effective and they were not included in the treatment guidelines. He recommended both be denied, and he recommended a course of specific therapy for IT band stretching and hip muscle strengthening as a better alternative. Dr. Lindberg also noted not having the lumbar MRI results to review, but he felt the injections should continue to be denied until the MRI results could be reviewed by a spine specialist.

21. On January 22, 2015, Dr. Ghazi recommended physical therapy to stretch the iliotibial band and strengthen the hip muscle, but he felt physical therapy had already been attempted without success. He also expressed surprise that Dr. Lindberg had not been able to review the lumbar MRI. He felt his clinical exam was sufficient to diagnosis facet joint pain and the medial branch blocks were indicated regardless of the MRI results.

22. On March 17, 2015, on behalf of Respondents, Dr. Jeffrey Wunder, M.D. performed an IME of Claimant to evaluate the question of both treatment for the hip and the lumbar spine. Claimant described her cumulative pain complaints as 7/10, both on average and at that time. She described her right hip pain and buttock pain as worse than her low back pain. On physical examination, Dr. Wunder identified several non-organic findings. He noted Claimant reported right lumbosacral pain with facet loading to the left and right which "would not be consistent with isolated right-sided facet joint pain." He also noted Claimant had "strong Waddell findings. She had overactive pain behavior . . . diffuse skin tenderness, increased pain with rotation at the knees, and discrepant straight leg raising," as well as a "non-physiologic sensory examination."

23. Dr. Wunder concluded that Claimant's positive response to the anesthetic injection into her bursa indicated she had soft tissue pain which extended into her buttock, trochanter, inguinal ligament, and medial thigh, and there was no intra-articular pain generator. He stated "the only treatment for this would be physical therapy, which has not been extremely successful." He agreed with Dr. Lindberg's recommendation

that Dr. Ghazi's request for use of stem cell or PRP injections should be denied. He also agreed with Dr. Lindberg's recommendation for additional, specifically directed, physical therapy by a therapist experienced in soft tissue gluteal pain, but he was not confident she would receive much additional benefit.

24. Dr. Wunder stated Claimant's lumbar complaints were not likely related to the work-injury. He noted Claimant had undergone multiple physician and physical therapy treatments after the accident without first reporting low back pain. He noted the mechanism of injury would have led to a tissue injury which in turn would have generated an inflammatory pain response within 72 hours. He stated Claimant's reports of lumbar pain first at physical therapy on December 2, 2013, and then to Dr. Reiter for the first time in March 2014, did not establish her symptoms were related to the incident.

25. Dr. Wunder stated he felt Dr. Ghazi's request for medical branch blocks was moot due to the relatedness issue, but he also noted he felt Claimant had a poor prognosis for any treatment, for reasons including her "prominent" Waddell findings. He specifically noted he could not elicit specific facet loading response in relation to the medial branch blocks request, as she had no specific pain produced by facet loading maneuvers on physical examination.

26. On March 23, 2015 Dr. Ghazi evaluated Claimant. He noted Dr. Wunder's recommendation that all treatment other than physical therapy be denied. He expressed support with starting the physical therapy.

27. On April 16, 2015, Dr. Reiter noted Claimant had started physical therapy and dry needling. She had improving range of motion in her right hip in flexion and external rotation with continued pain complaints.

28. Claimant testified at hearing. Claimant testified she hurt initially in her right hip. She also testified that she hurt from the beginning from above her waist into her leg, as well as pain in her mid-back, buttocks, and hip. When asked when she noticed pain beyond the hip, Claimant testified the "concern was ongoing" and she could not pinpoint her pain. Claimant testified she wanted the injections to obtain relief and to help her regain functionality to perform everyday activities. When asked by her counsel about Dr. Ghazi's statements about the concerns he had proceeding with the outlined treatment, Claimant testified "I wasn't aware of anything like what was announced here this morning." She also testified Dr. Ghazi had not told her the PRP treatment could be considered "cruel and unusual" treatment, and she "absolutely [had] never heard that."

29. Dr. Lindberg testified that Claimant's initial injury was a non-displaced neck fracture of the right hip, which healed itself non-operatively, and there were no remaining abnormalities noted in Claimant's most recent November 2014 MRI. He testified Claimant's current pain generator was likely a soft tissue contusion and scarring with a probable element of greater trochanteric bursitis. He explained that when Claimant fell, she likely contused the skin, the fat, her iliotibial band (explained as the band which connects the pelvic crest to the top of the femur), and her bursa (explained as a sliding sack that lets tissues move over each other). However, the November 2014 MRI showed no bursa abnormalities.

30. Dr. Lindberg discussed that an MRI is very sensitive to finding fluid in a bursa. He testified it was possible the fluid seen on Dr. Ghazi's April 2014 ultrasound had resolved itself, which would represent an objective improvement in Claimant's condition. He also testified Dr. Ghazi's recommendations have become more invasive in the same time period as that improvement was seen. Dr. Lindberg testified there was no objective evidence to correlate Claimant's subjective level of complaints, although her complaints of pain in general were an objective finding of continued symptoms.

31. Dr. Lindberg testified the request for stem cell injections and/or PRP injections was not reasonable and necessary treatment. He testified Claimant's successful diagnostic response to the anesthetic only injection to the bursa was not an indicator of success for the requested injections. Significantly, Dr. Lindberg noted Dr. Ghazi had recommended stem cell injections and PRP injections even before the pain generator was identified through the diagnostic injection which he, Dr. Lindberg, had recommended. He testified Dr. Ghazi's recommendation for the injections before identifying the pain generator had been "putting the cart before the horse."

32. He further testified stem cell injections were investigative and experimental, and there were no peer review studies that show Claimant would receive a positive response from the treatment. As to PRP injections, he testified those are also investigational and experimental treatment, and are not considered a standard treatment for a hip bursitis. He testified he recently received from his surgical partner a report that the American Academy of Orthopedic Medicine had recently discussed that additional studies are still needed to determine when and where to use these treatments. He testified he was not aware of any studies that show clinical effectiveness for injecting stem cells or PRP to treat greater trochanteric bursitis. He also testified he was familiar with the Division of Workers' Compensation *Medical Treatment Guidelines*, and neither type of injection was considered accepted treatment under the *Guidelines*. He did not believe either injection was appropriate treatment in any circumstance other than a controlled study group.

33. Dr. Lindberg testified the most important treatment for a greater trochanteric bursitis is stretching the iliotibial band and strengthening the hip muscles, which he has recommended in this claim. He noted both he and Dr. Wunder came to the same conclusions as to Claimant's diagnosis and treatment recommendations for the hip. Dr. Lindberg discussed the non-physiological findings identified by Dr. Wunder on examination. He noted the type of non-physiological findings were those associated with a patient trying to convince a physician she was in pain, and they were red flags and indicators that Claimant would not receive much benefit from any further treatment.

34. The ALJ finds that Claimant did not prove by a preponderance of the evidence that the stem cell or PRP injections constitute reasonable and necessary treatment for her hip condition. Dr. Lindberg persuasively opined that both stem cell and PRP injections are not reasonable and necessary treatment for Claimant's complaints. Dr. Lindberg explained that medical literature contained no support in clinical trials for the proposition that the injections would provide a benefit. Dr. Lindberg and Dr. Wunder were in agreement that no further invasive treatment was needed for Claimant's hip condition other than IT band stretching and hip muscle strengthening.

35. The ALJ finds that Claimant did not prove by a preponderance of the evidence that her lumbar spine complaints are causally related to the November 14, 2013 claim, and also did not prove by a preponderance of the evidence that further lumbar-directed care is reasonable or necessary. Dr. Wunder documented the delay in complaints relating to the low back relative to the expected timeframe for such complaints to arise. Regardless of causation, the ALJ further finds that the lumbar medial branch blocks are also not reasonable and necessary medical treatment based upon Claimant's non-physiological findings and the prognosis of Dr. Wunder that she would likely not receive a verifiable benefit from the injections. Dr. Wunder's opinion that no further care was needed for Claimant's lumbar spine, in conjunction with his findings of prominent Waddell findings and non-specific facet maneuvers, is credible and persuasive.

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. 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.

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

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). 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 Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). 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).

Respondents are required to provide medical benefits reasonably necessary to cure or relieve the effects of the industrial injury. § 8-42-101(1), C.R.S. (2014); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Similarly, the question of

whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa*, 53 P.3d at 1197.

When evaluating the issue of causation and reasonable and necessary medical care the ALJ may consider the provisions of the Colorado *Medical Treatment Guidelines* 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 *Medical Treatment Guidelines* are not dispositive, and the ALJ need not give them more weight than she determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (ICAO, February 23, 2009).

Stem Cell and/or PRP Injections are not Reasonable or Necessary Treatment for Claimant's Right Hip Injury.

The first issue for the ALJ's determination is whether Claimant proved by a preponderance of the evidence that the stem cell or PRP injections recommended by Dr. Ghazi constitute reasonable or necessary treatment for her hip condition. Claimant has failed to meet her burden in this regard.

Dr. Lindberg persuasively testified that both types of injections were investigative and experimental, and there were no peer review studies that show that Claimant would receive a positive response from the treatment. He testified he was not aware of any studies that show clinical effectiveness for stem cell injections or PRP injections to treat greater trochanteric bursitis. Dr. Ghazi's treatment recommendations did not dispute this contention, in that he noted only that he used these types of injections in his practice and they had been used in studies on inflammatory conditions such as knee arthritis. He does not state they have been proven clinically effective, only that they had been used in clinical studies treating a different body part. To the contrary, Dr. Lindberg noted they had been studied, they had not been proven effective, and the American Academy of Orthopedic Medicine had recently determined more studies were needed to determine their efficacy.

Also relevant to the ALJ's consideration is Dr. Lindberg's testimony that neither type of injection was considered accepted treatment under the *Medical Treatment Guidelines.* While the ALJ understands that the *Medical Treatment Guidelines* are not dispositive, they are instructive as to standards of care and accepted medical practice. In conjunction with Dr. Lindberg's testimony as to the still uncertain results from clinical studies of stem cell and PRP injections, their absence as an accepted treatment method in the *Medical Treatment Guidelines* is further evidence that the injections would not constitute accepted reasonable and necessary treatment for Claimant's condition.

The ALJ notes the documented course of Dr. Ghazi's treatment recommendations calls into question the reliability of his recommendations and whether they serve the Claimant's best interests. Of concern, Claimant expressed surprise and a level of fear at being presented with Dr. Ghazi's stated opinion in his notes that PRP injections would constitute "cruel and unusual" treatment due to the likely inflammatory response. She testified she was not aware he had characterized the treatment in that manner, which calls into question the level of communication at which Dr. Ghazi has

engaged Claimant to communicate the actual risks and benefits of his treatment recommendations. The ALJ also credits Dr. Lindberg's testimony that Dr. Ghazi prematurely recommended the injections, even before performing a diagnostic injection to accurately identify a pain generator, which calls into question the underlying basis for the treatment recommendation.

The ALJ further credits the opinions of both Dr. Lindberg and Dr. Wunder that the identification of the pain generator as the greater trochanteric bursa without findings on MRI only required specifically directed physical therapy to stretch the iliotibial band and strengthen the hip muscles. It appears that therapy only recently began, but as of April 16, 2015, Dr. Reiter noted Claimant had improving range of motion. Although Claimant's pain complaints have remained steady, Dr. Lindberg credibly testified the difference between her April 2014 ultrasound and November 2014 MRI possibly represented an improvement in her condition. Conversely, Dr. Ghazi's treatment recommendations have become inexplicably more invasive over that timeframe even after it was confirmed Claimant had no remaining fluid in her bursa, which had originally been one of Dr. Ghazi's primary stated reasons for attempting the injections.

Claimant failed to prove by a preponderance of the evidence that stem cell injections or PRP injections are reasonable and necessary treatment for her hip condition in general, and especially in light of the fact that Claimant has not completed the recommended course of conservative treatment that was agreed upon by both Dr. Lindberg and Dr. Wunder, and ordered by Dr. Ghazi.

Claimant's Lumbar Condition is not Causally Related to this Claim, and the L4-L5, L5-S1 Medial Branch Blocks are Not Reasonable or Necessary Treatment.

The second issue for the ALJ's determination is whether Claimant's lumbar complaints are related to this claim, and if so, whether the L4-L5, L5-S1 medial branch blocks constitute reasonable and necessary treatment. Claimant has failed to meet her burden in either regard.

As to causation, the ALJ notes the first mention of lumbar back pain first arises approximately three weeks after the date of injury in physical therapy notes. Perhaps more instructive, Dr. Reiter did not document any complaints of back pain until almost four months after the injury. In addition, Claimant testified at hearing that her pain was in her mid-back region, not her lumbar region. The ALJ finds credible Dr. Wunder's opinion that Claimant should have felt associated pain in her back within 72 hours of the incident, but it is not reflected in the records that Claimant complained to her treating physician of such pain for almost four months. Although Claimant vaguely testified she had severe pain all over after the fall and she could not pinpoint her pain, the treatment notes document specific pain complaints to different parts once the lumbar pain complaints arise in the records even while she has continued to complain of severe pain. Her pain complaints to her back and hip, once documented, have been distinct with different treatment recommendations for each.

The ALJ also notes that none of the treating physicians in this claim have engaged in any analysis of relatedness, nor is there a medical opinion in evidence contrary to Dr. Wunder's stating the lumbar pain is a related condition. It has simply

been documented and conservatively treated since Claimant's complaints arose. The only evidence in support of Claimant's argument is her subjective complaints.

Claimant's subjective complaints in her lumbar spine appear to have expanded, initially in April 2014 to lead to a diagnosis of SI joint pain by Dr. Ghazi and then months later to include additional higher levels of the lumbar spine. However, the comparison MRI showed her lumbar spine pathology had not changed at all between the MRIs of April 18, 2014 and December 11, 2014. Claimant's expanding complaints so far in time from the date of injury support the conclusion that her low back complaints are not related to the claim. Moreover, Claimant's reliability as a subjective reporter of symptoms is also called into question by Dr. Wunder's finding of multiple "prominent" Waddell signs which Dr. Lindberg testified would be indicative of a patient trying to convince her physician that she was having pain. As found, Claimant has not met her burden of proof to show her lumbar symptoms are causally related to this claim.

Secondarily, the ALJ finds that Claimant has not met her burden in proving the medial branch blocks are reasonable and necessary treatment even if her lumbar complaints were related. The ALJ notes that, as he did with Claimant's hip condition, Dr. Ghazi recommended the medial branch blocks before requesting a current MRI to determine her pathology. He stated in his notes that an MRI was unnecessary based upon his clinical findings alone. However, Dr. Ghazi originally only diagnosed SI joint pain based on his clinical exam on April 30, 2014. He later noted Claimant's back complaints expanded to higher levels, despite objective evidence of no change in her spinal pathology between that April 30, 2014 and December 11, 2014. The ALJ determines Dr. Ghazi's clinical examination is insufficient to identify an injury other than to treat subjective complaints of pain.

As earlier noted, Dr. Lindberg credibly testified and Dr. Wunder credibly documented that there were concerns with Claimant's reliability as a subjective reporter of symptoms. Dr. Wunder noted in general that the extent of "prominent" Waddell findings he documented indicated a poor prognosis for any treatment, including the medial branch blocks. Significantly, Dr. Ghazi discussed reviewing these findings with Claimant, and he provided no counter-argument to Dr. Wunder's findings, nor did he dispute the presence of Waddell findings. Dr. Wunder's opinion in this regard appears to be unchallenged. The ALJ credits Dr. Wunder's findings and opinions. Lumbar medial branch blocks are not reasonable or necessary and Claimant's request for same is denied.

ORDER

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

1. Claimant's claim for right hip stem cell and/or PRP injections are denied as Claimant has failed to prove that this care is reasonable or necessary treatment for this claim.

2. Claimant has failed to prove that her lumbar symptoms are causally related to this claim, or that the L4-L5 and L5-S1 medical branch blocks are reasonable, necessary, or related treatment to this claim.

DATED: June 18, 2015

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

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

ISSUES

The issues to be determined are compensability, medical benefits, and whether or not Claimant was an employee of Respondent-Employer or an independent contractor on October 29, 2013.

STIPULATION

Prior to the examination of witnesses, the parties reached the following stipulation:

If Claimant's claim is found compensable and if he is entitled to temporary total disability ("TTD") benefits, those benefits should be paid for the period between October 30, 2013 to February 12, 2014.

FINDINGS OF FACT

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

Background

1. The employer named in this claim is Natural Resources Group, Inc. (hereinafter "NRG") NRG was established in 2000 and in 2010 acquired Energy, Oil and Gas, Inc. (hereinafter "EOG") through an asset purchase.

2. Dwayne Bacon was affiliated with EOG and owned assets in a gas field located in an area close to Claimant's residence. Mr. Bacon's assets were among those NRG purchased in 2010. After the purchase of his assets, Mr. Bacon became an employee of NRG.

3. Gas produced from wells around Claimant's residence is piped to and consolidated at a storage facility known as the Garcia Gas Plant.

4. In September 2008 Claimant was approached by Mr. Bacon and asked if he would be interested in working as a "pumper" for EOG. Pumpers monitor gas wells to ensure that they are staying in production. A pumper's duties include checking the various valves, pipes, compressors and pressure gauges on the equipment used in extracting gas from the ground and pumping it to the Garcia Plant. In addition, pumpers maintain and fix any equipment necessary to keep the well

in production. At the end of the month, Claimant would fill out a log book documenting meter readings for the various wells in the field and sent them along with the hours he worked to Mr. Bacon.

5. Claimant testified that Mr. Bacon "hired" him; however, he presented no evidence of a contract demonstrating the employer-employee relationship he asserts was formed at this time.

6. At the time he was approached in 2008, Claimant informed Mr. Bacon that he knew nothing about the gas business.[1] According to Claimant, Mr. Bacon told him that he would teach him. Mr. Bacon provided training in the form of an overview of how the equipment worked and what to do when common problems arose. Claimant accepted Mr. Bacon's offer and began working for EOG in 2008.

7. Claimant was paid $15.00/hour for his work with EOG. His wages were paid directly by Mr. Bacon and in his name.

8. At first, Claimant relied heavily on Mr. Bacon to trouble shoot the various problems that would arise in the field given his lack of knowledge; however, as his knowledge improved, Claimant was able to rely less on Mr. Bacon for day to day operations. Nonetheless, due to his experience level, Claimant would occasionally require direction and assistance from Mr. Bacon on special problems and repairs which occasionally arose in the field. On these occasions, Mr. Bacon would come down to the field, take control of the situation and direct Claimant in completing the job or repairs required to keep the well in operation. In the alternative, Mr. Bacon would make arrangements for a contractor to come in and assist Claimant to assure that the work was done correctly and on time. This arrangement between Claimant and Mr. Bacon continued after NRG acquired EOG.

9. Based upon the totality of the evidence, the ALJ finds that Claimant was an employee of EOG. Although Claimant did not apply or interview with Mr. Bacon and there is no contract for hire, the ALJ is persuaded that Mr. Bacon "hired" Claimant who was under his control and direction from 2008 until EOG was acquired by NRG in 2010.

10. Claimant continued to perform work for NRG in the capacity of a pumper between 2010 and October 29, 2013 when he sustained injuries to his right hip.

The October 29, 2013 Injury

11. On October 29, 2013, Claimant was working at the Garcia plant as a pumper. While off loading water from a gas storage tank, Claimant turned to check a cooling unit. As he turned, he tripped over an exposed pipe at ground level. Claimant fell, fracturing his right hip.

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[1] Claimant had previously worked as a brand inspector for the State Board of Stock Inspectors for thirty (30) years and had retired from this position.

12. After Claimant fell, he was able to get to his truck with the use of a crutch fashioned from a piece of pipe. Claimant then drove approximately two miles to his house. Once at his house Claimant was taken by his wife to Mt. San Rafael Hospital in Trinidad for evaluation. CT scan was obtained which demonstrated findings consistent with intertrochanteric fracture of the right hip.

13. After being examined by the physicians at Mt. San Rafael Hospital, Claimant was transported by ambulance to St. Mary Corwin Hospital where he was evaluated by orthopedic surgeon Dr. Charles Hanson. Dr. Hanson diagnosed Claimant with a post fall related acute right hip injury resulting in a closed, simple, oblique right hip intertrochanteric fracture.

14. On October 30, 2013, Claimant had surgery under Dr. Hanson consisting of an open reduction internal fixation of the right hip. Post surgical care consisted of exercise, medication and follow up visits with Dr. Hanson.

15. Claimant received treatment from the following providers: Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, Charles A. Hanson, M.D. and providers at the Hanson Clinic.

16. The ALJ finds the imaging studies and examination of Dr. Hanson performed within hours of Claimant's trip and fall to contain objective evidence of right hip fracture consistent with the stated mechanism of injury as testified to by Claimant. The ALJ finds more probably than not, that Claimant fractured his right hip when he fell to the ground after tripping on an exposed pipe while attempting to check a cooling unit on a storage tank at the Garcia plant.

17. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury while performing work for NRG.

18. Claimant was unable to perform the usual functions of his job from October 29, 2013 through October 12, 2014 when Dr. Hanson released him to full duty without restriction. No modified duty offers were extended to Claimant during this time. Consequently, Claimant experienced a complete loss of wages as is disabled within the meaning of the law and entitled to temporary total disability (TTD) benefits.

19. Claimant filed a Worker's Claim for Compensation on January 13, 2014. Respondents filed a Notice of Contest on March 6, 2014 denying the claim on the grounds that Claimant was an independent contractor and not an employee of NRG.

Independent Contractor Status

20. Claimant testified that he became an employee of NRG after it acquired EOG

when he was told by Mr. Bacon that "we're going to change this [EOG] over to another company" and that "we're just go ahead and leave you on as an employee." When EOG was acquired by NRG, Mr. Bacon advised Claimant he would get a raise to $20.00 per hour. As found, Claimant continued to rely on Mr. Bacon for assistance and direction following the acquisition of EOG by NRG. The two communicated frequently regarding the condition of the wells and work/repairs that Claimant felt were beyond his capabilities. Claimant testified that he considered Mr. Bacon to be his "boss" or "supervisor" after EOG was acquired by NRG. Consequently, the Judge finds that Claimant remained under Mr. Bacon's control and following NRG's acquisition of EOG.

21. As with EOG, Claimant continued to keep track of his hours and submit them monthly to NRG. NRG continued to pay Claimant by the hour by issuing Claimant a check for the hours submitted in Claimant's name.

22. NRG did not keep track of the hours Claimant worked or require any verification of the hours Claimant asserted he worked; instead, Claimant determined the number of hours he worked each week and wrote down the number in his "little log book." There were no requirements dictating when he needed to submit his monthly hours, in what detail, or in what form.

23. Claimant never entered into a written contact with Respondent-Employer to provide services on a fixed or contract rate. Rather, Paul Laird who is the C.E.O of Respondent-Employer testified that when NRG acquired EOG, Claimant continued working at the Garcia Plant without interruption as he had previously under EOG.

24. Claimant admitted he never filled out an employment application with NRG, never interviewed for a position with NRG, never visited NRG's office, and never filled out any tax documents for NRG to withhold taxes from his pay. However, NRG issued Claimant a 1099 form only for the 2011 tax year.

25. The ALJ finds that the relationship between Claimant and Dwayne Bacon did not fundamentally change and that Claimant was still performing the duties of a pumper under the control and direction of Mr. Bacon, as "operations Manager" for NRG following the acquisition of EOG by NRG in 2010 up to the date of his October 29, 2013 trip and fall.

26. The ALJ also finds no credible evidence establishing that Claimant was directed by Mr. Bacon to contact human resources at NRG to clarify his employment status after NRG acquired EOG. The ALJ finds Claimant's testimony that Mr. Bacon informed him he was being kept on as an employee of NRG credible and persuasive. More probably than not, Claimant relied on the representations of Mr. Bacon and his raise to $20.00/hour to conclude that he was NRG's employee after EOG was acquired. Consequently, the ALJ finds there would be no reason for Claimant to contact anyone from NRG or visit their office to complete a job application, interview for a position and/or complete tax documents.

27. Accordingly, the ALJ finds Respondents' assertion that Claimant is not an employee of NRG based upon the fact that Claimant did not go through NRG's hiring process unconvincing.

28. Claimant and his wife have owned and worked a small 170 acre cattle ranch for years. At the time Claimant was working for NRG, he was also maintaining his ranch. By the time of hearing, Claimant only had ten (10) head of cattle on the ranch due to the drop in price for beef.

29. Claimant testified that no employee of NRG ever told him he could not own or operate his ranch, and Mr. Laird testified that he had no problem with Claimant working on his ranch.

30. Other than his cattle ranch, there was no credible evidence that Claimant worked for anyone else other than Respondent-Employer.

31. The ALJ finds Claimant's work tending cattle on his small ranch to constitute an avocational interest, i.e. a hobby as opposed to a vocational pursuit.

32. As found above, Claimant received some basic training from Mr. Bacon when he first started working as a pumper in 2008. The remainder of his knowledge was learned on the job and through the continued direction/assistance of Mr. Bacon when necessary. Claimant admitted that, after his "initial" training, at EOG he received no additional training from NRG.

33. Employer provided some of the tools to perform his job but Claimant also provided some of his own tools. Claimant testified that it was easier to use his own tools than to have Respondent-Employer provide the tools as he lived a short distance away and had ready access to his tools. There were times when Claimant needed special equipment, like a pressure washer and a back hoe, to complete essential tasks associated with his job. On these occasions, Claimant would talk to Mr. Bacon and get permission to use his own equipment and charge a rental fee to Respondent-Employer. Other times, Respondent- Employer would simply provide the equipment.

34. Employer paid Claimant mileage and provided him with a hard hat, hearing protection and eye protection. Claimant would use his own cell phone at times but Mr. Laird testified that Respondent-Employer provided a cell phone at the Garcia plant for Claimant's use.

35. On occasion, well upkeep required specific parts, like oil filters, pipe fittings, and valves to remain in production. On these occasions, Claimant went to a store called "C & M" and purchased them. Claimant then sent Mr. Bacon an invoice for the cost, which Mr. Bacon paid. Later while Claimant was working for EOG, Mr. Bacon provided Claimant a credit card number to use to purchase these parts. When NRG acquired EOG, NRG set up its own an account at the store. After this, Claimant would go to the store, order the materials, and the store would send the bill directly to NRG. Thus, after

NRG acquired EOG, Claimant did not pay for any well site materials, directly or indirectly.

36. Claimant testified that he went to the well site every day – weather permitting for four years – starting in September 2008 until he was injured in October 2013. He stated that he was not accompanied when he went to the well, and that for the vast majority of the time as outlined above there was no one assisting him: he performed the work himself.

37. Claimant testified he had no set schedule and was able to check the meters at any time he chose. Claimant acknowledged that there was no time clock he was required to use to document his hours and that NRG did not set a number of hours he could or should work.

38. Paul Laird, the C.E.O of NRG testified at hearing. Mr. Laird has worked in the oil and gas industry for more than thirty years. His responsibilities as C.E.O include overseeing the operations of the company and reporting to the board of directors.

39. Mr. Laird testified that, at the time NRG acquired EOG, NRG had only three employees: himself, Mr. Bacon, and Brian Hedberg, who is no longer with the company. Mr. Laird testified that his company was a small entity, and that "every position . . . hired is a major hire for us" and that every decision to hire an employee includes a discussion with the board of directors.

40. According to Mr. Laird he did not hire Claimant. Moreover, Mr. Laird testified that Mr. Bacon never has had the authority to hire a new employee. However, on cross examination, Mr. Laird admitted that Mr. Bacon had authority to take whatever measures were necessary to make sure that the Garcia Gas Plant ran smoothly. This included getting those people necessary to do the job at hand.

41. Mr. Laird stated his company now has five employees, all of whom are salaried and registered on the company's payroll system. Mr. Laird testified that his company currently works with two pumpers. He testified that he does not consider the other pumpers working for NRG employees and, in his thirty years working in the oil and gas industry, has never considered pumpers to be, nor has he ever known pumpers to be, employees of the company owning and operating the well.

42. He testified that pumpers are not on the NRG's payroll and that instead, the company pays them when they receive the invoices the pumpers send in. Mr. Laird further testified that the company categorizes the money paid to salaried employees and the money paid to pumpers differently: employee salaries are pay roll expenses and pumper funds are lease operating expenses.

43. Mr. Laird stated NRG provides health benefits and a 401k package to its employees, but did not provide these to Claimant.

44. Mr. Laird testified that the company had not given Claimant any compensation other than the checks sent to pay the invoices Claimant mailed to the company. Mr. Laird also testified that the company requires new employees to fill out W-2 forms as well as an I-9 form, but that the company did not ask Claimant to fill out those forms.

45. As found, the fact that Claimant did not proceed through the established hiring process to become a payroll employee of NRG is not persuasive that Claimant was not an actual employee of NRG. As presented here, the persuasive evidence demonstrates that Claimant was under the control and direction of Dwayne Bacon as Operations Manager for NRG. Mr. Bacon oversaw the work of Claimant. He exercised control and directed Claimant in completion of complicated tasks in the field. The ALJ finds that Mr. Bacon was essentially engaged in ongoing training of Claimant to learn the intricacies of the pumper position. The ALJ finds the fact that Claimant was able to manage the mundane tasks of a pumper does not mean that he was he was engaged in an independent business, trade or occupation.

46. Mr. Laird testified that the company had no expectation that their pumpers would work exclusively for them, because pumpers commonly work for multiple companies at the same time. Claimant himself acknowledged that, if another gas company had approached him to work as a pumper on one of their wells; he knew he could have done so but would not have.

47. The ALJ finds that Claimant was not required to work exclusively for NRG.

48. Mr. Laird confirmed that it was not Mr. Bacon's role to train pumpers, and that NRG as a company does not train pumpers. Nonetheless, Mr. Bacon continued to provide on the job training for Claimant by directing and assisting him in completing complicated tasks. Without the ongoing education imparted to Claimant by Mr. Bacon in the field, Claimant would not have been able to complete many of the duties expected of a pumper. Mr. Laird's testimony that Claimant's close and regular contact with Mr. Bacon should be characterized as coordination and not training is unpersuasive.

49. Mr. Laird testified that Employer could terminate Claimant's services at any time without penalty. In addition, Mr. Laird testified that Claimant could quit working for NRG at any time without penalty.

50. Respondents have failed to carry their burden of establishing that Claimant is engaged in an independent trade, occupation, profession, or business.

CONCLUSIONS OF LAW

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

Generally

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).

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. The question of whether the claimant proved the requisite causal relationship between the injury and the conditions or circumstances of employment is one of fact for determination by the ALJ. *Cabela v. Industrial Claim Appeals Office, 198 P.3d 1277 (Colo. App. 2008); Blunt v. Nursecore Management Services, W.C. No. 4-725-754 (ICAO February 15, 2008).* As found here, Claimant was at the Garcia plant performing work for the Respondent –Employer when he tripped over a pipe fracturing his right hip necessitating surgery. At the time he was injured, the persuasive evidence reveals that Claimant was being paid by Respondent-Employer for the work he was performing. There was no credible evidence which shows that Claimant injured himself other than as to what he testified. Moreover, the medical evidence within hours of the alleged incident persuasively demonstrates objective evidence consistent with the described mechanism of injury. Consequently, the ALJ concludes that Claimant has proven by a

preponderance of the evidence that he was injured while performing work for Respondent-Employer. The injury is compensable.

Independent Contractor Status

E. Only employees of an employer are entitled to compensation for work-related injuries. C.R.S. §8-41-301(1)(a), (stating that an injury is compensable if, "at the time of the injury, both employer and employee are subject to the provisions of said articles…"). Individuals who are "free from control and direction in the performance of [a] service" for an employer are not employees. C.R.S. §8-40-202(2)(a). Such individuals are referred to as "independent contractors." *See* C.R.S. §8-40-202.

F. The party asserting that a claimant is an "independent contractor" bears the burden of proving independence by a preponderance of the evidence. The putative employer may establish that the Claimant is an independent contractor because he was free from direction and control and engaged in an independent business or trade by proving the presence of some or all of nine criteria set forth in §8-40-202(2)(b)(II), C.R.S, 2014; *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App.1998).

G. Pursuant to §8-40-202(2)(b)(II) "to prove independence it must be shown that the person for whom services are preformed does not:"

- Require the individual to work exclusively for the person for whom services are preformed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be preformed;

- Pay a salary or at an hourly rate instead of at a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may be supplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

H. While the ALJ must consider the factors listed in the statute, the fact that the party asserting independence does not prove one of the factors is not conclusive evidence that the claimant was an employee; put another way, the party asserting independence does not have to meet every factor listed above to prove an individual was an independent contractor. *See* C.R.S. §8-40-202(b); *Nelson v. Industrial Claim Appeals Office, supra.*

I. Section 8-40-202(b)(I) and (II) create a "balancing test" requiring the party asserting "independence" to overcome the presumption of an employment contained in section 8-40-202(2)(a) and establish instead independent contractor status. *Nelson v. Industrial Claim Appeals Office, supra*. Once Claimant establishes that he performed services for Respondent-Employer for a wage, the burden shifts to the Respondent to prove the Claimant was not an employee by showing that Claimant was free from control and customarily engaged in an independent trade.

J. Generally an employee is a person who is subject to their employers control over the means and methods of their work, as well as the results. *Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). It is the power to control, and not the fact of control being exercised, which is the primary factor in distinguishing an employee from a contractor. *Industrial Commission of Colorado v. Moynihan*, 94 Colo. 438, 32 P.2d 802 (1934). As found here, Dwayne Bacon oversaw Claimant's work. While Claimant was competent to handle the commonplace duties of a pumper, Mr. Bacon, and thus NRG controlled the means, methods and results of Claimant's work on more complicated tasks which occasionally arose in the field. Thus, the Judge concludes that Claimant was in fact not free from control and direction in the performance of his service for NRG.

K. Moreover, the Judge concludes that consideration of all of the factors regarding "independence" as set forth in §8-40-202(2)(b)(II) tips the scale in favor of Claimant being an employee as opposed to an "independent contractor."

L. In this claim, Claimant never entered into a contract with Respondent-employer to provide certain services for a fixed rate. Claimant was paid by the hour. Claimant submitted his hours to respondent- Employer which then paid him by check made out to him personally. Claimant, received a "raise" from $15.00 to $20.00/hour when E.O.G was acquired by Employee. Claimant does not have a business where he provides services to other oil companies. In fact prior to performing services for EOG and NRG, Claimant knew nothing about working in the oil and gas industry. Rather, he was a brand inspector for the State of Colorado. Claimant was provided training by Duane

Bacon at time he was hired which this ALJ finds continued after EOG was acquired by NRG. Respondent- Employer provided some of the tools for Claimant to use when performing his job. What tools and equipment Claimant provided was done merely out of convenience as Claimant resided close to the field and had ready access to his tools. Had Claimant been unwilling to use his tools, Employer would have been required to supply all of them. Respondent set up an account at a local auto parts store for Claimant to purchase materials to do his job. The account was under Respondent-Employer's name. The bills were sent to Respondent- Employer and in turn paid by them. Respondent-Employer provided Claimant with a hard hat, hearing protection, and eye protection. Respondent-Employer also provided Claimant a cell phone to use while at the Garcia Gas Plant. Finally, Claimant felt he could quit his job at any time without penalty and Respondent- Employer felt it could terminate claimant's services at anytime without penalty.

M. It is recognized that, claimant was issued a 1099 for one year and never had taxes taken out of his check, that Claimant was never restricted from working for another oil or gas company and that he was allowed to determine the hours he worked. However, considering all of the Factors set forth in Section 8-40-202 (2)(b)(II) the ALJ concludes that Claimant is an employee of Respondent-Employer.

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The ALJ concludes Claimant's treatment from Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, and Charles A. Hanson, M.D. to constitute a bona fide emergency for which treatment could be obtained without prior authorization. The ALJ also concludes that the treatment was otherwise reasonable and necessary to cure and relieve Claimant from the effects of his compensable work injury. As the claim is compensable, Respondents are liable for the medical treatment provided by Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, and Charles A. Hanson, M.D.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course of his employment on October 29, 2013.

2. Claimant is an employee of NRG, the Respondent-Employer in this case.

3. Claimant is entitled to medical benefits as provided by Trinidad Ambulance Service, Mt. San Rafael Hospital, St. Mary Corwin Hospital, and Charles A. Hanson, M.D.

4. Pursuant to the parties stipulation, Respondents shall pay temporary total disability ("TTD") benefits for the period between October 30, 2013 and February 12, 2014.

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

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

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: _October 17, 2014_____

/s/ Richard M. Lamphere_____
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-943-575-02

ISSUES

Whether Claimant has shown by a preponderance of the evidence that she suffered a re-injury of a previously injured body parts while in the course and scope of her employment with Employer.

FINDINGS OF FACT

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

1. Claimant has been an employee of Respondent, Employer since 2006.

2. In November 2006, Claimant filed a workers' compensation claim alleging injuries to her hands, arms and neck, and received treatment for those conditions.

3. Ultimately, in August 2007, Claimant was placed at maximum medical improvement, and a subsequent Final Admission was filed without challenge.

4. Claimant's symptoms continued on and off from the 2006, 2007 injury over the course of several years while she continued to be employed at Employer. Claimant has worn wrist splints daily since August, 2007.

5. In 2013, Claimant's job with Employer significantly changed in that she went from being responsible for two lines of jeans in the Employer Men's Department, to being responsible for replenishing and displaying the entire Men's Department. Before 2013, Claimant was responsible for approximately 5,000 pieces of clothing and in 2013 she bacame responsible for approximately 200,000 pieces of clothing. When her job changed, she began experiencing symptoms daily, with new feelings of her finger bones being broken and more intense elbow, shoulder, and neck pain.

6. At around the time Claimant's job duties expanded, Employer changed the display furniture in their Men's Department, replacing lighter tables with much heavier tables.

7. Claimant's responsibilities were increased in that she went from being responsible for "replenishment" of two lines of jeans to being responsible for the entire Men's Department in a "core standard" status.

8. Core standard means not only the handling of merchandise, but stocking tables, moving tables and furniture, and stocking shelves and four-way racks. Claimant cashiers approximately once a day and spends several minutes per day helping customers locate specific merchandise.

9. As of 2013 Claimant was responsible for moving heavy tables on an almost monthly basis as Employer ordered displays of merchandise to be updated.

Although two men and sales associates could help Claimant move the tables, they were often unavailable. Claimant often moved the tables by herself or with one associate.

10. Claimant demonstrated how she turns her hands palm-up and places them under the table's edge to lift the table.

11. Lifting the heavy tables causes increased symptoms in Claimant's hands, wrists, arms, elbows, and shoulders.

12. Prior to her 2013 job change, Claimant had slower times of the day and slower seasons when she could rest and her symptoms would dissipate. But after her job change, she no longer has slow times of day or seasons and she is unable to rest increasing her symptoms.

13. Due to the increase in Claimant's hours on the job, the physical nature of her duties, and the expansion of the duties for which she is solely responsible, she suffered a substantial and permanent aggravation to her upper extremities and neck.

14. Claimant also works at another clothing retailer once or twice a week for a five hour shift. Her job duties there involve greeting customers and loss prevention. These duties do not cause pain in her upper extremities.

15. Respondents called Dr. Craig Davis as an expert in orthopedic surgery. On April 11, 2014, Dr. Davis performed a Respondents' IME on Claimant after reviewing her medical records. In his report, he diagnosed Claimant with carpel tunnel syndrome, lateral epicondylitis, and myofacial pain of the upper extremities, all of which he attributed to her work for Employer with causal origins in 2006 and 2007.

16. The ALJ finds Dr. Davis' hearing testimony supports the finding of substantial and permanent aggravation. For example, Dr. Davis testified:

- A patient with carpel tunnel syndrome can worsen to the point that they will have symptoms even when they are at rest.
- Claimant's experience of symptoms when at rest is "an indication that this condition is worsening."
- He was not aware of changes in Claimant's job duties in 2013, and the details of what her job entailed, "and a lot of activities I wasn't aware of that aggravated the condition.
- "Well, the activities I think - - recent activities here [referring to lifting the heavy tables]. . . I think are responsible for a worsening of the condition she already had."
- Claimant was not at maximum medical improvement.
- Dr. Davis was asked: "if [Claimant] tells you that this furniture moving that she would do on a regular and routine basis has just put her over the max, wouldn't you assume that that then was a new finding, a new injury, a new condition she was not facing before?" He responded: "I would say it's a new activity that I was not aware of that has had a significant aggravating affect on her symptoms."

- He was unaware at the time he wrote his report that Claimant's job involved moving heavy furniture.
- He opined that Claimant's symptoms "worsened considerably in 2013" because of her new job duties.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1) C.R.S. The claimant 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, and 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 (2008) 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).

Claimant has proven by a preponderance of the evidence that she substantially aggravated her existing physical issues involving her neck area and her upper extremities.

Claimant has proved by a preponderance of the evidence that these aggravations of her underlying physical issues arose out of and in the course of her employment. Section 8-41-301(1) C.R.S.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable work related occupational disease while in the course and scope of her employment with Employer. Claimant is entitled to reasonable, necessary and causally connected medical treatment as provided by the authorized treating physician in this matter.

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, 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 is 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: June 24, 2015

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

ISSUES

The issue addressed by this decision involves Claimant's entitlement to medical benefits. The questions to be answered are:

I. Whether Claimant's need for a right shoulder hemiarthroplasty surgery should be authorized as reasonable, necessary and related to Claimant's admitted industrial injury.

II. Whether Dr. Griffis request for a left shoulder MRI is reasonable, necessary and related to Claimant's admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing as well as the evidence generated at the post hearing deposition of Dr. Klajnbart, the ALJ enters the following Findings of Fact.

Admitted 03/11/14 Work Injury

1. On March 11, 2014, Claimant, a 10-year veteran employee of Respondent-Employer was doing asphalt road maintenance work through his employer's contract for the City of Colorado Springs. He sustained admitted injuries to his right and left shoulder during the execution of those duties. Over the ten-year period of employment and on the aforementioned injury date, Claimant's work for Respondent-Employer required him to, *inter alia,* obtain asphalt mix; deliver it to the site of repair; "cut out" the edges of existing pot holes in the asphalt using a jackhammer and other heavy tools; use demolition saws which necessitated Claimant holding the saw blades against the street edges; shovel hundreds of pounds of asphalt mix into the prepared holes by using large heavy shovels weighing up to 60-80 pounds; move the asphalt mix five feet or more from the dump site location to the pot hole repair site once loaded onto the shovel; pound the newly placed asphalt into place and clear the area of the dump site before moving onto the next repair site. Based upon the description of Claimant's job duties, the ALJ finds the job physically demanding.

2. On the date in question, Claimant estimated nearly 800 pounds of mix had been placed on the ground at a busy intersection in Colorado Springs. After re-directing the traffic, the repair had to be completed quickly due to the traffic congestion. While executing the street repair process, Claimant felt a painful popping sensation in his right shoulder while performing the required heavy work activities. Claimant timely

reported the injury to his employer and the claim was finally admitted by Respondent-Insurer approximately one month later.

3. Respondent filed a General Admission of Liability (GAL) on April 22, 2014 and temporary disability benefits have been admitted from April 4, 2014 and ongoing.

4. Claimant received authorized medical care which included an MRI and right shoulder surgery performed by John Redfern, M.D. on May 12, 2014. The MRI of the right shoulder performed on April 11, 2014 was felt to demonstrate findings including a large tear of the posterior labrum, a SLAP tear, medial subluxation of the long biceps tendon and tendinosis of the rotator cuff involving the supraspinatus, infraspinatus and subscapularis tendons.

5. Dr. Redfern performed a pre-authorized right shoulder arthroscopic biceps tenotomy, right shoulder chondroplasty, limited synovectomy and right shoulder subacromial decompression during the May 12, 2014 surgical procedure.

6. Claimant testified and the records support that following surgery Claimant had no relief and continued with pain, inflammation and instability of the right shoulder following surgery. Consequently, corticosteroid injections were also performed by Dr. Redfern.

7. Additional surgical procedures to improve Claimant's right shoulder condition have been considered. On August 12, 2014 Dr. Redfern noted that Claimant's young age and work as a heavy laborer made a total shoulder arthroplasty contraindicated, but some benefit to improve his post-injury symptoms might be obtained through a hemiarthroplasty.

8. By November 25, 2014, Dr. Redfern noted that as Claimant's range of motion improved with physical therapy, there existed a greater instability in the shoulder joint characterized by catching and popping with movement and with some dropping of the shoulder to the point where Claimant was having difficulty performing simple tasks such as pouring a cup of coffee. Dr. Redfern's opined that "[i]f the patient wishes to return to heavy lifting and heavy duty work, I do not recommend he have a total shoulder arthroplasty and only a hemiarthroplasty. If the patient is going to return to light duty work and not heavy lifting, total shoulder arthroplasty will give him more predictable results in regards to pain relief and shoulder function."

9. On August 6, 2014, William S. Griffis, D.O. recommended an MRI of the left shoulder to rule out a rotator cuff tear versus a labral tear which he also found to be work related.

10. The record demonstrates Respondents were in possession of the original recommendation for shoulder surgery and requested a medical review prior to authorization of the surgery from Dr. Allison Fall.

11. Dr. Allison Fall's report purports the Rule 16 review was performed on August 10, 2014. However, her report cites Dr. Redfern's August 12, 2014 note, which makes this date of report impossible. During her cross-examination, Dr. Fall admitted that the notation at page two of the report "VF#1012-016" (Resp. Ex. E, p. 12) actually demonstrates she created the voice file of her dictation on October 12, 2014 which coincides with the received date stamp of October 13, 2014 by Respondents' counsel, (Resp. Ex. E, p. 11) and which would also coincide with the date stamp purporting to have Dr. Fall's report being sent to Claimant's counsel, the insurance company, and the employer on October 16, 2014. (Resp. Ex. E, p. 11).

12. Respondents' Application for Hearing on the issue of challenging the requested hemiarthroplasty was filed on October 29, 2014.

13. Dr. Fall opines that the request for authorization for a right shoulder hemiarthroplasty is "not medically reasonable and necessary as related" to Claimant's admitted work-related injury. Dr. Fall bases her opinion on Claimant's right shoulder MRI which documents chronic, preexisting, significant degenerative changes including osteophytes and preexisting articular cartilage damage. According to Dr. Fall, the hemiarthroplasty is needed to address the underlying preexisting degenerative changes and not for the increased symptomatology Claimant experienced on March 11, 2014." Moreover, Dr. Fall challenged the opinion of Dr. Redfern "that shoulder arthroplasty may give some pain relief, but he would likely continue to have pain and limitations, as an indication that the procedure is not medically reasonable and necessary treatment for the work-related injury." According to Dr. Fall since there "is no guarantee [Claimant] would have any functional benefit or any significant pain benefit as a result of the hemiarthroplasty, the surgery is not reasonable and necessary treatment.

14. Dr. Hall testified that Claimant's first surgery was "not sufficient to solve the problem" and did not resolve the source of pain caused by the March 11, 2014 admitted work injury. According to Dr. Hall, the second surgery (hemiarthroplasty) was likely improve the pain and loss of function Claimant suffered not only on March 11, 2014, but also as a result of the first surgical procedure which failed to substantially improve his pain complaints.

15. Dr. Klajnbart, who performed an independent medical examination at the request of Respondent testified that in his opinion the first surgical intervention performed on Claimant was reasonable and necessary to cure or relieve Claimant of the effects of the admitted injury (Depo Tr. p. 19:23-20:6), and that it was not only the opinion of the Claimant that the first surgery was not successful, but it was also the opinion of Dr. Klajnbart that this surgery was not successful (Depo Tr. p. 20:20-24). It was also Dr. Klajnbart's opinion that part of the regression of Claimant's condition post-surgery was from the "intervention itself" (Depo Tr. p. 21:7-12). Dr. Klajnbart also suggests the possible surgical option of resurfacing of the humeral head as opposed to the hemiarthroplasty and whether the decision is ultimately made by the treating surgeon to do the hemi, total or resurfacing procedure, there would likely be an increase in Mr. Christian's function based on that surgery (Depo Tr. 23:1-6) and that by

increasing that function the Claimant would then be allowed to return to an ability to work as compared to his current status (Depo Tr. p. 23:7-10).

16. The ALJ finds, based on the evidence presented as a whole, that Claimant, more probably than not, suffers from pre-existing degenerative change in the right shoulder. Nonetheless the ALJ finds that Claimant's work duties on March 11, 2014 not only resulted in Claimant's acute injuries but also aggravated that underlying condition for which Claimant now needs treatment.

17. The ALJ finds the opinions of Dr. Fall unpersuasive and instead credits the testimony of Dr. Hall and Dr. Klajnbart to find that Claimant has proven by a preponderance of the evidence that his need for a right shoulder hemiarthroplasty is reasonable necessary and related to his March 11, 2014 work injury and that said surgery is likely to cure and relieve Claimant of the effects of the aggravation of his underlying pre-existing condition.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. 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. 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 need not address every piece of evidence or every inference that might lead to conflicting conclusions. *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 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).

D. An employer must take an employee as it finds him and is responsible for any increased disability resulting from the employee's preexisting weakened condition. *Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992). Thus, when an 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. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

E. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Here, the persuasive evidence establishes that the recommended right shoulder arthroplasty, which may include resurfacing, hemi or total replacement based on the treating surgeons conclusions at the time of surgery, is reasonable and necessary, and more probably than not related to his March 11, 2014 work injury.

F. Section 8-42-101(1)(a), supra, provides:

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

As Claimant has proven, by a preponderance of the evidence that the recommended right shoulder arthroplasty is reasonable, necessary and related to his work injury and likely to cure and relieve its ongoing effects, Respondents are liable for said medical benefits under the Act.

G. Based upon the evidence presented, the ALJ also concludes that claimant has established that that Dr. Griffis request for an MRI of the left shoulder is also reasonable, necessary and related to the March 11, 2014 work injury. The requested MRI is likely to cure and relieve Claimant of the effects of his admitted work injuries. Consequently, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that insurer is liable for the MRI requested by Dr. Griffis.

H. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed, and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). In contrast, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

I. Under the statutory definition of an occupational disease, the hazardous conditions of employment need not be the sole cause of the disease. A claimant is entitled to recovery if he or she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). Here, Claimant experienced an accidental injury traceable to a particular time, place and cause as admitted for the March 11, 2014 event, but the surgery performed to cure or relieve Claimant of the effects of said injury served to significantly combine with and worsen the occupational disease created in the shoulder joint as a result of 10 years of heavy labor involved with the performance of the street repairs required in the course and scope of his employment. Respondents offered no nonindustrial cause or extent of its contribution to the underlying disease process to Claimant's bilateral shoulders.

J. Claimant has proven by a preponderance of the evidence that he suffered an admitted injury on March 11, 2014 which necessitated the surgery by Dr. Redfern on May 12, 2014, which combined with an occupational disease to his bilateral shoulders resulting directly from the employment or conditions under which work was performed and following as a natural incident of the work and the surgery performed thereafter. Claimant's job required physical exertion at a heavy and vibratory level beyond what was experienced in Claimant's nonindustrial activities. He likely developed end-stage degenerative joint disease as a result. However, the evidence sufficiently connects the incidents of March 11, 2014 and the care provided thereafter to the need for the additional surgery now being requested by Dr. Redfern. Accordingly, Claimant has proven by a preponderance of the evidence that the admitted March 11, 2014 work injury and care related thereto aggravated claimant's condition so that his pain symptoms from his end-stage degenerative joint disease worsened and caused the need for the anticipated hemi or total arthroplasty. The treatment contemplated by Dr. Redfern and Dr. Griffis is therefore related to Claimant's admitted March 11, 2014 work injury. Respondents are therefore liable for said medical treatment as being 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).

K. Based upon the evidence presented, the ALJ concludes that Claimant has established that Respondents are liable for the medical benefits related to the right and left based on causation grounds.

ORDER

It is therefore ordered that:

1. Claimant's aggravation of her pre-existing degenerative right shoulder condition is a compensable consequence of his March 11, 2014 industrial injury.

2. Respondent shall pay, pursuant to the workers compensation fee schedule for all medical expenses to cure and relieve claimant from the effects of his right shoulder condition, including, but not limited to the arthroplasty procedure requested by Dr. Redfern.

3. Respondents shall pay, pursuant to fee schedule for the recommended left shoulder MRI.

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: July 7, 2015

/s/ Richard M. Lamphere

Richard Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUE

Has the claimant proven by a preponderance of the evidence that the need for a right knee total knee arthroplasty is causally related to her January 6, 2014 industrial injury?

FINDINGS OF FACT

1. The claimant sustained an industrial aggravation of a pre-existing condition to her right knee on January 6, 2014 while performing cashiering services for the respondent-employer. The claimant's injuries occurred when she was working in the photo lab as a cashier, turned toward the cash register, caught her foot on a mat, and twisted her knee.

2. The claimant treated her injuries at the designated provider, Concentra Medical Center, and was referred to orthopedic surgeon, Wiley Jinkins, M.D. The claimant reported to Dr. Jinkins that prior to the incident on January 6, 2014 that her right knee was "asymptomatic." Dr. Jinkins understood that the claimant's right knee was essentially asymptomatic prior to the incident on January 6, 2014 and did not require medical treatment.

3. The claimant underwent an MRI of her right knee on February 25, 2014 which revealed a lateral meniscal tear, small medial meniscal tear, and arthrosis of the femorotibial and patellofemoral compartments.

4. The respondents' expert, Dr. Wallace Larson, testified as an expert in the field of orthopedic surgery. Dr. Larson evaluated the claimant and reviewed her prior medical records and authored reports dated March 26 and May 5, 2015. Dr. Larson observed that the initial MRI performed on February 25, 2014 showed severe degenerative changes of the knee.

5. Dr. Jinkins performed surgery on the claimant's right knee on May 22, 2014. The surgery confirmed pre-existing degenerative findings in two compartments of the claimant's knee, the lateral and patellofemoral compartments. Dr. Larson opined that the first surgery documented severe degenerative changes in claimant's right knee.

6. The claimant continued to experience pain in her right knee post surgery. The claimant underwent another MRI of her right knee on September 11, 2014. The second MRI confirmed degenerative findings that were essentially the same as the MRI findings seen on the February 25, 2014 MRI.

7. Dr. Jinkins conducted a second right knee surgery on October 9, 2014. Dr. Jinkins noticed degeneration in the same compartments as he noted during the first surgery.

8. Dr. Jinkins opined that the degenerative findings as seen in the knee during the second surgery had progressed since the first surgery. Dr. Jinkins was not surprised by the progression of the arthritis between the two surgeries because the level of progression was entirely consistent with the claimant's symptoms and history of arthritic knees.

9. The claimant's right knee pain complaints continued after the second surgery. Dr. Jinkins recommended that the claimant proceed with a right knee arthroplasty.

10. Dr. Jinkins testified via deposition regarding his recommendation for the total knee arthroplasty. Dr. Jinkins agreed that the claimant would have necessitated the total knee arthroplasty at some point even if the January 6, 2014 work injuries had never occurred. Dr. Jinkins opined that the need for the total knee arthroplasty was accelerated as a result of the industrial event on January 6, 2014.

11. The claimant's medical history is found to be significant for pre-existing right knee complaints. The claimant's medical records confirm that she has experienced pain complaints in her bilateral knees dating back to at least 1996. On December 3, 1996, the claimant consulted with Dr. Jinkins for complaints of joint pain in her bilateral knees. Dr. Jinkins was concerned about rheumatoid arthritis and referred the claimant to a specialist.

12. The claimant sustained widespread pain complaints and injuries as a result of a motor vehicle accident that occurred in 1999. In 1999 the claimant developed fibromyalgia, which is a chronic pain condition that results in widespread pain in multiple joints. The claimant agreed that her chronic fibromyalgia had not been cured or abated and that she was continuing to experience this chronic joint pain at the time of her January 6, 2014 work injuries.

13. On March 5, 2004 the claimant complained to her primary care provider at Colorado Springs Health Partners that she was experiencing right knee pain. Right knee arthritis was documented via x-ray.

14. On May 18, 2005, the claimant reported bilateral knee pain to her treating doctors, which she described as making it painful to go up and down stairs. The claimant indicated that she was hearing a lot of noise in her knees when going up and down stairs. The claimant's medical providers noted that she was "almost incapacitated" with pain. The claimant indicated that she was thinking about taking off work the following Fall because of the pain going up and down stairs. She was additionally, contemplating moving into a different house.

15. X-rays of the claimant's right knee taken on May 18, 2005 revealed degenerative changes consistent with chondromalacia.

16. On an intake form from June 2005, the claimant noted areas of pain complaints, which included her right knee. On June 16, 2005, the claimant complained of bilateral knee pain with continued difficulty going up and down stairs and difficulty with prolonged standing. The claimant noted no relief with Flexeril, Darvocet and other conservative modalities. The claimant's doctor, Lawrence Zyskowski, M.D., opined the claimant had evidence of chondromalacia in her bilateral knees, which had been caused by early menopause and a hysterectomy.

17. At an evaluation on April 11, 2006, the claimant continued to complain of bilateral knee pain with popping and buckling. The claimant's treating provider noted that her smoking history had been one and a half packs per day for the past 40 years.

18. The claimant's left knee pain worsened and on July 13, 2006, she underwent an MRI of her left knee which revealed three compartment degenerative changes. The claimant was subsequently diagnosed with osteoarthritis of her bilateral knees on July 20, 2006 by Steven Waskow, M.D.

19. The claimant initially testified at hearing that her right knee did not prevent her from performing any activities of daily living prior to January 6, 2014. This is inconsistent with the claimant's medical records which document prior limitations with standing and going up and down stairs. The claimant agreed on cross examination that prior to January 6, 2014 her pre-existing right knee degenerative arthritis caused her to experience pain with some activities of daily living including bending, squatting, kneeling, and stooping.

20. The claimant has been on anti-inflammatory and pain medications for many years for treatment of chronic pain caused by fibromyalgia, injuries sustained in seven prior motor vehicle accidents, and widespread degenerative osteoarthritis. The claimant agreed that she was taking pain medications and anti-inflammatory medication for pre-existing arthritis at the time she sustained her work injuries in this claim on January 6, 2014.

21. The claimant agreed that prior to sustaining her industrial injury on January 6, 2014 she was experiencing pain complaints in her right knee. The claimant attributed these pain complaints to general wear and tear and getting older. The claimant understood that prior to sustaining her injuries on January 6, 2014 that she suffered from degenerative arthritis and that this was a chronic condition that caused her to suffer from incurable pain. The claimant agreed that her pain complaints in her right knee caused pain when she squatted and bent down at work. The claimant acknowledged that she frequently reported to work in pain prior to January 6, 2014.

22. Dr. Jinkins had not reviewed the claimant's pre-existing medical records predating her date of accident in this claim. Dr. Jinkins testified that the claimant had described to him that she was essentially asymptomatic in her right knee prior to the date of accident and that her right knee pain had not required any medical treatment prior to the date accident. There is no indication that Dr. Jinkins was aware of the claimant's documented pre-existing history of pain complaints in her right knee and medical treatment she received for pain complaints in her right knee.

23. Although this prior right knee medical treatment is documented years before the January 6, 2014 event, the diagnostics, medical evaluations and the claimant's own testimony confirm that the claimant was suffering from chronic pain and incurable arthritis in her right knee at the time she sustained her injuries in this claim. The claimant was medically managing these pain complaints at the time she suffered her injuries in this claim with pain medications and anti-inflammatory medication.

24. As found, Dr. Jinkins' testimony and opinion is not supported by the credible weight of the evidence because Dr. Jinkins did not have a full and accurate understanding of the claimant's medical history. Dr. Jinkins conceded that the claimant would have necessitated a total arthroplasty in her right knee at some point in the future, even if the January 6, 2014 work event had never occurred. Dr. Larson's opinion that there is no standard rate of degeneration that is uniform across the general population is credited. Dr. Larson testified that it is scientifically implausible and purely speculative to reach the conclusion that the claimant's right knee degenerative arthritis

accelerated faster than it otherwise would have if the minor twisting event on January 6, 2014 had never occurred.

25. The claimant's argument that her right knee had only minor degenerative changes at the time of the January 6, 2014 injury is not credible in light of claimant's medical records from 2004 to 2006, which document a clear history of right knee arthritis pain and the diagnosis of osteoarthritis, which then progressed over the next ten years. This opinion is further not supported by Dr. Jinkins' own concession that claimant would have needed a right total knee arthroplasty at some point even if the January 6, 2014 event had never occurred.

26. Dr. Larson testified the need for a total knee arthroplasty is an optional choice for any patient. Dr. Larson opined that claimant would have been a candidate for a total knee arthroplasty even if the January 6, 2014 work injury had never occurred.

27. Dr. Larson's opinion that the need for the claimant's right knee arthroplasty is not causally related to the January 6, 2014 industrial incident is credible and more persuasive than medical evidence to the contrary.

28. The ALJ finds that the claimant has failed to establish that it is more likely than not that her need for total right knee arthroplasty is related to her industrial injury of January 6, 2014.

CONCLUSIONS OF LAW

1. The claimant has the burden of proof, by a preponderance of the evidence, of establishing an entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals* Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals* Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones,* 688 P.2d 1116 (Colo. 1984).

2. The claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, 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).

3. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment the claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). And 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).

4. The ALJ concludes, as found above, that the claimant has failed to establish by a preponderance that the need for the total knee arthroplasty is causally related to her January 6, 2014 industrial aggravation of her pre-existing arthritic condition.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for a total right knee arthroplasty is denied and dismissed.

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

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

DATE: June 16, 2015

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant received an overpayment of temporary total disability benefits; and

2. Whether Respondents are entitled to an Order for repayment.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following findings of fact are entered.

1. Christine Schelble is the risk manager for Employer and is familiar with Claimant's worker's compensation claim. The evidence established that Claimant received his regular wages while off work, from May 23, 2014, through July 11, 2014, under the Sick & Accident Plan, which is funded by Employer. Claimant received TTD, from May 23, 2014, through July 11, 2014, in error. Claimant was not assessed sick or vacation time during this time frame.

2. Ms. Schelble further testified that it is her belief that the Insurer obtained approval of the Sick & Accident Plan from the Director of the Division of Workers' Compensation (Director).

3. Brittany Swa is the Insurer's workers' compensation claims adjuster for Claimant's claim. During a telephone call with an Employer representative, Ms. Swa discovered Claimant was receiving his regular wages at the same time he was receiving TTD benefits. Claimant did not contact Ms. Swa within 20 days of receiving the overpayments and did not advise Insurer that he was receiving his regular wages while receiving TTD benefits until after Ms. Swa discovered the error and contacted him.

4. Claimant was overpaid $4,587.67 in TTD benefits. Claimant has repaid a portion of the amount owed Employer and that the remaining balance owed is $3,632.07.

5. Ms. Swa testified that it is her belief that the Insurer obtained approval of the Sick & Accident Plan from the Director.

6. Respondents presented credible and persuasive documentary evidence that Respondents obtained approval of the Sick & Accident Plan from the Director as reflected in a February 8, 2006, letter to Nikki Robson, RN, Manager, Medical

Department for Respondent Employer from Mary Ann Whiteside, Director of the Division of Workers' Compensation, Colorado Department of Labor and Employment approving a wage continuation plan for Employer. Accordingly, it is found that Employer's wage continuation plan has the approval of the Director.

7. A Final Admission of Liability (FAL) was filed on September 16, 2014, and Claimant did not object to the FAL. There are no indemnity payments currently owed to Claimant.

CONCLUSIONS OF LAW

1. Respondents contend that they are entitled to an order directing Claimant to repay an overpayment of TTD. The ALJ finds that Respondents are entitled to an order to repay an overpayment of $3,632.07 in TTD. Based on the additional evidence presented at the reopened hearing, it is concluded that Respondents established that Employer's wage continuation plan was approved by the Director and that under that plan Claimant was erroneously paid wages while at the same time receiving TTD. Respondents established by a preponderance of the evidence that Claimant was overpaid TTD and that Respondents are entitled to an order of repayment in the amount of $3,632.07

2. It was established by a preponderance of the evidence that Claimant received an "overpayment" resulting from the payment of wages under a "wage continuation" plan as defined by Section 8-42-124 (2) (a), C.R.S. The statute provides, as follows:

> Any employer who is subject to the provisions of articles 40 to 47 of this title and who, by separate agreement, working agreement, contract of hire, or any other procedure, continues to pay a sum in excess of the temporary total disability benefits prescribed under articles 40 to 47 of this title to any employee disabled as a result of any injury arising out of and in the course of such employee's employment and has not charged the employee with any earned vacation, sick leave or other similar benefits shall be reimbursed if insured by an insurance carrier or shall take credit if self-insured to the extent of all moneys that such employee may be eligible to receive as compensation of benefits for temporary partial or temporary total disability under the provisions of said articles, subject to the approval of the director.

3. The evidence established that the "wage continuation" plan under which Claimant received payment from Employer for the period May 23, 2014, through July 11, 2014, constitutes a "payment" under which the Claimant's TTD benefits are "required to be reduced" within the meaning of Section 8-42-113.5 (1). Respondents proved that the Director approved the Employer's wage continuation plan and Respondents are entitled to repayment of the overpayment as required by law under of Section 8-42-113.5 (1), C.R.S.

5. It is concluded that Respondents are entitled to an order for repayment. As the proponent of the claimed overpayment and right to repayment, the Respondents bear the burden of proof to establish that payments to Claimant under the "wage continuation plan" were of the type that can reduce TTD benefits. *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002); *Barnhill v. City and County of Denver,* WC 4-525-398 (ICAO August 27, 2003) (to take credit for wage continuation respondent required to establish it paid in excess of TTD benefits and did not charge sick leave). Section 8-42-124 (2) (a) provides that wage continuation plans effect a reduction in TTD benefits only when: (1) The amount paid under the plan exceeds the TTD benefits payable for the injury; (2) The employee has not been charged vacation leave, sick leave or other similar benefits; (3) The Director has approved the wage continuation plan. *See* WCRP 1-8 (establishing procedures for Director's approval for wage continuation plans established under Section 8-42-124).

6. WCRP 1-8, pertaining to the approval of a "wage continuation" plan, provides,

> 1-8 EMPLOYER CREDIT FOR WAGES PAID UNDER §8-42-124(2), C.R.S.
>
> (A) An employer who wishes to pay salary or wages in lieu of temporary disability benefits may apply to the Director for authorization to proceed pursuant to §8-42-124(2), C.R.S.
>
> (B) The application to the Director shall contain the following information:
>
> (1) a reference to the contract, agreement, policy, rule or other plan under which the employer wishes to pay salary or wages in excess of the temporary disability benefits required by the act, and
>
> (2) a description of the employees covered by the application and a statement that these employees will not be charged with earned vacation leave, sick leave, or other similar benefits during the period the employer is seeking a credit or reimbursement.
>
> (C) An employer who has received approval from the Director to proceed under §8-42-124(2), C.R.S., shall indicate on the employer's first report of injury form whether the claim is subject to §8-42-124, C.R.S.

7. Here, the evidence established that Employer's wage continuation plan was approved by the Director. Respondents offered the testimony of two witnesses who testified that they believed the "wage continuation plan" was approved by the Director. Respondents' witnesses, a claims adjuster for the Insurer and a risk manager for Employer, were credible and persuasive regarding their belief about the Employer's wage continuation plan and their testimony was supported by documentary evidence, a February 8, 2006, letter from the Director of the Division of Workers' Compensation approving the Employer's wage continuation plan.

ORDER

It is therefore ordered that:

1. Claimant was overpaid TTD in the amount of $4,587.67.

2. Claimant shall repay Respondents overpaid TTD in the amount of $3,632.07.

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 8, 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

1. Whether the claimant proved by a preponderance of the evidence that he sustained a compensable industrial injury arising out of and in the course of his employment with the respondent-employer; and,

2. If so, whether the claimant proved as a result of the industrial injury he required authorized, reasonably necessary and related medical treatment to cure and relieve him from the effects of the industrial injury.

FINDINGS OF FACT

1. The claimant is an employee of the respondent-employer. This company provides professional environmental cleanup services. On the date of injury, June 4, 2014, the claimant was working at a large coal facility in Gillette, Wyoming where the company was performing a "washdown" after an explosion. In order to do this, the claimant was operating a large fire hose used to wash down coal dust.

2. The claimant estimated his typical workweek was six twelve hour days, working anywhere from 40-84 hours per week. His job duties might involve lifting over 100 pounds, and included crouching and crawling.

3. On June 4, 2014 the claimant was operating the hose, which was under significant water pressure. The job began at about 8:00 am that day. By around 9:30, the claimant noticed severe back pain and sought out his supervisor to tell him he did not think he could continue working. Initially he was going to return to his hotel room to rest, but he changed his mind and asked to be taken to an emergency room.

4. 4. The claimant's supervisor Tom Kellogg took him to the local Emergency Room. The claimant arrived in the ER and was seen by James Hawley, MD at 10:24 am. X-rays were ordered, which showed degenerative joint disease with no evidence of acute fractures or dislocation, but which did show straightening of cervical lordosis at L1-S1. The history indicates "Chronic back pain: Resolved., States he has L4 rupture." The physician prescribed Medrol Dosepak, Flexeril10 mg., and Naproxen 500 mg. Once the claimant was stabilized, he was released with limitations of "No work, For 2 days, Light

duty until Tuesday. 6/10/14". The claimant was advised to follow up with his primary care provider within 5-7 days.

5. The claimant took a drug screen after his release from the ER, and was transported back to his home base in Pueblo, Colorado by another crew that was passing through the area.

6. On June 5, 2014, the claimant was seen by occupational physician Dr. Dallenbach in Pueblo. The claimant was accompanied to the appointment by Wendy Cullen, a safety coordinator for the Employer. Dr. Dallenbach's Assessment was:

> Acute lumbar strain; Left SIJ sprain; questionable significant aggravation of preexisting lumbar spondylosis. Within a reasonable degree of medical probability based upon currently available information [the claimant's] current clinical condition is work related in that it is secondary to activity performed within the course and scope of his employment as a Technician at [the respondent-employer].

7. Dr. Dallenbach ordered PT two times per week, continued the Medrol, and prescribed Percocet. He noted, “At this point in time [the claimant] is unable to function safely in the work environment in any gainful capacity.

8. On October 25, 2013, and while working for the same employer, the claimant had a previous back injury. He was also treated for this injury by Dr. Dallenbach. During the course of his treatment for the first injury, Dr. Dallenbach prescribed medications, and made a referral to Drs. Bainbridge and Shoemaker at Denver Back Pain Specialists for pain management.

9. Dr. Bainbridge recommended medications and physical therapy for the first injury. He reviewed X-rays and MRI images. He noted "evidence of a right paracentral disc protrusion, possibly with slightly extruded disc material, small in size at the L4-5 level. This appears to be superimposed on a broad based disc bulge at this level." Later he notes, “a small posterior annular tear at the L5-S-1 disc right of midline."

10. The claimant later saw Dr. Shoemaker who recommended psychological treatment for depression. The claimant continued to receive physical therapy. On March 13, 2014, Dr. Dallenbach released the claimant to full duty and placed him at MMI. He had no permanent impairment and no permanent restrictions from the first injury.

11. The claimant returned to full duty after he was placed at MMI, performing his regular job duties.

12. After the claimant's second injury, Dr. Dallenbach made another referral to Dr. Bainbridge. The claimant saw Dr. Bainbridge on July 22, 2014. Dr. Bainbridge noted his history, stating "From the 10/15/13 injury, [the claimant] was experiencing bilateral low back and left groin pain. He participated in physical therapy for 2 months with excellent benefit, and largely resolve of his symptoms. [The claimant] was able to return to work after this, and believes that he worked for 1.5 to 2 months." Dr. Bainbridge also noted the new June 4, 2014 injury and the mechanism of injury. He recommended bilateral L-5-S-1 injections.

13. Dr. Bainbridge also compared the MRI performed on June 20, 2014 after the second injury, with the MRI taken after the first injury. He wrote, “Lumbar MRI performed at Park West Imaging on 6/20/14 was reviewed and reveals mild to moderate degenerative disc disease with broad bulging from L-3-S-1. At L3-4 there is a broad foraminal disc protrusion to the right > left. There is a mild DJD at L3-4 and L4-5 and to a more significant degree at L5-S-1 bilaterally."

14. The medical records of both Dr. Dallenbach and Dr. Bainbridge show that the claimant, while he had suffered from a previous back injury in 2013, had recovered from that injury and had returned to full duty without incident.

15. Dr. Dallenbach testified at hearing, consistent with his reports, that on June 4, 2014 the claimant suffered from a significant aggravation of a pre-existing back condition that would constitute a new compensable injury.

16. The ALJ finds the claimant to be credible.

17. The ALJ finds that Dr. Dallenbach’s analysis and opinions are credible and persuasive in terms of the claimant suffering a material aggravation of his back condition arising out of and in the course of his employment with the respondent-employer on June 4, 2014.

18. The ALJ finds that the claimant has proven that it is more likely than not that he suffered a compensable worker's compensation injury on June 4, 2014. According to the records of Dr. Dallenbach placed the claimant at MMI for this injury on October 1, 2014.

19. The claimant first presented for treatment for his injury at the emergency room at Platte County Memorial Hospital in Wheatland, Wyoming. He received follow-up treatment for his injury from his ATP Dr. Dallenbach. Dr. Dallenbach ordered diagnostic MRIs, prescribed medications, and made referrals to specialist Dr. Bainbridge and to

physical therapy. The claimant also received psychological counseling from Dr. Evans, on the recommendation of Dr. Bainbridge.

20. The ALJ finds that the claimant has established that it is more likely than not that all of the medical treatment the claimant received from the above-referenced providers is reasonable, necessary, and related treatment for the instant worker's compensation injury.

CONCLUSIONS OF LAW

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

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

3. A workers' compensation case is decided on its merits. See §8-43-201, C.R.S.

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

5. In order to prove a compensable injury and entitlement to benefits, a claimant must show by a preponderance of the evidence that his injury was caused by

activities that arose out of and in the course of his employment. See §8-43-201, C.R.S. and §8-41-301(1) (c) C.R.S. "Proof by a preponderance of the evidence requires claimant to establish that the evidence of a "contested fact" is more probable than its non existence." See *Matson v. CLP, Inc.*, W.C. No. 4-722-111 (ICAO August 13, 2009).

6. The claimant must prove by a preponderance of the evidence that the alleged injury was proximately caused by an injury arising out of and in the course of his employment with the employer. See §8-41-301(1)(b-c) C.R.S. See also *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "arising out of" element requires claimant to show a casual 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.*

7. The question of whether the claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P. 3d 844(Colo. App. 2000).

8. Merely feeling pain at work in and of itself is not "compensable." See *Miranda v. Best Western Rio Grande Inn* W.C. No. 4-663-169 (ICAO April 11, 2007) "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant was sustained a compensable injury." See also *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

9. Here the claimant has established by a preponderance of the evidence a causal connection between his employment activities and his injury. The claimant presented persuasive evidence that his injury actually is compensable. The claimant's activities of wielding a fire hose under high pressure and the movements required of the claimant while using the fire hose are sufficient to establish that his injury arose from this activity.

10. The 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). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

11. The ALJ concludes that the claimant has established by a preponderance of the evidence that all of the medical treatment received from the ER in Wyoming on

June 4, 2014 and the treatment received through Dr. Dallenbach and his referrals was reasonable, necessary, and related to the claimant's industrial injury hereunder.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-insurer shall pay for all reasonable, necessary, and related medical care to cure or relieve the claimant from the effects of his injury, including all care so found above.

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: June 10, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether the claimant's claim of a work related right shoulder injury occurring on January 8, 2010 is barred by the statute of limitations;

2. If not, whether the claimant's right shoulder rotator cuff tear injury is compensable;

3. If compensable, whether the claimant's need for medical treatment after 2010 was caused by the injury; and

4. Whether the treatment, including surgery, provided by Dr. Weinstein was unauthorized.

Based upon the findings and conclusions below that the claim is not related to her industrial injury of January 8, 2010 and that even if it were it is barred by the statute of limitations, the ALJ does not reach a decision on the remaining issues.

FINDINGS OF FACT

1. On January 8, 2010, the claimant (then age 49), while engaged in her duties for the respondent-employer, felt pain in her right shoulder while pulling on a drawer which had become stuck. The claimant was employed by the respondent-employer as a procurement director at the time and continues to hold the same position.

2. On January 10, 2010, the claimant selected CCOM as the initial authorized treating provider (ATP) from the list of two physicians which the respondent provided.

3. On January 12, 2010, the claimant was seen at CCOM by Richard Nanes, D.O. and reported a 5/10 pain level, which she described as "not severe." Dr. Nanes diagnosed work-related right shoulder tendinitis. Dr. Nanes noted a previous left shoulder surgery, which he interpreted as a non-occupational rotator cuff repair. The claimant testified that she did not recall the specific type of surgery which she underwent, but she confirmed that it was performed in the area of her left shoulder.

4. On January 14, 2010, the claimant underwent a right shoulder x-ray, which did not reveal any fracture or dislocation.

5. On January 18, 2010, the claimant was seen by Jeannine Laforce, P.T. and reported a 3/10 pain level. Ms. Laforce recorded the following right shoulder range of motion (ROM) measurements: flexion of 70 degrees, abduction of 62 degrees, and extension of 43 degrees.

6. On February 16, 2010, Dr. Nanes placed claimant at maximum medical improvement (MMI), without permanent impairment. That same day, the claimant completed an intake form in which she reported a contemporaneous pain level of 2/10, in addition to having pain approximately 20% of the time.

7. On February 26, 2010, the claimant told Jaymie Ludeman, P.T. that she had returned to full activity without pain or restriction. Mr. Ludeman took a final set of ROM measurements, which revealed no limitations.

8. From February 2010 through October 2012, the claimant did not seek or receive any treatment for her right shoulder.

9. On October 15, 2012, the claimant sent an email to the respondent-employer in which she requested additional medical treatment for her right shoulder. In the email, the claimant stated that "the physical therapy appeared to have helped for a while, but my arm is experiencing a lot of pain now."

10. That same day, the claimant was seen by George Schwender, M.D., who referenced a date of injury of October 15, 2012. Dr. Schwender consistently listed October 15, 2012 as the date of injury in his subsequent reports.

11. On October 16, 2012, the claimant was examined Daniel Olson, M.D. and reported having 7/10 to 9/10 pain in her right shoulder 80% of the time. Dr. Olson identified October 15, 2012 as the date of injury, while noting the 2010 incident in summarizing claimant's history.

12. On October 22, 2012, the claimant underwent a right shoulder MRI, which demonstrated a 13 mm full-thickness rotator cuff tear, with 10-11 mm of retraction and overlying bursitis.

13. On October 30, 2012, the claimant underwent a second set of right shoulder x-rays. Unlike the 2010 study, the 2012 x-rays revealed hypertrophic spurring

at the glenohumeral joint and mild flattening of the glenoid, which Curtis Harlow, M.D. interpreted as degenerative changes without any acute injuries.

14. That same day, the claimant was also evaluated by Bruce Taylor, M.D., who noted that her pain had markedly worsened over the past couple of months. Dr. Taylor recommended rotator cuff repair surgery.

15. On January 9, 2013, Dr. Schwender took ROM measurements and recorded 130 degrees of abduction and 140 degrees of flexion.

16. On April 30, 2013, the claimant followed-up with Dr. Taylor and reported a progressive worsening of symptoms.

17. On June 5, 2013, the claimant was examined by Dr. Nanes, who noted that right arm abduction was limited to 90 degrees, and internal rotation was limited to about 10 degrees. Dr. Nanes listed a date of injury of October 15, 2012.

18. On October 16, 2013, Tashof Bernton, M.D. issued a report after reviewing the claimant's medical records. Dr. Bernton concluded that the claimant's need for rotator cuff repair surgery was not work-related. Dr. Bernton also explained that rotator cuff tears can occur acutely or as a chronic degenerative process without any specific injury. Although Dr. Bernton recognized that pulling on a file drawer could cause "a temporary symptomatic aggravation," he stopped short of suggesting that this could cause or permanently aggravate a preexisting rotator cuff tear. Dr. Bernton also noted that the retraction which was identified by the MRI "indicates that the tear was clearly present prior to the reported date of injury of October 15, 2012."

19. On June 11, 2014, the claimant filed a workers' claim for compensation in this case, more than three years after the alleged date of injury.

20. The claimant also filed a separate workers' claim for compensation for the same right shoulder condition, which was the subject of W.C. No. 4-934-402. The claimant testified that she filed this claim because her employer told her that she needed to file a separate claim when she reported her increased symptoms in October 2012. The claimant admitted on cross-examination, however, that she provided an interrogatory answer regarding W.C. No. 4-934-402 in which she stated that her injury in that case happened on October 15, 2012 when she pulled hard on a drawer and felt an impact on her arm. The ALJ finds that the claimant is credible in her testimony that revealed she only indicated that date because she was told to do so. On August 8, 2014, an order dismissing W.C. No. 4-934-402 was entered based on the claimant's willful failure to comply with a discovery order.

21. On October 31, 2014, the claimant underwent arthroscopic subacromial decompression and rotator cuff repair surgery performed by David Weinstein, M.D. The claimant testified that she sought treatment from Dr. Weinstein outside of the workers' compensation system and was not referred him by anyone at CCOM.

22. On March 4, 2015, the claimant was examined by Albert Hattem, M.D., to whom she described a very minor accident ("pulled on a stuck drawer for a few seconds until it finally opened"). The claimant told Dr. Hattem that after the incident she had to ask for help when reaching, working overhead, and lifting heavy objects. Additionally, the claimant reported being unable to play basketball, which she previously played about three times per week. Dr. Hattem concluded that the claimant's rotator cuff tear was most likely caused by the natural degenerative process, because the alleged mechanism of injury was insufficient to cause a new tear or permanently aggravate a preexisting tear; such tears are common in older patients; the claimant's basketball hobby was a very strenuous activity requiring reaching and throwing using both arms; and the claimant uses her right hand for everything besides eating and writing. Dr. Hattem further opined that the symptoms which the claimant has experienced since 2012 are unrelated to the 2010 incident, and the lack of any treatment in the 32 months after the claimant was placed at MMI suggests that her subsequent symptoms were more likely the result of the degenerative process rather than the minor accident.

23. The claimant testified on direct examination that her job duties did not change after the accident, but she admitted on cross-examination that she would rely upon students to lift items for her. The claimant also testified that she loved and frequently played basketball before the accident, but she essentially stopped playing thereafter. The claimant also testified that she never had any doubt that her symptoms since 2010 were related to the accident, she never had any days without pain, and her pain was concerning. The claimant also testified that the respondent-employer paid for her medical treatment in 2010 and she is unaware of any unpaid bills for services rendered in 2010.

24. Michael Dallenbach, M.D. examined the claimant at the request of claimant's counsel on March 20, 2015, but he did not produce a report before testifying. Dr. Dallenbach testified that the claimant's alleged injury is compensable. Dr. Dallenbach testified that it is not possible to determine exactly when the rotator cuff tear occurred, though he agreed with Drs. Hattem and Bernton that it probably occurred long before the MRI was performed. On cross-examination, Dr. Dallenbach testified that his handwritten notes reflect that the claimant was having functional limitations in 2010.

25. Dr. Hattem testified and was accepted as an expert in occupational medicine. Dr. Hattem explained that the alleged mechanism of injury did not cause the rotator cuff tear based on the insufficient mechanism of injury, the claimant's nearly complete resolution of symptoms shortly thereafter, and the frequency of such tears in the older population. Dr. Hattem explained that the claimant's tear was most likely degenerative in nature based on her age, genetic predisposition, and non-occupational activities; and he concluded that the claimant's need for the surgery which was performed by Dr. Weinstein was unrelated to the accident for the same reasons. Dr. Hattem testified that the accident at most temporarily aggravated a preexisting partial tear.

26. The ALJ finds that Dr. Hattem's opinions are credible and more persuasive than medical opinions to the contrary.

27. The ALJ finds that the claimant has failed to establish that it is more likely than not that the rotator cuff tear is related to her industrial injury of January 8, 2010. The ALJ finds that the claimant's rotator cuff tear is more likely than not from a degenerative process.

28. The ALJ finds that even if the claimant's rotator cuff tear was related to her industrial injury of January 8, 2010, that her claim is barred by the statute of limitations.

CONCLUSIONS OF LAW

1. The claimant faces a "preponderance of the evidence" burden of proof on the issue of compensability. *Section 8-43-201, C.R.S.* This standard requires a party 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).

2. Not every accident results in an injury. The term "accident" refers to an "unexpected, unusual or undersigned occurrence." *Section 8-40-201(1), C.R.S.* The term "injury" refers to the effect of an accident. *Section 8-40-201(2), C.R.S.*

3. Even if an accident causes an injury, not every injury is compensable. Indeed, an injury is only compensable if it entitles the claimant to disability benefits, regardless of whether medical treatment is needed. *See Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014) (holding that the claimant's injury "did not become compensable" until she lost in excess of three days of work, while declining to address the effects of "a treated, but not-compensable injury" for AWW purposes).

4. A claim for compensation is barred unless it is filed within two years after the date of injury (or three years with a reasonable excuse), pursuant to the statute of limitations established by section 8-43-103(2), C.R.S. (hereinafter "the SOL"). The SOL begins to run on the date which the claimant, as a reasonable person, knew or should have known the "nature, seriousness, and probable compensable character of his injury." *Sanchez v. Western Forge Corp.*, W.C. No. 4-428-933 (May 17, 2001).

5. An entitlement to indemnity benefits is not a prerequisite for the SOL beginning to run. *Ott v. Pediatric Services of America*, W.C. No. 4-705-444 (January 14, 2009).

6. The theory behind *Ott* is equally applicable to this industrial accident claim. Indeed, the same SOL applies to both occupational diseases and industrial injuries, and there is no basis to treat industrial accident claims differently under the same statute.

7. In assessing credibility, the ALJ may consider the consistency or inconsistency of testimony and actions, the reasonableness or unreasonableness of testimony and actions, and personal motives, bias, prejudice, and interests. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

8. The accident did not cause a compensable injury pursuant to the standard established in *Loofbourrow*. This is because the injury was so minor that it did not entitle claimant to any indemnity benefits, as it did not cause any temporary wage loss before she was placed at MMI without impairment. The medical records demonstrate that any related symptoms and need for treatment quickly dissipated. The claimant was nearly pain-free and demonstrating full ROM just six weeks later, and she did not seek or receive any treatment whatsoever for the following thirty-two months. At most, the accident caused a temporary, non-compensable exacerbation of a preexisting condition.

9. The claimant was or should have been aware of the work-related nature of her condition since 2010. The claimant testified that she has always related her subsequent symptoms to the event in 2010. Additionally, all of the medical records from 2010 are focused on the treatment of what is described as a work-related shoulder injury, and the claimant knew that her medical treatment was paid for by the respondent.

10. The claimant was or should have been aware of the seriousness of her condition since 2010. The claimant's testimony demonstrates that she believed something was significantly wrong before the MRI: she has stated she experienced

symptoms every day since the accident, she has always attributed her symptoms the incident, she was concerned about her symptoms, and she altered her job duties and personal activities as a result of them.

11. The ALJ concludes that the claimant's underlying degenerative condition is the most likely cause of her post-2010 symptoms. As outlined above, the alleged mechanism of injury was insufficient to cause or permanently aggravate a rotator cuff tear, and the resulting symptoms quickly resolved. Drs. Bernton and Hattem consistently opined that rotator cuff tears are often the result of degenerative changes, and Dr. Hattem explained that such tears are commonly seen in older patients.

12. The ALJ concludes that the opinions of Dr. Hattem and Dr. Bernton are credible and more persuasive than medical opinions to the contrary.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that need for medical treatment for her right shoulder for a rotator cuff tear is causally related to her industrial injury of January 8, 2010.

14. The ALJ concludes that the respondent has established by a preponderance of the evidence that the claim is barred by the statute of limitations.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado for her right shoulder 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: June 8, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issue presented for determination is whether the Claimant sustained a compensable injury to his neck in June 2013; if so, what medical benefits are reasonable and necessary to cure and relieve the effects of the injury

FINDINGS OF FACT

1. The Claimant is a 47-year old man who began employment with Respondent in 1990. He works with the Public Works Department and is a member of the street paving crew.

2. Claimant generally operates a Caterpillar 434D Vibratory Pavement Roller. This machine travels behind a machine which spreads new asphalt on streets. The Caterpillar 434D Vibratory Pavement Roller ("Caterpillar 434D") is one of several machines that compacts the new asphalt and prepares it for use by motor vehicles.

3. In June 2013, Claimant was operating the Caterpillar 434D during paving operations. He testified that he was on a two-inch thick mat of fresh asphalt when he encountered a truck on the asphalt. He had to drive the Caterpillar off the asphalt and when he did so, he claims he felt his neck jerk back and forth similar to a whiplash type of injury. He alleges that he has had left-sided neck pain ever since this incident.

4. Claimant testified that he told his immediate supervisor about the incident. The supervisor allegedly told Claimant to wait until the end of the paving season to report the injury. Claimant testified that he did not report the injury at the time because he was afraid of losing his job. Claimant formally filed a claim for workers' compensation on December 5, 2013.

5. Claimant had a prior work injury to his neck in 2012 and he did not lose his job as a result. The evidence does not support Claimant's alleged fear of losing his job due to sustaining a work-related injury or filing a workers' compensation claim.

6. After Claimant reported the injury, the Respondent referred the Claimant for medical treatment. Claimant went to Denver Health Center for Occupational Safety and Health ("Denver Health") and was evaluated by Margaret Cook-Shimanek. Claimant was prescribed some medications, and advised about use of heat and a TENS unit he already possessed. Claimant was released to full duty work.

7. Thereafter, the Claimant continued to follow-up at Denver Health with Dr. Cynthia Keuhn. Dr. Keuhn did not render a causation opinion and instead continued to treat Claimant and recommend treatment for his neck symptoms.

8. Dr. Keuhn eventually referred the Claimant to Dr. Robert Kawasaki due to Claimant's persistent neck symptoms. Dr. Kawasaki initially evaluated the Claimant on May 20, 2014. Dr. Kawasaki noted that the mechanism of injury could have caused facetogenic pain but that the timing of the injury and reporting was somewhat suspect. Dr. Kawasaki also noted that Claimant has degenerative changes in his cervical spine which were not caused by the injury.

9. Claimant saw Dr. Kawasaki again on June 11, 2014. Dr. Kawasaki's report noted that he reviewed Claimant's June 2, 2014 MRI of the cervical spine. Dr. Kawasaki noted that Claimant has multi-level degenerative changes including disc bulges, and facetogenic pain at C5-6 and C6-7. Dr. Kawasaki felt it was best to treat the facets by performing injections. He did not specifically address treating the disc bulges. Dr. Kawasaki provided no opinion on causation or relatedness of Claimant's neck condition to the June 2013 work event.

10. Claimant then began seeing Dr. Xavier Moses also at Denver Health. Dr. Moses noted that Respondent had filed a notice of contest and that Claimant should work to have the notice of contest resolved as quickly as possible. Dr. Moses did not render an opinion as to whether the June 2013 work event caused Claimant's ongoing neck symptoms.

11. Claimant's supervisor, Jason Cassell, testified about the operation of the vibratory asphalt roller. Cassell has experience supervising road crews and had operated the asphalt roller some twenty-five times.

12. The Respondent took video footage of Cassell operating the Caterpillar 434D in the customary and usual manner in which all employees should operate the machine. During the hearing, Cassell confirmed that the video demonstrated the normal operation of the same model of asphalt roller at maximum paving speed.

13. Cassell further testified that the video showed him driving off the side of the asphalt mat at an angle, consistent with Claimant's alleged mechanism of injury. Cassell also testified as to how the suspension system under the seat of the asphalt roller functioned, confirming that the video demonstrated both of the possible orientations of the seat while driving over the edge of the asphalt mat.

14. Quinn Campbell is an engineer with an M.S. degree who works for Vector Scientific. He is a Ph.D. candidate at the Colorado School of Mines where he studies biomechanics. His work history includes accident reconstruction and biomechanical investigations. He testified as expert in engineering and biomechanics.

15. Campbell conducted a biomechanical investigation of the incident Claimant described. He reviewed Claimant's answers to interrogatories, Claimant's medical records, and also observed, recorded, and analyzed the movements of an operator of the Caterpillar 434D as it moved on an off a two-inch thick asphalt mat, and viewed the video footage of Cassell operating the Caterpillar 434D.

16. Campbell took detailed measurements of the Caterpillar 434D, and explained the video of the machine operated by Cassell as it drove on and off of a two-inch thick asphalt mat.

17. After reviewing the video, Campbell determined that the Caterpillar 434D travelled at a speed of approximately 2.1 mph during paving operations.

18. Using the measurement and speed of the Caterpillar 434D, Campbell employed recognized mathematical techniques to calculate the acceleration the operator would have experienced while driving off a two-inch think asphalt mat at approximately 2.1 mph.

19. Campbell calculated that the greatest peak acceleration that Claimant could have experienced under the circumstances would be 0.31g[1].

20. Because Claimant's description of the injury was that of a whiplash-like mechanism, Campbell compared the peak acceleration that Claimant could have experienced against the peak acceleration that typically results in whiplash-associated disorders (WAD) most commonly resulting from rear-end automobile impacts.

21. Campbell cited studies that showed that the peak acceleration in a low-speed (2.5 mph) collision is about 1.6g, or five times the greatest peak acceleration that Claimant could have experienced during his alleged injury. In other words, any whiplash that Claimant experienced could be no greater than that experienced in a collision at 0.5 mph.

22. Campbell's testimony was credible and persuasive.

23. Dr. J. Tashof Bernton performed an independent medical examination ("IME") of the Claimant on October 17, 2014. Dr. Bernton examined the Claimant and reviewed Claimant's medical records.

24. Dr. Bernton noted that, and the ALJ finds, Claimant has been experiencing symptom in his neck since as early as 1999. The medical records reflect that Claimant reported to his physician that he had been experiencing "neck tension." In November, 1999, Claimant fell off a truck, striking the back of his head. Several months later, he saw Dr. Joseph Fillmore, who noted that Claimant experienced pain when he tilted his head backward. An x-ray of Claimant's cervical spine showed degenerative changes, including neural foraminal encroachment on a bony basis in the seventh and eighth right neural foramina. Claimant received follow-up treatment for his cervical strain. Again, in September 2003, Claimant reported neck pain after exercising at the gym. On October 17, 2012, Claimant saw his doctor complaining of neck pain. Claimant reported that he had been experiencing ongoing, left-sided neck pain during the month prior to his visit,

[1] Gs are a unit of acceleration equivalent to the acceleration of gravity at the Earth's surface. That is, if an object is dropped near the Earth's surface, it will accelerate toward the earth at approximately 9.8 m/s^2.

and that the pain was exacerbated the day prior to his visit when Claimant rode an asphalt roller over a manhole. Respondent admitted liability for Claimant's injury, and furnished medical benefits to return Claimant to maximum medical improvement ("MMI"). Claimant did not miss any work as a result of the injury, and he was placed at MMI two months later with no impairment.

25. Dr. Bernton concluded after his examination of the Claimant and review of the medical records that Claimant's neck symptoms were not a result of the June 2013 work incident.

26. During the hearing Dr. Bernton testified consistent with his report. He was admitted as an expert in occupational medicine who is also Level II accredited by the DOWC. Dr. Bernton has also studied causation of injuries during his work as an occupational medicine physician.

27. Dr. Bernton reviewed Claimant's medical records, examined Claimant, reviewed Mr. Campbell's October 16, 2014 report, reviewed the video of the Caterpillar 434D, and heard the testimony of the other witnesses in open court.

28. Dr. Bernton found that Claimant had extensive degenerative disease in the cervical spine that is symptomatic, and that Claimant likely has some nerve root impingement as well.

29. On the issue of whether Claimant's pain is a result of his industrial injury, Dr. Bernton concluded to a reasonable degree of medical probability that it is not. In so concluding, Dr. Bernton followed the analysis prescribed in the Guidelines:

> "To establish that a factor *could* have contributed to the impairment, the analysis must include a discussion of the pathophysiology of the particular condition and of pertinent host characteristics. A conclusion that a factor *did* contribute to an impairment must rely on documentation of the circumstances under which the factor was present and verification that the type and magnitude of the factor were sufficient and bore the necessary temporal relationship to the condition."

30. Dr. Bernton applied this analysis and found that neither the magnitude of the force nor the temporal relationship necessary to establish a causal relationship were present. Specifically, he noted that the minor jostling associated with driving over a two-and-a-half-inch drop in an asphalt roller is an insufficient mechanism to result in injury, let alone lasting pain, particularly against the backdrop of Claimant's extensive history of degenerative cervical disc disease.

31. Dr. Bernton noted that he was provided with a great deal of information regarding the alleged mechanism of Claimant's injury. Comparing the information about the movements of the Caterpillar 434D to more severe types of accelerations, Dr. Bernton described the forces associated with driving the Caterpillar 434D off the two-inch thick asphalt mat as almost "trivial".

32. The ALJ finds the testimony of Dr. Bernton credible and persuasive regarding the degenerative condition of Claimant's neck and the expected presence of symptoms regardless of Claimant's job activities.

33. The ALJ also viewed the video of Cassel driving the roller onto and off the mat. The ALJ observed that Cassel experienced very slight bouncing and jostling while operating the roller. While it is true that Claimant is not as tall as Cassel and has a smaller build, the ALJ is not convinced that the Claimant was jostled or whiplashed in such a way that would cause an injury to his neck or aggravate his pre-existing degenerative condition to produce the need for medical treatment. The Claimant has had problems with his neck for quite some time including a workers' compensation claim filed less than a year prior to this incident.

34. The Claimant has failed to meet his burden of proof to show that he suffered an injury to his neck in the course and scope of his employment in June 2013 while operating the Caterpillar 434D.

CONCLUSIONS OF LAW

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

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

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce disability or 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). However, the evidence in a particular case may establish that the claimant's condition represents the natural and recurrent consequences of a preexisting condition unrelated to the alleged industrial injury. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). 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).

6. As found above, the Claimant has failed to prove that he sustained a compensable injury in the summer of 2013. The forces to which Claimant was exposed while operating the Caterpillar 434D were simply insufficient to either cause a new injury to his cervical spine or to aggravate any pre-existing problems with his cervical spine. The ALJ believes that Claimant is suffering from neck symptoms, but the Claimant has not established a causal link between the onset of those symptoms and an incident that occurred in the summer of 2013 especially in light of the six month delay in filing his claim or seeking medical treatment.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation benefits is denied and dismissed, thus the request for medical benefits is also 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: June 1, 2015

DIGITAL SIGNATURE:

L. Broniak

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

STIPULATIONS

The parties stipulated to an average weekly wage of $430.08 if the claim is found compensable.

REMAINING ISSUES

I. Whether Claimant sustained a compensable cervical spine injury arising out of and in the course of her employment with Employer on June 30, 2014.

II. Whether Claimant sustained an occupational disease to her cervical spine arising out of her employment with Employer on June 30, 2014.

III. If a compensable injury/occupational disease is found, whether Claimant is entitled to all reasonably necessary and related medical benefits.

IV. If a compensable injury/occupational disease if found, whether the right of selection of the authorized treating physician passed to Claimant.

V. If a compensable injury is found, whether Claimant has proven that she was disabled and entitled to temporary disability benefits.

Because the ALJ finds and concludes that Claimant has failed to prove that she sustained a compensable injury or occupational disease related to her employment with Sedexo, Inc, this order does not address the aforementioned issues of Claimant's entitlement to medical benefits, right of selection, or Claimant's entitlement to temporary disability benefits.

FINDINGS OF FACT

Having considered the evidenced presented, the ALJ enters the following findings of fact:

1. Claimant is employed as a Food Service Worker for Employer. Her title is "Utility Floater" meaning that she performs a variety of jobs from dishwashing to food service. Her position requires an equally varied range of duties. On June 30, 2014, Claimant was assigned to cover two medical lounges frequented by the Doctors and one lounge used by EMS personnel at Memorial Hospital. In order to supply the nutritional needs of the healthcare providers who used the lounges, Claimant's duties required her to serve hot breakfasts and lunches twice per day and stock/ and

periodically replenish the lounges with cases of water, soda and juice, in addition to coffee, bread, fruit, cereal, utensils, condiments, and other dry goods.

2. To complete these duties, Claimant would deliver hot-food pans from the kitchen to the lounges and place them on a steam table. Claimant also had to prepare non-cooked items such as salads, deli meat trays, and cut fruit platters and deliver these items to the lounges. Although Claimant's job required a lifting capacity of 50 pounds, covering the lounges normally involved lifting cases of water and other liquids weighing 15-20 pounds. Covering the lounges required stocking upwards of 10 cases of beverages per shift.

3. When Claimant arrived for work in the morning of June 30, 2014, she clocked-in at 5:27 a.m. Her first task was to turn on the steam tables and distribute food and beverage items that were supposed to have been restocked by personnel on the previous shift. Claimant found that the necessary restocking had not been completed. As a result, Claimant testified that she had to perform not only her food preparation tasks, but also restock the empty shelves and cupboards in the lounges.

4. Claimant testified that the items she had to restock included the typical cases of water, soda, juice and milk. The cases weighed approximately 20 pounds, and had to be broken down to individual cans, bottles, and containers and then placed onto rolling carts for delivery to the lounges and then placed onto shelves from the cart.

5. Claimant testified that as a result of the extra stocking work on June 30, 2014, she essentially performed the work of a 12 hour day in 8 hours. According to Claimant she had performed the work of two people because the personnel on the previous shift had not completed their restocking duties. In order to complete all duties, Claimant worked straight through her work shift without taking a lunch break.

6. Claimant's shift ended and she clocked-out at 2:01 p.m. She testified she was exhausted, hungry and thirsty. Her muscles were "twitching," but she felt no pain at that time, which she attributed to "adrenaline" from constant fast paced physically demanding work since she clocked-in that morning.

7. Upon completion of her shift, Claimant walked to her car, which was parked in a designated area in an on-site hospital parking garage. As she approached her car, she felt what she described as "blinding" neck pain. She got into her car but did not leave immediately due to her initial inability to move her head without pain. Claimant attributed her pain to the extra work she did that day; including lifting product overhead, hauling, bending, and rotating more than usual. Consequently, Claimant called her supervisor from her car to report her symptoms; however, she did not want to fill out an incident report at that time and she did not request medical attention.

8. The following day, July 1, 2014, Claimant telephoned Employer and reported her neck injury. She presented to Memorial's Occupational Health Clinic on July 7, 2014 where she was evaluated by Dr. Steve Castle. Dr. Castle noted she complained of left sided neck pain resulting from "…working hard including stocking and

serving the doctors and EMS lounge." Dr. Castle diagnosed cervical strain and imposed work restrictions. However, Dr. Castle opined that he could not attribute Claimant's neck pain to her work duties as it came on abruptly while she was getting into her car.

9. Claimant then went to her personal care provider, Peak Vista, on July 14, 2014. She reported her neck pain had started after leaving work. She denied any history of trauma. Cervical x-rays were obtained which demonstrated disc space narrowing at C4-5, C5-6, and C6-7, as well as osteophyte formation from C4-5 to T1-2. No acute abnormalities were noted.

10. Claimant has a prior history of neck, upper back and shoulder pain. Medical records dating back to August 16, 1999 indicate that Claimant broke both arms and injured her upper back and neck in a skiing accident in 1996. In August 1999, she developed right sided upper back pain which came on for "no apparent reason" in addition to headaches originating in the neck, moving to the base of the skull and both sides of her head. These symptoms prompted her to seek chiropractic care. Cervical x-rays performed during her initial chiropractic visit on August 16, 1999 demonstrated "early osteophyte lipping and the start of bridging between the anterior aspects of the C4 and C5 vertebral bodies" as well as a significantly narrowed disc space at C6/C7. Claimant was diagnosed with degenerative disc and degenerative joint disease of the cervical spine. She underwent a course of chiropractic treatment.

11. Despite chiropractic treatment, Claimant continued to have chronic pain in her shoulders, neck and arms secondary to her skiing accident as demonstrated by her 2005 medical records.

12. Claimant was involved in a motor vehicle accident on March 2, 2008, causing increased neck and back pain. A questionnaire filled out by Claimant indicates that she had prior injuries to her neck, shoulders, and arms from the skiing accident. Claimant went to the chiropractor for several visits but had to discontinue treatment due to financial reasons.

13. Claimant presented to her personal care provider on January 23, 2013. She continued to have neck pain. She stated her neck did not feel better on days she did not work. She took ibuprofen in the morning and before activity. Claimant returned to her PCP on October 2, 2013. The medical history indicates chronic pain involving her upper shoulders and neck. Moreover, Claimant reported significant work stress and anxiety. She felt discriminated against at work due to her age and high paced job.

14. Claimant returned to Peak Vista on August 5, August 19, November 11 and December 2, 2014 following the June 30, 2014 incident. The latter records indicate very little or no improvement despite chiropractic treatment and medications.

15. Dr. Rook examined Claimant and prepared a report dated November 13, 2014. Dr. Rook testified at hearing as an expert in the fields of pain medicine, physical medicine and rehabilitation, and electro-diagnostics. Dr. Rook opined that Claimant

sustained a cervical strain and because of a "lack of treatment she appears to have developed a myofascial pain syndrome principally involving the left-sided neck and upper back musculature." According to Dr Rook Claimant's condition was a result of the usually heavy lifting and repetitive upper extremity activity she performed on June 30, 2014.

16. Dr. Rook noted, "…It is clear from the patient's history that the work she performed on June 30th was above and beyond what she normally does. She reported that she essentially had to do the work of two work shifts during her eight-hour shift. She did not have time to take a break and she did not have time to eat lunch. By the end of the day she was exhausted and overheated and by the time she got to her car in the parking lot she was experiencing severe neck pain. This neck pain has persisted. This patient was not having severe neck pain when she went to work that day…"

17. Dr. Rook explained that while Claimant may have aggravated an underlying myofascial condition, more likely than not she sustained additional micro-trauma to the muscles in her neck and shoulder region as a result of the unusually heavy and vigorous work activity she performed on June 30, 2014.

18. Dr. Rook testified regarding the findings of a December 4, 2014 MRI of Claimant's cervical spine. He explained that the MRI findings substantiate Claimant's complaints of left sided neck pain, and that her pain likely emanates from the facet joint at the C2-3 level. He testified there was muscle spasm in Claimant's cervical spine upon examination, and that objective findings of pathology are present.

19. The aforementioned MRI demonstrated multilevel degenerative disc disease with moderate to severe foraminal narrowing at C2-3 and C7-T1 and facet changes at C2-3 compatible with arthropathy. There was evidence of facet effusion and soft tissue edema at C2-C3. The effusion was present despite the fact that the MRI was performed more than six months after the date of the alleged onset.

20. Respondents retained Henry Roth, M.D, to examine Claimant and prepare a report. Dr. Roth completed the respondent independent medical examination (RIME) on January 27, 2015. During the examination, Claimant reiterated that she "went above and beyond what [she] usually [had] to do to properly stock lounges" and that as a result she overworked herself. According to Claimant, she aggravated something that day because she had sharp shooting pain in her neck; however, she did not relay a specific injury event or time of symptom onset. She did not experience any discomfort while working. Rather, she experienced the onset of symptoms as she was about to get into her car. Claimant reported she was still in extreme pain. Dr. Roth reviewed the x-rays and MRI reports and opining that they demonstrated wide spread chronic degenerative change commensurate with Claimant's age. Dr. Roth opined that Claimant's symptoms were the result of the natural progression of her pre-existing degenerative condition and/or idiopathic. Dr. Roth further opined that there was no work related mechanisms of injury, and that it was not medically probable that Claimant's work activities on June 30, 2014 caused or aggravated her neck condition.

21. Dr. Roth opined that Dr. Rook "…failed to adhere to any of the principles of Causality Assessment as instructed and outlined by the Colorado Division of Labor." Contrary to Dr. Roth's testimony, the ALJ finds that Dr. Rook completed a causality assessment. Nonetheless, considering Claimant's prior history of neck pain in combination with the extent of degenerative change on Claimant's December 4, 2014 MRI, the ALJ finds Dr. Roth's opinions concerning the cause of Claimant's neck symptoms more persuasive that the contrary opinions of Dr. Rook. Crediting the opinions of Dr. Roth, the ALJ finds that Claimant's neck pain and subsequent disability along with her current need for treatment are more probably than not related to the natural progression of pre-existing degenerative disc and joint disease first diagnosed on August 16, 1999. Accordingly, the ALJ finds that Claimant has failed to prove by a preponderance of the evidence that she sustained an injury to her cervical spine as a result of her work activities on June 30, 2014.

22. Ramon Carr, Claimant's supervisor testified that the restocking did not require any heavy lifting. Most of the materials were light weight such as chips, bread, napkins and utensils. The heaviest items were the cases of water which could be broken down into multiple trips. The most Claimant had to lift was fifteen pounds. This puts Claimant's job in the light category of employment. Mr. Carr also testified that Claimant could request help and that employees were encouraged to obtain help when needed. Mr. Carr spoke to Claimant on the date of the alleged onset but she did not request any help or report any problems completing her job duties. In her testimony, Claimant agreed that she could get help, and that if there was extra inventory, someone else would deliver the stock to the doctors' lounges and she would put it away. While Mr. Carr believes the job of stocking the doctors' lounges was a lot of work, he thinks it can be done in an eight hour shift at a normal pace.

23. Claimant has failed to carry her burden to prove that she sustained a compensable injury to her cervical spine. Consequently, the ALJ finds that there is no need to address her claims of entitlement to medical and temporary disability benefits nor the question concerning selection of the authorized treatment provider further.

CONCLUSIONS OF LAW

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

A. Claimant has failed to prove, by a preponderance of the evidence that she suffered a compensable injury to her cervical spine on June 30, 2014. 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). While the ALJ is persuaded that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment, the ALJ is not convinced that her neck symptoms and current need for treatment "arise out" of her employment.

B. 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. Section 8-43-201, C.R.S. 2013.

C. 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).

D. An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). In contrast, Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

E. The above cited section imposes additional proof requirements beyond

that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997).

F. In this case, Claimant is not alleging an accidental injury because there was no specific injury event. She cannot attribute the onset of her symptoms to any specific time or activity. Rather, Claimant contends that she suffered an occupational disease caused by prolonged exposure to having to work above and beyond what was "normal" for her on June 30, 2014. In addition to June 30, 2014, Claimant testified that there had been several occasions where the doctors' lounges were not stocked properly. Claimant's supervisor, Ramon Carr, testified it was relatively common for the doctors' lounges to run out of supplies and require complete restocking. Claimant had previously complained to her supervisors that her work load was excessive and that her coworkers were not doing their job tasks properly yet she was able to complete all tasks required on previous occasions without the development of symptoms. As stated in her answers to interrogatories Claimant reported that "for a long time prior to my injury, I was doing the job of two people." While Claimant's testimony constitutes some evidence of prolonged exposure to specific work tasks, this undermines Claimant's testimony that she had to work harder than usual on the alleged date of onset. Moreover, based upon the evidence presented, the ALJ concludes that Claimant's work takes varied throughout her shift. Accordingly, the ALJ is not persuaded that Claimant's neck symptoms were proximately caused by the type of prolonged exposure contemplated by the Worker's Compensation Act.

G. In concluding that Claimant has failed to prove that she suffered a compensable work injury, the ALJ has also 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 his/her 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.*

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, the ALJ is persuaded that Claimant's neck symptoms are, more probably than not, a consequence of her preexisting nonindustrial degenerative disc and joint disease. 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 result in a compensable work injury to Claimant's low back. *National Health Laboratories, supra.* At various times throughout this case, Claimant has stated that the onset of her pain occurred while walking down a hallway to the parking lot, getting into her car, and/or turning her head to back out of the parking space. All of these are activities of daily living. Hallways, parking lots and cars are ubiquitous and generally encountered in many non-employment environments. Further, the ALJ is not persuaded that the equipment/tools used by Claimant in the discharge of her duties are "special hazards" of employment likely to increase the probability or extent of injury. Based upon the evidence presented, the ALJ concludes that Claimant failed to prove a concurrence of a pre-existing weakness and a hazard of employment supporting a conclusion that she sustained a compensable neck injury on June 30, 2014. Consequently, her claim for benefits must be denied and dismissed and her further claims need not be addressed.

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.

DATED: June 17, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

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

ISSUES

- Did the Claimant prove by a preponderance of the evidence that on July 6, 2014 he suffered a lumbar spine injury proximately caused by the performance of service arising out of and in the course of his employment?

- Did the Claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical treatment for the alleged lumbar spine injury?

- Did the Claimant prove by a preponderance of the evidence that he is entitled to awards of temporary total and temporary partial disability benefits as a result of the alleged lumbar spine injury?

- If the Claimant is entitled to an award of temporary total disability benefits are the Respondents entitled to an offset based on the Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

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

1. At the hearing Claimant's Exhibits 1 through 17 were admitted into evidence. Respondents' Exhibits A through O were received into evidence. The depositions of Dr. John Hughes and Dr. Timothy O'Brien were received into evidence.

STIPULATIONS

2. At hearing the parties stipulated the Claimant's average weekly wage is $1350.

3. At the hearing the parties stipulated the Claimant is not alleging that he sustained any compensable injury to his knees on July 6, 2014.

CLAIMANT'S PRE-INJURY BACK SYMPTOMS AND TREATMENT

4. The Claimant contends that on Sunday, July 6, 2014 he sustained a compensable lumbar spine injury. He further contends that the injury caused a need for medical treatment as well as temporary total disability (TTD) and temporary partial disability (TPD). The Respondents contend that on July 6, 2014 the Claimant sustained a minor hip injury for which they admitted liability, but did not suffer any lumbar injury.

As a result the Respondents argue they are not liable to provide any additional medical or disability benefits.

5. Some evidence and medical records presented at hearing indicate the Claimant suffered from back symptoms prior to July 6, 2014 and received treatment for these symptoms.

6. The Claimant testified that he served in the United States Coast Guard (USCG) from 1969 through 1973. He stated that while serving in 1970 he sustained an injury to his mid-back between the shoulder blades. He explained that he received a disability from the Veterans Administration (VA) as a result of this injury.

7. On October 27, 2009 the Claimant was seen for a complaint of back pain of three weeks' duration. The Claimant reported no specific injury but advised that he had a "hard time lying on his side." The Claimant had "minimal symptoms as far as leg radiation" and the symptoms were "more on the right than the left."

8. On October 28, 2009 the Claimant underwent "three view lumbar spine" x-rays. The radiologist reported hypertrophic changes at L4-5 and L5-S1, endplate sclerosis and osteophyte formation at L5-S1 and "prominent anteriorly directed osteophytes at L4-5 and L2-3." The radiologist's impression was spondylitic change "felt to be most significant at L5-S1."

9. On June 25, 2012 Timothy Soper, M.D., of the Urology Center of the Rockies, PC treated the Claimant for a complaint of back pain of 24 hours' duration. The pain was described as located in the "right flank." Dr. Soper's impressions were "lumbago" and history of urinary calculi.

10. In April 2013 Family Nurse Practitioner (FNP) Robert Weinland examined the Claimant at the VA facility in Cheyenne, Wyoming. The Claimant reported that his "last C&P exam" for his thoracolumbar condition was in 1973 when he was discharged from the USCG. The Claimant described this as a "condition of the thoracic spine, NOT LS-spine." FNP Weinland noted there were no signs of radicular pain or symptoms. FNP Weinland's diagnoses included a "thoracic strain" and "DJD T-spine." He assessed a service connected disability of 10% for "lumbosacral or cervical strain."

CLAIMANT'S TESTIMONY CONCERNING ALLEGED INJURY

11. The Claimant testified as follows concerning the alleged injury. On July 6, 2014 he was working for the employer as a heating, ventilation and air conditioning (HVAC) service technician. On July 6 he and a co-employee were installing a "slot diffuser" in a ceiling. A slot diffuser is a large metal device weighing 100 to 120 pounds. He was standing on a ladder reaching overhead with both hands to patch a piece of broken duct work. He had to "hug around this piece of duct" work while in an "off position kind of to the right side of the ladder" reaching overhead at approximately a 70 degree angle "off of vertical." While repairing the duct work he experienced a sharp pain in the "pocket area" of his right hip. He got off of the ladder, stretched and the pain went away. He completed the day's work and went home. At 2 or 3 o'clock a.m. on

July 7, 2014 he awakened with "bad" pain in the pocket area of his hip. He tried to get out of bed but couldn't walk. At approximately 7 a.m. he sent an email to his supervisor (Gillett), the employer's service manager (Marlow) and the employer's service dispatcher (Thibodeau) saying that he couldn't come to work because of pain in his knees and hip.

12. Claimant's Exhibit 4 is the July 7, 2014 email the Claimant sent to Gillett, Marlow and Thibodeau. This email reveals that the Claimant advised the recipients that he hurt his "knees and hip yesterday" and he would not be into work because the knees and hip hurt too badly. The Claimant also requested to see an "on the job injury doctor."

13. The Claimant's July 7, 2014 email was forwarded to the employer's safety director, Mr. David Dunn (Dunn). The Claimant later spoke to Dunn by telephone. The Claimant requested that he be assigned to a physician in Fort Collins, Colorado where he lives.

14. The Claimant credibly testified concerning a later telephone call from Dunn on July 7, 2014. The Claimant testified that during this telephone conversation Dunn stated the Claimant had not been injured but was "just old basically." Dunn told the claimant to go to his family doctor for treatment. The Claimant's testimony concerning this conversation is corroborated by a July 7, 2014 email that Dunn sent to Mr. Bob Levens stating that "this is considered a non-incident."

15. The Claimant credibly testified that on July 7, 2014 he called his personal physicians at Associates in Family Medicine, P.C. (AFM). However, AFM advised the Claimant that he could not be seen until Tuesday, July 8, 2014. The Claimant then decided to seek treatment at University of Colorado Health Harmony Urgent Care (Urgent Care) in Fort Collins.

TREATMENT SUBSEQUENT TO ALLEGED INJURY

16. On July 7, 2014 Kelby Bethards, M.D., examined the Claimant at Urgent Care. The Claimant gave a history that on July 6, 2014 he was working on a 10 foot ladder reaching over his head when he felt a "sharp pain" in his hip joint. The Claimant also reported that both knees hurt. Dr. Bethards noted there was "no inability to bear weight or loss of motion." Dr. Bethards performed a physical examination (PE) of the right hip. Dr. Bethards noted the Claimant had right hip pain "without radiation." Dr. Bethards recorded there was tenderness in the greater trochanter but no swelling or crepitus. Dr. Bethards diagnosed right "hip pain/strain." Dr. Bethards released the Claimant to light duty and imposed restrictions of no crawling, no kneeling, no squatting and no climbing. Dr. Bethards prescribed tramadol and referred the claimant to follow-up at "OHS" and also to Mason Sidney, M.D., at AFM.

17. On July 8, 2014 the Claimant sent an email to Gillett, Marlow and Thibodeau. The email states the Claimant had gone to the doctor on July 7, 2014 and the doctor put him on light duty and work restrictions. The email also notes the Claimant was unsure what "light duty work" was available but specifically noted the

doctor said "no ladders." Finally the email states the Claimant had an appointment scheduled on "Thursday" with a "rehab doctor."

18. The Claimant credibly testified that he did not remember the employer ever gave him a document that allowed him to choose between two independent medical clinics for treatment of his injury. The Claimant credibly testified that the employer did not offer to accommodate his restrictions and that Gillett stated that the employer didn't have any work for him. The Respondents did not present any credible or persuasive evidence demonstrating that they ever provided the Claimant a "list" of at least two physicians or two medical providers from which the Claimant could select the provider to treat his injury.

19. The Claimant testified that within a "couple of days" after July 6, 2014 he began to experience foot numbness and couldn't feel his toes. The Claimant testified that the numbness later spread to his ankle, the top of his right foot and calf.

20. On July 9, 2014 Ms. Kathy Johnson (Johnson), the employer's Human Resources Director, sent an email to the Claimant notifying him that he might qualify for 12 weeks of unpaid, job-protected leave under the Family Medical Leave Act (FMLA).

21. On July 10, 2014 Tracey Stefanon, D.O., of Colorado Health Medical Group (CHMG) examined the Claimant. The Claimant credibly testified that CHMG is also known as Occupational Health Services (OHS). The Claimant's testimony is corroborated by Dr. Stefanon's July 10 note stating that the Claimant reported to the "Occupational Health Services Clinic" for evaluation of right hip pain. The ALJ infers that CHMG is the "OHS" to which Dr. Bethards referred the Claimant.

22. On July 10, 2014 the Claimant gave a history to Dr. Stefanon that on July 6, 2014 he was stood on a ladder "with his left hip out to the side" while reaching up into to "tight quarters" to repair duct work. This activity continued for more than one hour. While standing on the ladder the Claimant experienced pain in his "right gluteal region." The Claimant stated that since the incident he had experienced pain in the right gluteal region with "prolonged walking." The Claimant also reported that on July 9, 2010 he began to experience "some intermittent numbness under his great toe." The claimant denied prior injury to the right hip but stated he suffered a "midback muscle strain" when he was 18 years old and in the USCG. The Claimant advised that ever since the USCG incident he has experienced "chronic intermittent mid back pain." The Claimant denied any prior low back pain or injury. The Claimant also reported a history of injury to both knees and a history of kidney stones with the "last episode 3 years ago."

23. On July 10, 2014 Dr. Stefanon performed a PE. She noted the Claimant's back demonstrated good range of motion (ROM). The Claimant reported discomfort in the gluteal region with right-sided bending and rotation. This pain was much greater than that produced by left-sided bending and rotation. The Claimant reported no tenderness to palpation over the SI joints or the spinous processes, but there was tenderness to palpation over the right gluteal region. Dr. Stefanon assessed a right gluteal strain. Dr. Stefanon opined that it was more medically probable than not that the

Claimant sought treatment for "a work-related medical condition" resulting from his "exposure" of July 6. Dr. Stefanon further opined the "mechanism of injury" was "consistent with" the Claimant's "symptomatolgy and poor positioning in a static position." Dr. Stefanon prescribed tramadol for pain, referred the Claimant for physical therapy (PT) and directed him to return for follow-up in two weeks. Dr. Stefanon also imposed restrictions of no lifting greater than 30 pounds and "no ladder climbing." The Claimant was also instructed to "avoid" repetitive bending or twisting at the waist, and to avoid kneeling, crawling and squatting.

24. On July 10, 2014 Paul Braunlin, P.T., initiated the PT prescribed by Dr. Stefanon. P.T. Braunlin noted the Claimant reported some intermittent "paresthesias in his right great toe and right lateral ankle." P.T. Braunlin performed "joint mobilization to the lumbar spine at the L4-5 and L5-S1 facets bilaterally." He also performed right hip mobilization traction rotations and instructed the Claimant concerning home exercises. P.T. Braunlin assessed right hip dysfunction and lumbar facet dysfunction.

25. On July 14, 2014 the Claimant completed a Worker's Claim For Compensation. He reported that on July 6, 2014 he injured his "right hip joint area and both knees" while installing "ducting" in a "very tight work place using a 10 ft ladder."

26. On July 15, 2014 P.T. Braunlin noted there was no change in the Claimant's right buttock pain. However the Claimant reported "numbness" and pain in the right lateral calf/ankle and the lateral foot. There was no low back pain. On July 18, 2014 the Claimant reported to another therapist that he had continuing right buttock pain. He also reported "ache/numbness" of the lateral lower leg, the top of the foot and the bottom of the toes.

27. The claimant credibly testified, consistent with P.T. Braunlin's note, that he was not having low back pain in July 2014. The claimant also credibly testified that he never had low back pain as a result of the July 6, 2014 injury.

28. On July 22, 2014 Ann Yanagi, M.D., examined the Claimant at OHS. Dr. Yanagi recorded the Claimant's chief complaints were right buttock pain and "numbness to the lateral leg and foot." On examination Dr. Yanagi noted right buttock pain directly over the piriformis, but with excellent hip ROM. She did not detect any low back pain but reported a positive right-sided straight-leg raise test. Dr. Yanagi opined the Claimant appeared to have "radicular symptoms" that followed the L4-5 nerve path on the right, and that this could explain his continued gluteal pain. She further opined that although the Claimant might have had a strain with some spasm of the piriformis muscle, the degree of numbness in the left leg was concerning for radicular pain, "possibly at the lower lumbar spine level." Dr. Yanagi assessed right gluteal pain with possible L4-5 radicular pain to the right leg. She recommended an MRI of the lower lumbar spine.

29. On July 22, 2014 Dr. Yanagi also noted the Claimant "reported his right knee as an injury." Dr. Yanagi noted the claimant's right knee had been "bothering him for years" and he had undergone surgery to the left knee. Dr. Yanagi stated that to

consider the claimant's right knee complaints as part of the "Work Comp injury" the "acuteness should have come on at the same time, which it did not." Dr. Yanagi explained to the claimant that she could not treat "chronic right knee pain as part of the acute injury that occurred on July 6, 2014." Dr. Yanagi wrote the Claimant would "withdraw his right knee complaint as part of this particular claim."

30. On July 22, 2014 Dr. Yanagi completed a Physician's Report of Worker's Compensation Injury (WC164). In this form Dr. Yanagi indicated work related diagnoses of "sprain and strain of other specified sites of hip and thigh" and opined that her findings were consistent with the Claimant's "history and/or work related mechanism of injury/illness."

31. The Claimant credibly testified that he continued PT through August 5, 2014, and that an MRI was eventually approved. He also credibly testified that after August 5 he did not return to OHS because the employer "denied the claim" and OHS refused to provide any further treatment.

32. The Claimant applied for FMLA leave. In connection with this application the employer certified that the essential functions of the claimant's job included climbing ladders and lifting in excess of 50 pounds. (Claimant's Exhibit 4 p. 33). On August 1, 2014 Dr. Stefanon completed a health care provider's certification is support of the Claimant's FMLA application. Dr. Stefanon certified that the Claimant's condition rendered him unable to perform the essential functions of his job as a an HVAC service technician because he could not lift more than 30 pounds and could not lift more than 15 pounds repetitively.

33. On August 20, 2014 Johnson notified the Claimant by email that the employer had approved his request for FMLA leave effective July 7, 2014. Johnson also noted that the employer had received his application for unemployment benefits and stated the employer had not terminated him.

34. On September 29, 2014 the Claimant underwent an MRI of the lumbar spine. The radiologist's impressions included chronic-appearing bilateral L5 pars defects with 3 mm anterolisthesis of L5 on S1 and severe bilateral L5-S1 neuroforminal narrowing.

35. On September 29, 2014 Johnson sent an email to the Claimant notifying him that the FMLA leave had expired. She requested the Claimant provide an updated physician's report concerning his ability to return to his job as an HVAC technician. Johnson wrote that the Claimant's job required that he "climb ladders, lift 50+ pounds, stoop, squat, kneel and crawl."

36. On October 1, 2014 John Hughes, M.D., performed an independent medical examination (IME) of the Claimant upon the request of Claimant's counsel. Dr. Hughes took a history, reviewed medical records and performed a PE. Dr. Hughes recorded a history that on July 6, 2014 the Claimant was standing on a ladder, reaching overhead and extending to repair duct work. The Claimant then experienced a "muscle

cramp" that lasted one to two minutes and then "got better." The next morning the Claimant awakened with hip pain that caused him to seek treatment at Urgent Care. The Claimant reported that he continued with "low-grade symptoms" of aching in the posterior right hip and "numbness involving the outside of the right calf, foot, and all of the toes in the right foot."

37. In the October 1, 2014 report Dr. Hughes noted a "positivity to right-sided facet loading in the lumbar spine, and that right-sided lateral flexion was "guarded and reduced." Dr. Hughes reviewed the September 29, 2014 MRI and noted disc dessication at multiple levels from L2-3 to L5-S1 and a central disc protrusion at L5-S1. Dr. Hughes assessed a lumbar spine sprain/strain at work on July 6, 2014 with persistent right lower facet joint arthropathy secondary to the sprain/strain. In support of this opinion Dr. Hughes noted that Dr. Stefanon's findings were similar to his own and consistent with pain generation from the right lower facet joint "probably at L5-S1." Dr. Hughes stated there were "no findings consistent with primary right hip pathology." Dr. Hughes opined the Claimant was not at maximum medical improvement (MMI) and recommended treatment to include a follow-up examination, chiropractic adjustments, traction and possibly medial branch blocks.

38. On October 6, 2014 the Claimant went to AFM where he was seen by Quincy Crane, PAC. PA Crane wrote a letter to Johnson stating the Claimant was still restricted to lifting a maximum of 30 pounds and 15 pounds repetitively. However, the Claimant credibly testified that AFM refused to provide any treatment because "they don't do Workers' Comp."

39. On October 14, 2014 Timothy O'Brien, M.D. performed an IME of the Claimant, apparently at the respondents' request. On November 10, 2014 Dr. O'Brien issued a written report concerning his evaluation of the Claimant. Dr. O'Brien took a history from the Claimant, reviewed medical records and performed a PE. By way of history Dr. O'Brien recorded that the Claimant injured himself on "6-20-14" [sic]. Dr. O'Brien wrote the Claimant was on a ladder looking up into a "2 x 4 space" when he noted "right buttock pain." The Claimant did not experience any radiating pain, numbness or tingling and he had no back pain. The next morning the Claimant reported that he could hardly get up and noted "numbness and tingling" in the lateral four toes. On October 14, 2014 the Claimant reported that he was "95% better because his numbness and tingling was gone." The Claimant also reported his hip pain right buttock pain was "approximately 0 on a scale of 0-10."

40. In the November 10, 2014 report Dr. O'Brien opined the Claimant sustained a "minor" right gluteal strain that did not result in a "disc herniation or sciatic [sic] or radiculopathy." Dr. O'Brien explained that by November 10 the gluteal strain had healed and was resolved. In support of these conclusions Dr. O'Brien stated that when the Claimant sustained the injury he "didn't fall or twist, he was merely standing on a ladder and lifting a heavy part." Dr. O'Brien stated that his "musculoskeletal exam" of the Claimant's lumbosacral spine and hips was normal and the injury did not result in "anything as severe as incurable gluteal strain." Dr. O'Brien wrote the Claimant reached "an end of healing on or before" the October 14, 2014 IME and "returned to his pre-

injury level of function by that time." Dr. O'Brien stated the Claimant was able to return to work with no restrictions.

41. On October 21, 2014 the Claimant sought treatment at First Care Family Physicians (First Care). The Claimant was examined by Thomas Allen, M.D. The Claimant reported to Dr. Allen that he had right hip pain since he "reached high from [a] ladder" on July 6, 2014. The Claimant also reported experiencing tingling into his right foot, right calf, and all toes and "side of calf along with top of foot." Dr. Allen reviewed the MRI results and assessed "BL pars defect and spondylolisthesis which has now reverted to asymptomatic." He diagnosed a "radicular syndrome of lower limbs." Dr. Allen opined the claimant may or may not need surgery to "stabilize" the spine. He further opined that the "onset" of the radicular symptoms was "clearly related to the job incident." Dr. Allen also commented that the issue "may be as to how much he is limited by that incident vs. being limited by his underlying condition which was previously unknown but now may be limiting." Dr. Allen referred the Claimant to "Dr. Benz/Biggs" for a spine consult.

42. The Claimant credibly testified as follows. He made an appointment with Dr. Benz. However, when he arrived for the appointment the "care manger" told him he could not be examined because the case was "in litigation."

43. On November 18, 2014 Michael Janssen, D.O., examined the Claimant at the Center for Spine & Orthopedics. The Claimant explained that Dr. Janssen was a "preferred provider" under his health insurance policy.

44. In the November 18, 2014 report Dr. Janssen recorded a history that on July 6 the claimant was working "overhead on a ladder in a very difficult hyperextended position by report." The claimant then developed "unrelenting leg pain, severe back pain, pain radiating down his right lower extremity, and a sharp sensation." Dr. Janssen noted the claimant reported symptoms of "severe buttock pain, right lower extremity pain, and intermittent decreased sensation in the S1 distribution associated with his back pain." On PE Dr. Janssen noted a "markedly positive stretch root sign." He reviewed the MRI and opined that it "clearly demonstrates bilateral spondylolysis, subacute or acute in nature, with a disc herniation eccentering to the right, compressing the right exiting nerve root at L5 –S1." Dr. Janssen assessed a work related injury, an "unfortunate bilateral pars fracture with instability and a disc extrusion with herniation compressing the right S1 nerve root. Dr. Janssen opined that "this is a clearcut occupation-related injury." He further opined that there is also a "clearcut compressive pathology with an instability associated with the bilateral spondylolysis." Dr. Janssen stated the Claimant should consider conservative management "that would consist of surgical intervention to stabilize the unstable segment at the L5-S1 level."

45. The Claimant credibly testified that he never told Dr. Janssen that he developed back pain and severe leg pain on July 6, 2014. The Claimant stated that he didn't know where Dr. Janssen "got that stuff."

46. On December 5, 2014 the Respondents filed a General Admission of Liability (GAL) for an injury occurring on July 6, 2014. In the remarks section of the GAL the Respondents stated they were admitting liability for "medical benefits only for a Gluteal Strain."

47. On December 14, 2014 Kirby Duvall, M.D., examined the claimant at First Care. Dr. Duvall continued restrictions of no lifting greater than 30 pounds and no repetitive lifting greater than 15 pounds.

48. On January 8, 2015 Dr. O'Brien issued a second written report after reviewing Dr. Janssen's report and the September 29, 2014 MRI scan. Dr. O'Brien wrote the Claimant did not sustain a bilateral pars fracture from "standing on a ladder." He opined the bilateral pars fracture is the result of either "genetic makeup or an early childhood or young adulthood trauma." Dr. O'Brien also noted the MRI findings were "chronic." Dr. O'Brien further opined the injury of July 6, 2014 did not cause the spondylolysis noted on the September MRI. He explained that standing on a ladder, even if the Claimant was also lifting a heavy part, would not "constitute a work-related injury that would result in spondylolysis." Dr. O'Brien further explained that the Claimant did not "behave" as if he had acute spondylolysis because at the time of the injury he did not "immediately complain of pain" and did not immediately note "dysfunction." Dr. O'Brien also stated that based on his review of the records the Claimant did not seek medical treatment until July 10, 2014, four days after the injury. Dr. O'Brien stated that standing on a ladder does "not generate enough energy such that its dissipation into any musculoskeletal structure would result in breakage of that soft tissue or skeletal element."

49. On January 3, 2015 Dr. O'Brien issued a third report after reviewing VA records. Dr. O'Brien stated that the VA records did not affect the opinions he expressed in his prior reports. However they did establish the Claimant had a "preexisting spinal condition and this condition was significant enough that it resulted in disability."

50. Dr. O'Brien testified by deposition on January 23, 2015. Dr. O'Brien is board certified in orthopedic surgery and is level II accredited. Dr. O'Brien opined that on July 6, 2014 the Claimant sustained a "low-energy" injury that resulted in a right-sided gluteal strain. Dr. O'Brien explained that when a patient strains a gluteal muscle the patient typically experiences pain in the buttocks. Dr. O'Brien would expect a gluteal strain to heal within weeks and he opined the Claimant's strain had healed by the time of the October 14, 2014 IME. Dr. O'Brien stated that his examination of the Claimant's back was normal as was the neurologic examination of the lower extremities. Dr. O'Brien pointed out that on October 14 the Claimant reported his numbness, tingling and back pain was gone and he considered himself almost healed.

51. Dr. O'Brien testified that he reviewed the September 29, 2014 MRI. Dr. O'Brien opined that the MRI shows a "chronic," well-corticated fracture in the pars at L5 with a "low degenerative shift" through the fracture. He also stated that the MRI shows the chronic hypertrophy of the facet joints and disc dessication. Dr. O'Brien opined these findings would take years to develop and represent a long-standing process that

is “progressive.” Dr. O’Brien opined that the back conditions seen on the MRI are consistent with a preexisting condition and the development of “episodic pain.”

52. On January 29, 2015 Dr. Allen issued a report stating the Claimant could not return to work as an HVAC technician without restrictions because the job requires lifting more than 30 pounds. Dr. Allen opined the claimant’s condition, slippage of the L-5 vertebra forward on the sacrum, could be corrected through surgery.

53. Dr. Hughes testified by deposition on February 4, 2014. Dr. Hughes is board certified in occupational medicine and level II accredited. Since October 1, 2014 Dr. Hughes reviewed the September 29, 2014 MRI report, the VA medical records and the October 2009 medical reports including the x-rays.

54. Dr. Hughes opined the Claimant’s diagnoses include the following: (1) Occult spondylolysis of L5 as shown by the October 27, 2009 x-rays; (2) Lumbar sprain/strain sustained on July 6, 2014; (3) Persistent symptomatic spondylolisthesis at L5-S1 secondary to the July 6, 2014 sprain/strain; (4) Right lower extremity radiculopathy meriting further evaluation to include neuro-diagnositc evaluation of the right lower extremity. Dr. Hughes explained that the term “spondylolysis” refers to a “pars interarticularis defect” which can result from trauma but is most commonly congenital. He also explained that “spondylolisthesis” refers to “progressive instability allowing the spine to slip at that particular level where the fracture no longer allows support through the pars interarticularis in the spine.”

55. Dr. Hughes opined that when he examined the Claimant on October 1, 2014 he was manifesting symptoms consistent with “symptomatic spondylolisthesis of the lumbar spine” evidenced by positive right-sided facet loading, limited right lateral flexion, and limited lumbar extension and flexion. Dr. Hughes opined that on July 6, 2014 the Claimant suffered an injury that aggravated his preexisting spondylolysis so as to cause a “frank and symptomatic spondylolisthesis of L5-S1 with right lower extremity radiculopathy.” Dr. Hughes explained that the claimant gave a history that on July 6 he was working overhead in a “sustained extended position.” Dr. Hughes opined this constituted an “awkward position” that caused “torque in the lower spine” sufficient to aggravate the spondylolysis and cause it to become symptomatic.

56. Dr. Hughes opined that his causation analysis is consistent with the medical records. He stated that the October 2009 x-rays showed spondylitic changes in the lumbar spine. However, when the Claimant was seen at the VA in April 2013 his lumbar ROM was normal so that in Dr. Hughes’s opinion there was “no evidence of a functional impairment stemming from an L5-S1 spondylolisthesis.” Dr. Hughes explained that after July 6, 2014 the evolution of the claimant’s symptoms, including the pain in the right buttocks, was consistent with a “pars defect progression to spondylolisthesis of L5-S1.” Dr. Hughes explained that the right buttock pain was consistent with the dermatomal path of the L5 and S1 nerves on the right. Dr. Hughes opined that the essentially negative examination noted by Dr. O’Brien on October 14, 2014 is consistent with the “typical waxing and waning of this condition that occurs early on after the condition has been aggravated.”

57. Dr. Hughes opined that if the claimant returned to his regular employment as an HVAC technician he would aggravate the frank segmental instability at L5-S1. He opined that the restrictions imposed by Dr. Allen on January 29, 2015 are appropriate and related to the July 7, 2014 injury.

58. Dr. Hughes opined based on his review of the medical records after July 6, 2014 that the treatment the claimant received was appropriate. Dr. Hughes specifically endorsed the care rendered by OHS (including Dr. Stefanon and Dr. Yanagi), treatment provided by First Care physicians (Dr. Allen and Dr. Duvall) and by Dr. Janssen.

CAUSE OF LOW BACK CONDITION AND RELATED SYMPTOMS

59. The Claimant proved it is more probably true than not that on July 6, 2014 he sustained a low back injury proximately caused by the performance of his duties as an HVAC technician. The Claimant credibly testified as follows. On July 6 he was required to work overhead while standing on a ladder and reaching overhead to repair duct work. While performing this activity he experienced the sudden onset of right buttock cramping while performing this activity. By the next morning he experienced severe buttock pain and was unable to get out of bed. Soon thereafter he began to experience right lower extremity numbness and tingling under his big toe and later in the ankle and calf. The Claimant's testimony concerning this sequence of events is corroborated by the medical history that he gave to several providers including Dr. Stefanon on July 10, 2014, PT Braunlin on July 10, 2014 and Dr. Yanagi on July 22, 2014.

60. Dr. Hughes credibly and persuasively opined that the "awkward posture" that the Claimant assumed on July 6, 2014 probably caused an aggravation of preexisting lumbar spondylolysis seen in the October 2009 x-rays. Dr. Hughes credibly explained that the claimant's overhead activity and awkward posture on July 6 probably caused the spondylolysis to become a symptomatic L5-S1 spondylolisthesis resulting in right-sided radicular symptoms.

61. The opinion of Dr. Hughes is corroborated by the medical records concerning the development of the claimant's symptoms. Although it is true that the claimant had a preexisting degenerative low back condition, Dr. Hughes persuasively argued that the claimant did not exhibit any radicular-type symptoms when he was examined by the VA in April 2013, slightly more than a year before July 6, 2014. However, after July 7, 2014 the claimant began to experience radicular-type symptoms that rapidly evolved. Dr. Hughes persuasively explained that there was no evidence of primary hip pathology, but the Claimant's hip pain was consistent with irritation of the L4-5 and/or L5-S1 nerves where they passed through the "sciatic notch." Moreover, within 3 days of the date of the injury the claimant began to experience radicular-type symptoms in his right big toe and later in his foot, ankle and calf.

62. Dr. Hughes's opinion is corroborated by the credible opinion of Dr. Yanagi. Dr. Yanagi credibly opined on July 22, 2014 that the Claimant appeared to have

"radicular pain" possibly at the "lower lumbar spine level." She assessed right "gluteal pain with possible L4-5 radicular pain to the right leg and recommended a lumbar MRI. Dr. Yanagi credibly reported the Claimant's symptoms were consistent with a work-related mechanism of injury.

63. Dr. Hughes's opinions are further corroborated by the credible opinions of Dr. Allen. Dr. Allen credibly opined that the onset of the Claimant's radicular symptoms was "clearly related to the job incident." Dr. Allen assessed a "radicular syndrome of the lower limbs" which had reverted to an "asymptomatic condition" on October 21, 2014.

64. Dr. O'Brien's opinions are not as persuasive as those expressed by Dr. Hughes, Dr. Yanagi and Dr. Allen. Dr. O'Brien did not persuasively refute Dr, Hughes's argument that there is a temporal relationship between the claimant's activity of July 6, 2014 and the subsequent and rapid onset of radicular symptoms. The ALJ is not persuaded that the onset of the Claimant's symptoms in the right buttock and the right lower extremity represent the natural progression of the claimant's preexisting condition without regard to the events of July 6, 2014. The ALJ is not persuaded by Dr. O'Brien's opinion that the appearance of the radicular symptoms was coincident with the Claimant's July 6 activities but not related to them.

TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABLITY BENEFITS

65. The Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing July 7, 2014 and continuing through November 9, 2014.

66. The Claimant's regular job duties as an HVAC technician required him to left in excess of 50 pounds and climb ladders.

67. The Claimant credibly reported to the employer that on July 7, 2014 he was in too much pain to work because of his hip and his knees. The Claimant left work on July 7, 2014 at least in part because of the injury to his low back on July 6, 2014.

68. On July 10, 2014 Dr. Stefanon credibly and persuasively imposed restrictions of no lifting greater than 30 pounds and no climbing ladders. The ALJ infers that these restrictions were imposed at least in part because of the injury to the Claimant's back. Dr. Stefanon diagnosed a "gluteal strain" and stated that the mechanism of injury was consistent with the claimant's symptoms.

69. The credible opinions of Dr. Duvall, Dr. Allen and Dr. Hughes establish that the Claimant has remained disabled from performing his regular employment as an HVAC technician because he cannot lift more than 30 pounds as a result of the injury-related spondylolisthesis at L5-S1.

70. The Claimant credibly testified that the employer never offered him work within his restrictions.

71. The Claimant credibly testified that he commenced work at "TeleTech" on November 10, 2014. The claimant credibly explained that this is "customer service phone job." Therefore the ALJ infers the duties of the Teletech job don not exceed the 30-pound lifting restriction imposed on the claimant. The claimant is entitled to temporary partial disability benefits (TPD) commencing November 10, 2014.

72. The Claimant received unemployment insurance benefits for a period of 14 weeks from August 3, 2014 through November 8, 2014. The unemployment records indicate that the gross amount paid to the claimant was $532 per week, or a total of $7448.

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 a 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

The Claimant alleges that a preponderance of the evidence establishes that on July 6, 2014 he sustained a compensable injury to his low back. The Respondents contend the Claimant failed to prove that he sustained any injury to the low back on July 6 and the most probable explanation for the claimant's radicular-type symptoms is the natural progression of his preexisting degenerative low back disease.

The Claimant was required to prove by a preponderance of the evidence that the condition for which he seeks disability benefits and medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-

301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 59 through 64 the claimant proved it is more probably true than not that he sustained an injury to his low back on July 6, 2015. The claimant credibly testified that on July 6, 2015 he was standing on a ladder, working overhead in an awkward posture. Dr. Hughes credibly and persuasively opined that this activity aggravated the Claimant's pre-existing lumbar spondylolysis resulting in a spondylolisthesis and consequent radicular symptoms in the right lower extremity. Dr. Hughes's conclusion is corroborated by the credible opinions of Dr. Yanagi and Dr. Allen.

TEMPORARY TOTAL AND TEMPORARY PARTIAL DISABLITY BENEFITS AND OFFSET

The Claimant contends that he is entitled to an award of TTD benefits commencing July 7, 2014 through November 9, 2014, and a an award of TPD benefits commencing November 10, 2014 and continuing until terminated by law or order. The respondents contend that the Claimant failed to prove that he was disabled by the industrial injury. In the event the Claimant proves entitlement to disability benefits the Respondents seek an offset based on the Claimant's receipt of unemployment compensation benefits.

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

and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The Claimant need not prove the industrial injury was the sole cause of the wage loss. Rather, temporary benefits may be awarded if the injury contributes in part to the wage loss. *See Horton v. Industrial Claim Appeals Office,* 942 P.2d 1209 (Colo. App. 1996).

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

The existence of disability presents a question of fact for the ALJ. There is no requirement that the Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Findings of Fact 65 through 70 the Claimant proved it is more probably true than not that he is entitled to an award of TTD benefits commencing July 7, 2014. The Claimant proved that he left work on July 7, 2014 in part because of pain in the right hip caused by the July 6, 2014 injury. The ALJ is also persuaded by the credible medical records showing that the industrial injury to the claimant's low back caused Dr. Stefanon, Dr. Allen and Dr. Hughes to impose restrictions against lifting more than 30 pounds. These credible restrictions disabled the Claimant from performing the regular duties of his employment because the job of HVAC technician requires lifting in excess of 50 pounds.

The Claimant shall be entitled to receive TTD benefits at the statutory rate for the period of July 7, 2014 through July 9, 2014. The ALJ notes that the parties agree the maximum compensation rate for TTD benefits for this injury is $881.65. The Respondents may take an offset of $7448 against their liability for TTD benefits on account of the Claimant's receipt of unemployment insurance benefits. Section 8-42-103(1)(f), C.R.S.

Section 8-42-106(1), C.R.S., provides that in cases of TPD the employee "shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance" of the TPD. The Claimant continued to be disabled when he accepted the job at TeleTech because the industrial injury precluded him from performing his regular job as an HVAC technician. Therefore, the Claimant is entitled to TPD benefits at the rate of sixty-six and two-thirds of the difference between the stipulated average weekly wage of $1350 and the Claimant's average weekly wage at Teletech.

Teletech wage records demonstrate that the Claimant earned $4,983.77 for the period November 10, 2014 through January 25, 2015. This was a period of 76 days or 10.85 weeks. If the claimant had worked his regular job during the same period he would have earned $14,647.50 ($1350 x 10.85 weeks). The difference between $14,647.50 and $4,983.77 is $9,663.73. When $9,663.73 is multiplied by .666 (two-thirds of the difference between average weekly wage and actual earnings at Teletech) the result is $6,436.04. The Claimant is entitled to $6,436.04 in TPD benefits for the period of November 10, 2014 through January 25, 2015. Further, the Respondents shall continue to pay TPD benefits in accordance with the statutory formula until that obligation is terminated by law or order.

MEDICAL BENEFITS

The Claimant seeks an award of medical benefits as a result of the July 6, 2014 injury to his low back. As determined above, the ALJ finds the Claimant sustained a low back injury in the nature of an aggravation of a preexisting low back condition. The injury resulted in a "frank spondylolisthesis" and resulting radicular symptoms in the right lower extremity. The issues then become what medical treatment has the Claimant received that is reasonable, necessary and authorized.

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).

Section 8-43-404(5)(a)(I)(A), C.R.S. gives the Respondents the right in the first instance to select the authorized treating physician (ATP). Authorization refers to a physician's legal status to treat the industrial injury at the Respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Section 8-43-404(5)(a)(I)(A) further provides that the Respondents may select the ATP by providing the Claimant with a list of providers from which the claimant may select the provider to treat the injury. However, the statute further provides that "if the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

Once an ATP has been selected 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); *Tidwell v. Spencer Technologies*, WC 4-917-514-03 (March 2, 2015).

However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial*

Commission, 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Thus, where an employer directed a claimant to file a PIP claim rather than a workers' compensation claim, the compensation carrier waived any subsequent right to object to a change of physician authorized by the PIP carrier. *McLaughlin-Kramer v. Capital Pacific Homes,* W.C. No. 4-491-883 (ICAO June 20, 2002); *aff'd., Capital Pacific Homes v. Industrial Claim Appeals Office,* (Colo. App. No. 02CA1367, May 15, 2003) (not selected for publication).

Authorized providers also include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the Claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

Concerning authorization of medical treatment, the ALJ concludes that the right of selection passed to the Claimant under 8-43-404(5)(a)(I)(A) because the employer failed to provide a list of designated providers. As determined in Finding of Fact 18, the Claimant credibly testified that the employer never provided a list of authorized medical providers after the Claimant reported the injury and requested treatment. The ALJ concludes that, as an initial matter, the Claimant selected Dr. Bethards as the ATP.

As determined in Findings of Fact 14 and 19, Dr. Bethards referred the claimant to "OHS" for follow-up medical treatment. OHS refers to Occupational Health Services where the Claimant received treatment from various providers including Dr. Stefanon, Dr. Yanagi and PT Braunlin. The ALJ concludes all treatment rendered by OHS providers was authorized.

As determined in Finding of Fact 28 and 38, in October 2014 the Claimant "changed" physicians to First Care (Dr. Allen and Dr. Duvall). The ALJ finds and concludes that the employer, by its conduct in this matter, conveyed to the Claimant that he was entitled to choose his own treating physicians and that the employer waived any objection to his choice of physicians. Specifically, after the Claimant requested medical treatment Mr. Dunn told the claimant that he could go to his own doctor because the employer considered the claimant's problems to be age-related. In so doing, Dunn conveyed to the Claimant the impression that the employer did not consider his condition to be work-related and was not interested in designating physicians to treat the condition.

The ALJ further finds that treatment provided by Dr. Janssen was authorized. The Claimant selected Dr. Janssen after Dr. Allen referred him to Dr. Benz for an orthopedic evaluation. Dr. Benz then refused to treat the claimant for the non-medical reason that he did not wish to be involved in a litigated matter. Under these circumstances the Claimant reasonably selected Dr. Janssen to perform the orthopedic evaluation. The employer had already waived objection to the Claimant's selection of physicians to treat the injury.

Based on the credible opinion of Dr. Hughes as well as the medical records, the ALJ concludes the treatment provided at Urgent Care by Dr. Bethards, the treatment provided at OHS, the treatment provided by Dr. Allen and Dr. Duvall and the treatment provided by Dr. Janssen has been reasonable and necessary to cure and relieve the effects of the claimant's low back injury of July 6, 2014.

The ALJ finds that AFM has not provided any treatment causally related to the industrial injury. A physician's assistant did provide a note concerning restrictions, but this was associated with the request for FMLA leave.

Because the ALJ has determined that treatment provided has been reasonable, necessary and authorized, the ALJ need not address the Claimant's request for a change in the authorized treating physician(s).

ORDER

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

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

2. Insurer shall pay the Claimant TTD benefits at the applicable statutory rate from July 7, 2014 through November 9, 2014. Insurer shall pay TPD benefits in the amount of $6,436.04 for the period of November 10, 2014 through January 25, 2015. Thereafter, Insurer shall continue to pay TPD benefits in accordance with the statutory formula until such time as that obligation is terminated by law or order.

3. Insurer may reduce the amount of TTD benefits by taking an unemployment insurance offset in the amount of $7448.

4. Insurer shall pay reasonable and necessary medical expenses for treatment of the Claimant's low back injury. The Insurer shall pay for the treatment already provided by Urgent Care, OHS, First Care and Dr. Janssen.

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

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

DATED: June 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

- Did the Claimant prove by a preponderance of the evidence that she sustained any injury proximately caused by the performance of service arising out of and in the course of her employment?

- Did the Claimant prove by a preponderance of the evidence that she is entitled to awards of temporary total disability and temporary partial disability benefits as a result of the alleged injury?

- Did the Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable and necessary medical benefits as a result of the alleged injury?

FINDINGS OF FACT

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

1. At hearing Claimant's Exhibits 1 through 10, with the exception of Exhibit 8 bate stamp 51, were admitted into evidence. Respondents' Exhibits A through H were admitted into evidence. The parties stipulated that if the claim is found compensable that the Claimant's average weekly wage is $336.71.

CLAIMANT'S TESTIMONY CONCERNING INJURY

2. The Claimant testified as follows concerning the events of August 5, 2014. She was employed as a hair stylist by the Employer. Her duties required her to help maintain the salon. She went to the back of the salon to clean the "back shelf." A bottle of developer was holding a shelf up because a peg was missing. When she moved the developer bottle the shelf tilted and caused 12 one liter developer bottles to fall on her. As a result she immediately experienced dizziness and loss of vision. Shortly thereafter a supervisor, Ms. Cruz, arrived at the salon. At the Claimant's request Ms. Cruz called an ambulance.

3. The Claimant testified as follows concerning treatment that she received on August 5, 2014. The ambulance transported her to St. Anthony's Hospital North (St. Anthony's) where she received emergency treatment. Later that day she went to NextCare Urgent Care (NUC), one of the Employer's designated medical providers. At the time she went to NUC she was dizzy and had a headache that made her feel as if her head was in a vice.

4. On cross-examination the Claimant admitted that she had experienced a number of medical problems prior to the alleged injury. She admitted to "longstanding" nystagmus (rapid eye movement), blurry vision when reading, a history of head and neck pain, a history of dizziness and vertigo plus a history of nausea. The Claimant testified that prior to August 5, 2014 she had never lost her vision as she did after she was hit by the bottles of developer. The Claimant further testified that her pre-injury symptoms resolved after she learned she was "pre-diabetic" and changed her diet. Finally, the Claimant testified that after the alleged injury she developed bruises and swelling of her face.

PRE-INJURY SYMPTOMS AND TREATMENT

5. The Claimant's personal care physician is Michael Iannotti, M.D., of Family Medicine Associates (FMA). In approximately August 2008 Dr. Iannotti referred the Claimant to physical therapy (PT) based on diagnoses of cervical strain/sprain and "C-spine DDD."

6. On August 11, 2008 the Claimant underwent a PT evaluation based on Dr. Iannotti's referral. At the evaluation the Claimant reported symptoms of "posterior head/neck pain as well as headaches. She stated that these symptoms had been "ongoing for years." She reported the headaches occurred daily and could last for the entire day. The Claimant further advised that she experienced numbness and tingling in her bilateral upper extremities. The physical therapist noted "decreased mobility in the lower cervical and upper thoracic spine limiting active and passive range of motion."

7. On June 18, 2010 the Claimant was seen at Kaiser Permanente (Kaiser) for complaints of 5 to 6 days of left-sided neck pain and left ear pain and pressure.

8. On February 14, 2011 the Claimant was seen at Kaiser. She reported she was a hairdresser and had experienced headaches and a "kink in neck." The Claimant reported a history that she underwent a "few massages" and noticed "muscle pain worsened with spasm."

9. On December 19, 2013 PA Sara Weltzer examined the Claimant at AFM. The Claimant reported that she felt dizzy, her eyes "weren't quite right," and that she was having headaches. The Claimant advised that she had experienced daily headaches since a back injury 16 years ago. She described the dizziness as a spinning sensation exacerbated when standing or sitting. She had difficulties focusing when reading because the words on the page were blurry.

10. On March 4, 2014 Dr. Iannotti examined the Claimant for complaints of headache associated with nausea. The Claimant advised that she had experienced headaches since an injury at the age of 23. She also related a history of cervical disc disease. Dr. Iannotti suspected myofascial headaches. He recommended chiropractic treatment, massage therapy and prescribed amitriptyline for pain.

11. On July 30, 2014 Dr. Iannotti examined the claimant for complaints of right eye twitching, persistent blurred vision. Dr. Iannotti considered but doubted a diagnosis of "MS." He assessed "eye muscle twitches" and obesity.

12. On July 31, 2014 Brian Abert, O.D., examined the claimant for a complaint of right eye twitching. Dr. Abert noted the Claimant was seeking further testing for "eye/vision-related evidence of multiple sclerosis." Dr. Abert stated that "unwanted eye movements" were "not elicited in office." However, he noted that "visual field testing had revealed a patternless, mild general depression." Dr. Abert recommended a "neurological work-up to explain the mild visual depression."

MEDICAL TREATMENT AFTER ALLEGED INJURY

13. After the alleged injury the Claimant was transported to St. Anthony's where she was examined and treated by Vassily Theodore Eliopoulos, M.D. The Claimant gave a history that a shelf gave way causing a "1L shampoo bottle to fall onto her head." She complained of a mild headache, and a "woozy" sensation with nausea. She also reported a "general sensation of not feeling well." She denied other complaints including neck and back pain. Dr. Eliopoulos noted the Claimant had a "normal neurologic exam" and there was "no apparent traumatic injury on clinical exam." Dr. Eliopoulos determined that no imaging was indicated given the "benign clinical presentation." His "primary impression" was closed head injury (CHI) and he noted differential diagnoses of "fracture, intracranial hemorrhage, as concussive syndrome, malingering." Dr. Eliopoulos prescribed Zofran for nausea and discharged the Claimant home with a recommendation for outpatient follow-up. Dr. Eliopoulos noted that he declined to order "imaging" because of the "minor mechanism of injury and [the Claimant's] normal neurologic exam."

14. Later on August 5, 2014 the Claimant reported to NUC where she was examined by PAC Corinne Hanisch. The Claimant gave a history that she was at work and "many bottles fell and hit [her] in head and neck." She reported severe and constant left lateral neck pain and left posterior neck pain. Pertinent negatives included "incoordinaton, joint pain, muscle spasm, numbness, tingling and weakness." The Claimant reported no "relevant medical, surgical or psychiatric history." The left side of the cervical spine was tender to palpation as was the "left upper trap." There was subjective pain with cervical flexion and extension. There were no "impressive skin lesions present." The Claimant's memory was "intact" and there were no balance or gait problems. PAC Hanisch assessed "cervicalgia" and CHI. She prescribed Ultram.

15. On August 5, 2014 PAC Hanisch completed a Physician's Report of Worker's Compensation Injury form (WC 164). On this form PAC Hanisch recorded that the Claimant reported she was sore, stiff, had a headache and it was "hard to process things." PAC Hanisch checked a box on the form indicating that her "objective findings" were "consistent with history and/or work related mechanism of injury/illness." She imposed restrictions of no lifting, no carrying, no pushing or pulling and no reaching over head.

16. On August 6, 2014 the Claimant returned to NUC and was examined by Cynthia Riegel, M.D. The Claimant reported neck pain radiating to the top of the head as a result of a "direct blow" that occurred at work on August 5, 2014. The pain was reportedly moderate to severe and involved "aching and throbbing." Dr. Riegel noted "pertinent negatives" included "bruising." On that portion of the report captioned as "review of symptoms" the claimant was "positive" for dizziness in the neuro/psychiatric category, and "positive" for decreased mobility, neck pain and spasms in the musculoskeletal category. The claimant was "negative" for bruising in the hematology category. Dr. Riegel assessed an "acute" sprain or strain of the cervical spine. She took the claimant off work for the period of August 6, 2014 through August 12, 2014. Dr. Riegel recommended bed rest until the Claimant's next medical visit.

17. Dr. Iannotti again examined the Claimant on August 7, 2014. Dr. Iannotti noted the claimant had a "concussion from work injury" but stated he was not seeing her for this condition because she was being treated by "workmans comp." Dr. Iannotti noted a medical history of obesity, tobacco dependency, endometriosis, chronic headaches, cervical disc disease "insulin resistance." .The Claimant admitted to symptoms of dizziness, difficulty speaking and balance and coordination problems. Dr. Iannotti assessed "vision abnormalities," dysmetabolic syndrome x and tobacco use disorder. Dr. Iannotti recommended referral to a "neuro-opthalmology specialist" for the visual disorder, less sugar and "carbs," more exercise for the metabolic disorder and to stop smoking.

18. On August 12, 2014 PAC Hanisch again examined the claimant at NUC. The Claimant presented with a headache and associated "dizziness, nausea neurological symptoms and personality change." The claimant reported she felt 50% better although her neck still felt "stiff" and she had intermittent dizziness with nausea. The Claimant also reported that she felt "slow to comprehend" and was having difficulty searching for words. PAC Hanisch assessed dizziness, nausea, cervical strain and CHI. She referred the Claimant to neurology for evaluation and treatment. On August 12 PAC Hanisch completed another WC 164 and released the Claimant to "light duty" with restrictions of no lifting, carrying, pushing and pulling in excess of 5 pounds. PAC Hanisch again checked a box on the WC 164 indicating that her "objective findings" were "consistent with history and/or work related mechanism of injury/illness."

19. On August 19, 2014 PAC Hanisch again examined the Claimant at NUC. The Claimant reported symptoms of "imbalance and spinning" that were aggravated by bending, rapid movement and turning her head from side to side. The Claimant reported nausea as an associated symptom. The Claimant reported she felt 50% better but still felt "off." She requested a release to return to work cutting hair as she was "not getting paid for light duty" and felt safe using shears. PA Hanisch released the Claimant to modified duty and restricted her to no more than 5 hours per day of walking, standing, sitting, crawling, kneeling, squatting and climbing. PAC Hanisch again checked a box on the WC 164 indicating that her "objective findings" were "consistent with history and/or work related mechanism of injury/illness."

20. The next day, August 20, 2014, the Claimant returned to NUC where she was examined by Dr. Riegel. The Claimant reported that August 20 was her first day back to work and that she worked 5 hours. She advised that she developed vertigo while coloring hair and then experienced a severe headache an hour or two later. This was a left-sided throbbing headache with associated symptoms of dizziness and fatigue. Dr. Riegel assessed a concussion "improved," and acute dizziness and headache. She prescribed promethazine for the dizziness.

21. On August 21, 2014 the Respondents filed a Notice of Contest based on the contention that the alleged injury was not work-related.

22. On August 30, 2014 the Claimant returned to Dr. Iannotti wanting "to talk about workman's comp." The claimant gave a history that twelve 1 liter bottles fell from above onto her head, neck, arms and shoulders. She reported she did not lose consciousness and there was no syncope. She advised she was working 4 hours each day cutting hair and "doing her usual job," and that her only restriction was to limit work to 4 hours per day. The Claimant expressed a desire to continue the 4-hour restriction for another 2 weeks. Dr. Iannotti noted the only symptom that had not fully resolved was dizziness. Dr. Iannotti assessed "post-concussive syndrome" and dizziness. He stated the examination did not warrant any imaging or referrals. He advised the Claimant to continue taking prescribed medications for dizziness and stated he would give her a note for part time work from August 30, 2014 to September 13, 2014.

23. On September 2, 2014 the Claimant returned to PAC Hanisch at NUC. The claimant reported she was still experiencing dizziness but this condition was improving. The Claimant denied headaches, nausea, memory problems, speech problems, vision problems and a stiff neck. PAC Hanisch noted that that the case was closed because "work comp" had denied the claim. She referred the Claimant to her "PCP" for further care.

24. On September 16, 2014 the Claimant sought chiropractic treatment. She completed an intake form and listed her main complaint as "headache." She wrote that the headaches were the result of "work stress" and were not attributable to an accident, injury or trauma. On November 17, 2014 the chiropractor noted the claimant was "feeling better" and the headaches had "improved." However, the headaches still continued to come and go.

INDEPENDENT MEDICAL EXAMINATION

25. On January 20, 2015 the Respondents notified the Claimant that she was to attend an independent medical examination (IME) with Lawrence Lesnak, D.O., on February 18, 2015.

26. Dr. Lesnak is board certified in physical medicine and rehabilitation and elctrodiagnosis. Dr. Lesnak is level II accredited.

27. On February 18, 2015 Dr. Lesnak issued a written report concerning the IME. The report reflects that Dr. Lesnak took a history from the Claimant, reviewed

pertinent medical records from before and after the alleged injury and performed a physical examination (PE). The Claimant gave a history that when she was at work on August 5, 2014 "12 bottles of one liter product" rolled off of a shelf and struck her "on the left face/scalp as well as her left suprascapular region." Several minutes later she developed dizziness and nausea and was transported to St. Anthony's emergency room. The Claimant also reported that she developed bruising throughout the left side of her face "for approximately one week." On the date of examination the Claimant reported most of her symptoms had resolved but she reported intermittent short term memory loss and "cracking sensations in her bilateral jaw regions." The Claimant denied any neck symptoms, shoulder symptoms, dizziness, nausea or "other cognitive issues."

28. On PE Dr. Lesnak noted normal cervical spine range of motion without reproduction of any symptoms. The Claimant was "oriented times three." Her speech was fluent "without evidence of semantic or phonemic language errors" and her "abstract thinking" was intact. There was no evidence of audible or palpable crepitus on examination of the jaw. Dr. Lesnak reported that in fact there were "no abnormal exam findings whatsoever identified."

29. In the February 18, 2015 report Dr. Lesnak opined that to a reasonable degree of medical probability the Claimant did not "sustain any type of trauma or injury as it pertains to the alleged incident that occurred" on August 5, 2014. Dr. Lesnak opined that even if one or more bottles struck the Claimant on August 5 she did not require any medical treatment, emergent or otherwise, as a result of the incident. Dr. Lesnak further opined that the August 5 incident did not cause the need for any work restrictions or activity restrictions.

30. In support of these conclusions Dr. Lesnak explained that in his opinion the Claimant is an unreliable historian with respect to her subjective complaints. Dr. Lesnak pointed out that although the Claimant denied to him that she had pre-injury complaints of dizziness, memory loss, neck pain or jaw symptoms, the medical records show that she sustained a head injury in 1995. The medical records also show that she has experienced chronic neck pain and headaches dating back to at least age 23, and that she reported dizziness "at least seven to eight months prior to August 5, 2014." In July 2014 the Claimant was also referred for a neuro-ophtalmologic evaluation because of blurred vision, documented visual field deficits and nystagmus. Dr. Lesnak further noted that although the Claimant reported that the falling bottles caused bruising on her face, the St. Anthony's emergency room report did not mention any "ecchymosis, abrasions, etc." involving the head, neck, shoulders or anywhere else on her body.

31. Dr. Lesnak noted that although the Claimant was complaining of short term memory loss and bilateral jaw crepitus, his examination yielded "absolutely no evidence" of "any gross or focal cognitive abnormalities" or any temporomandibular joint pathology. Indeed, Dr. Lesnak stated that "that there were no abnormal exam findings whatever identified."

32. Dr. Lesnak also opined that emergency room report the Claimant did not need emergent treatment nor did she require treatment of any kind for the alleged events of August 5, 2014. Similarly, Dr. Lesnak opined the incident of August 5 did not require any restrictions or activity limitations.

33. Dr. Lesnak testified at the hearing. For the most part he reiterated the opinions and reasoning expressed in his written report. He added that in cases of soft tissue trauma skin redness appears immediately followed by bruising that appears almost immediately. He noted the Claimant had been examined in the emergency room and by Dr. Iannotti within three days following the date of injury and these providers did not note any bruising or swelling. Dr. Lesnak noted there were two NUC records (presumably from August 5 and 6) but he didn't "know what to make" of them.

34. Although the Claimant proved that she sustained an "accident" at work on August 5, 2014, she failed to prove it is more probably true than not that she sustained a compensable "injury" that caused a need for medical treatment or a "disability."

35. The Claimant credibly testified that on August 5, 2014 twelve 1 liter bottles of developer fell off of a shelf and that some or all of these bottles came into contact with her head and upper body.

36. Insofar as the Claimant's testimony could be interpreted to support a finding that the August 5, 2014 accident caused or aggravated numerous symptoms including headaches, dizziness, memory problems, neck pain and nausea her testimony is not credible and persuasive. Similarly, insofar as the Claimant's testimony could be interpreted to support the inference that the August 5 incident caused a need for medical treatment and disability it is not credible and persuasive.

37. The Claimant's testimony that the bottle incident caused the immediate onset of dizziness and "loss of vision" such that she requested to be taken to the hospital by ambulance is not credible and persuasive. The medical records from St. Anthony's emergency room on August 5, 2014 do not mention "dizziness" or "loss of vision" as symptoms reported by the Claimant. The ALJ infers that if the Claimant had actually "lost her vision" on August 5 she would have reported this dramatic symptom to Dr. Eliopoulos and he would have been documented it. Similarly, the ALJ infers that if the Claimant experienced "dizziness," as she had in the past, she would have reported that symptom to Dr. Eliopoulos and he would have recorded it. Instead, the Claimant reported symptoms of headache, wooziness, nausea and "not feeling well." Moreover, Dr. Eliopoulos reported the Claimant underwent a "normal" neurological evaluation, had "no apparent traumatic injury on clinical exam" and exhibited a "benign clinical presentation." Although Dr. Eliopoulos's primary impression was a CHI, he also listed "malingering" as one of the differential diagnoses. The ALJ infers from the emergency room records that Dr. Eliopoulos thought the claimant's subjective symptoms and reported history were consistent with a CHI, but he could find no objective evidence to support that diagnosis. Indeed, Dr. Eliopoulos declined to do imaging studies in light of his "normal neurologic exam" of the Claimant.

38. The Claimant's testimony is also incredible and unpersuasive because the symptoms she reported to PAC Hanisch on August 5, 2014 are significantly different that those she reported at the emergency room earlier the same day. The Claimant reported to PAC Hanisch that she was suffering from cervical and trapezius pain, a headache and difficulty "processing" things. The emergency room report indicates the Claimant's neck was "supple" and she did not report neck pain. Moreover, the Claimant apparently did not tell PAC Hanisch that she was "dizzy" or had lost her vision after the incident. Indeed the complaint of "dizziness" was not noted until the Claimant saw Dr. Riegel on August 6, 2014, and there are no documented post-injury complaints of "vision problems" until the Claimant saw Dr. Iannotti on August 7, 2014.

39. The Claimant's testimony is also incredible and unpersuasive because she failed to disclose her relevant medical history to PAC Hanisch and Dr. Riegel. When PAC Hanisch first examined the Claimant on August 5, 2014 Hanisch recorded that there was no relevant "medical, surgical or psychiatric history." The ALJ infers from this statement that the Claimant failed to mention her long history of cervical pain, headaches, dizziness and eye problems. This long history is documented in Findings of Fact 5 through 12 and by the Claimant's own testimony on cross-examination (Finding of Fact 4). After August 5 PAC Hanisch and Dr. Riegel periodically reviewed and updated the claimant's medical history, but their notes never mention the Claimant's pre-injury history.

40. The Claimant's testimony is also incredible and unpersuasive because, contrary to her statements at the hearing and to Dr. Lesnak, there is no credible and persuasive evidence to corroborate that she sustained any bruises as a result of the August 5, 2014 incident. On August 5, 2014, no redness, bruises or swelling were noted at the emergency room or by PAC Hanisch. Indeed the emergency room records document a "benign" presentation and "no apparent" traumatic injury." When Dr. Riegel examined the Claimant on August 6, 2014 she was "negative for bruising" and "bruising" was listed under the "negative" category for hematology. The ALJ infers that Dr. Riegel did not observe any bruising or skin discoloration. The ALJ also credits Dr. Lesnak's testimony that if the claimant had been struck in the face hard enough to cause bruises she would have exhibited "red" marks immediately after the August 5 incident and actual bruises within hours afterwards.

41. The Claimant's testimony is also incredible and unpersuasive because most of the symptoms she reported over the month following the incident of August 5, 2014 existed prior to that date. As noted, the Claimant had a long history of neck pain, headaches, nausea and dizziness prior to August 5. On December 19, 2013, less than nine months prior to alleged injury she reported headaches, nausea and eye problems with reading. On March 4, 2014 Dr. Iannotti examined the claimant for complaints of headaches and nausea with a history of "cervical disc disease." Dr. Iannotti prescribed chiropractic treatment, massage therapy and medication. On July 31, 2014, four days prior to the alleged injury Dr. Abert referred the Claimant referred for a "neurological work-up to explain" mild visual field depression. The Claimant's testimony that all of her symptoms had resolved prior to August 5 because she was diagnosed as "pre-diabetic" and changed her diet is not credible. To the contrary, Dr. Iannotti's report of August 7,

2014 indicates that it was on this date that he diagnosed a "dysmetabolic syndrome" and recommended that the claimant eat less sugar and fewer "carbs."

42. Dr. Lesnak persuasively opined that even if the Claimant was struck by one or more bottles on August 5, 2014 she did not require any medical treatment and did not require any restrictions or limitations as a result of the incident. Dr. Lesnak persuasively opined the Claimant is not a reliable historian for the reasons stated in Finding of Fact 30. He persuasively opined that the medical records do not contain any objective evidence, such as bruising, to establish that the Claimant sustained a "trauma" sufficient to injure her head, neck or body.

43. To the extent that PAC Hanisch and Dr. Riegel opined the Claimant sustained a CHI, neck sprain strain or other injuries as a result of the accident of August 5, 2014, and that the August 5 event caused a need for treatment and medical restrictions, their opinions are not persuasive. The opinions of PAC Hanisch and Dr. Riegel were issued without any apparent knowledge of the Claimant's medical history prior to August 5, 2014. Therefore their opinions concerning the cause of the various symptoms reported to them by the Claimant is not persuasive. Further, neither of these providers resented a persuasive rebuttal to Dr. Lesnak's arguments that if the Claimant was struck by bottles on August 5 that event was insufficient to cause a need for treatment or the need for restrictions.

44. To the extent that Dr. Iannotti opined the events of August 5, 2014 caused a "post-concussive syndrome," his opinion is not persuasive. There is no credible and persuasive indication that Dr. Iannotti reviewed the medical records from the St. Anthony's emergency room or the records from NUC. Further, Dr. Iannotti did not offer a persuasive rebuttal to the arguments made by Dr. Lesnak.

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

The Claimant contends the evidence establishes that on August 5, 2014 she sustained compensable injuries when bottles of developer fell from a shelf striking her. The Claimant asserts this incident resulted in neck and head injuries including a "post-concussive syndrome." The Respondents contend that the evidence fails to establish that the Claimant sustained any accident at work on August 5. However, in the event a work-related accident occurred, the Respondents argue the Claimant failed to prove that the accident resulted in a work-related "injury."

The Claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing service arising out of and in the course of the employment, and that her 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 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).

To establish causation the Claimant must prove a causal nexus between the claimed disability and need for treatment and the alleged work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, *supra*; *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 34 through 44, the Claimant failed to prove it is more probably true than not that she sustained a compensable injury, as opposed to a mere accident, that proximately caused any need for medical treatment or any disability. For the reasons stated in Findings of Fact 36 through 41, the Claimant's testimony is incredible and unpersuasive insofar as it would support an inference that the August 5, 2014 accident caused a need for medical treatment or any disability. Specifically, the Claimant's testimony is not credible because she failed to report pertinent medical history to doctors Riegel and Lesnak and to PAC Hanisch. The objective medical findings from August 5, 2014 and thereafter do not persuasively establish that the claimant sustained an injury-causing trauma on August 5. The medical records establish that the vast majority of the symptoms reported by the Claimant were present before August 5. For the reasons stated in Finding of Fact 42 Dr. Lesnak's opinion that the events of August 5 did not cause a need for medical treatment or any disability is credible and persuasive. For the reasons stated in Findings of Fact 43 and 44 the opinions of Dr. Riegel, Dr. Iannotti and PAC Hanisch are not persuasive insofar as they would support an inference that the Claimant sustained a work-related injury that proximately caused or contributed to any need for medical treatment and/or disability.

In light of these findings and conclusions 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 W.C. No. 4-957-818 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: June 29, 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

- Whether claimant has proven by a preponderance of the evidence that she suffered an industrial 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 injury resulted in claimant obtaining medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the injury and from a provider who was authorized to treat claimant?

- 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 benefits beginning July 24, 2014 and continuing?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer as a housekeeper beginning her employment on or about August 2006. Claimant testified at hearing that on March 1, 2013 she was descending a flight of stairs when she slipped on a piece of ice and fell to the ground. Claimant testified she fell onto her left side. Claimant testified when she fell she was carrying a basket with cleaning supplies and rags. Claimant testified that after she fell, she had pain in her whole body.

2. Claimant's testimony regarding her fall was supported by the testimony of Mr. Maldonaldo, a co-worker. Mr. Maldonaldo testified that he was informed by Ms. McPike that a guest had witnessed claimant fall and Ms. McPike requested Mr. Maldonaldo to go check on claimant. Mr. Maldonaldo testified that when he found claimant in the room, claimant was crying. Mr. Maldonaldo testified that claimant reported on the date of the injury that she did not want to seek medical care. Mr. Maldonaldo further testified to being in a meeting with claimant and Ms. McPike in which claimant's fall was discussed. Mr. Maldonaldo confirmed that Ms. McPike was the person employees would report work injuries to.

3. Claimant testified that the day after her work injury, she reported her injury to Ms. Suhouski with Mr. Maldonaldo performing interpretation for her. This testimony was supported by the testimony of Mr. Maldonaldo who noted that during the meeting,

claimant reported that she still had pain in her shoulder from her fall. On cross-examination, Mr. Maldonaldo testified that claimant did not request medical treatment following her fall. The ALJ finds the testimony of Mr. Maldonaldo to be credible and persuasive.

4. While respondents maintain claimant testified inconsistently regarding how she fell on March 1, 2013, the testimony and medical records do establish that claimant fell at work on March 1, 2013. This fact is supported by the testimony of claimant and Mr. Maldonaldo. Claimant however, did not receive medical treatment following her fall until 2014.

5. Claimant was examined by Dr. Sauerbry on March 4, 2014 with complaints of left shoulder pain. Claimant noted that she had problems with pain in the shoulder for a couple of years now. Claimant reported she was a housekeeper and did a lot of heavy work that aggravated her pain, but noted it was not a workers' compensation injury. Dr. Suerbrey recommended claimant get a magnetic resonance image ("MRI") of the shoulder.

6. Notably, when claimant reported to Memorial Hospital for the MRI, she reported she injured her shoulder in a fall 1 year ago, and complained of persistent pain and decreased range of motion. The MRI revealed a small localized full thickness tear of the anterior distal supraspinatus tendon along with moderately severe partial thickness tearing of the infraspinatus tendon and remainder of the supraspinatus tendon, along with mild articular surface tearing of the subscapularis tendon. A slap II tear, degenerative acromioclavicular joint with mild to moderate compromise of the acomial outlet and subacromial subdeltoid bursitis was also noted in the MRI findings.

7. Respondents note in their position statement that while claimant reported to the MRI physician, Dr. Lile, that she injured her shoulder in a fall, the records do not indicate that claimant fell at work. However, the testimony of claimant and Mr. Maldonaldo establish that claimant was involved in a fall in March 2013 and the fall was reported to Ms. McPike.

8. Claimant returned to Dr. Sauerbrey on June 25, 2014. Dr. Sauerbrey recommended claimant undergo surgery on her shoulder.

9. Claimant presented the testimony of her adult children, Jose and Erica at hearing. Claimant's children have performed translation services for claimant at various times with her medical providers and her employer. Jose testified at hearing that he translated for claimant at her appointment with Dr. Sauerbrey on March 4, 2014. Jose testified that his girlfriend took claimant to her appointment for the MRI on March 19, 2014.

10. Erica testified that he went with claimant to employer and reported the injury to "Laura" on or about June 25, 2014. Erica testified that Laura could not find the report regarding the fall and would contact Erica when she found the report.

11. Jose testified he returned with claimant in July 2014 and spoke with Laura and "Christine" regarding claimant's fall. Jose testified that Christine gave claimant an insurance card for the medical appointments and told Jose to have claimant use her sick leave and not come to work.

12. The ALJ credits the testimony of Erica and Jose and finds that when claimant reported the injury to employer on or about June 25, 2014 and advised employer that claimant was seeking medical treatment, claimant was not provided with a list of 2 physicians to choose from.

13. The ALJ notes the W.C.R.P. 8-2 requires the employer to provide claimant with a list of physicians designated to treat the injured worker within 7 days of the date they receive notice of the injury. W.C.R.P. 8-2(E) establishes that if the employer does not provide a list of providers to the injured worker, the injured worker may select a physician of their choosing.

14. The ALJ finds that after claimant's fall on March 1, 2013, claimant initially denied that she wanted to seek medical treatment. Therefore, employer was not required to provide claimant with a choice of medical providers as employer was not aware of the compensable nature of the injury. However, upon being informed by claimant that she was seeking medical treatment in July 2014, employer was then required to provide claimant with a designated provider list pursuant to W.C.R.P. 8-2. Because employer failed to provide claimant with the designated provider list, the claimant is then allowed to choose a physician to treat her injury. The ALJ finds that this occurred as of June 25, 2014 when she reported to employer that she had injured her shoulder in the fall and was seeking medical treatment.

15. Claimant was examined by Dr. Speer on July 24, 2014. Dr. Speer noted that claimant reported she fell down stairs at work in March 2012 and landed on her right shoulder. Following a letter from claimant to Dr. Speer dated October 9, 2014, Dr. Speer issued an addendum to his report to reflect changes regarding when claimant fell at work.

16. Respondents note that the records from Dr. Speer report an injury occurring in March 2012, and not 2013 as testified to by claimant. However, again, the evidence establishes that claimant fell at work in March 2013 and reported the incident to her employer, following which she reported the injury to Ms. McPike and Mr. Maldonaldo. This fact is established by the testimony of claimant and Mr. Maldonaldo, and was not credibly contradicted by respondents at hearing. The ALJ therefore finds that the discrepancies in the medical records regarding the date of the fall at work are simply discrepancies in the medical records and do not disprove the fact that the fall occurred on March 1, 2013 as testified to by claimant and Mr. Maldonaldo.

17. It was unclear from the testimony as to how claimant came to be seen by Dr. Speer. The ALJ ascertains from the records, however, that Dr. Speer became claimant's choice of physician to treat with as of the July 24, 2014 appointment.

18. Respondents filed a Notice of Contest on August 25, 2014. Claimant's August 28, 2014 appointment with Dr. Speer was cancelled because insurer had not decided if the claim would be accepted or not. Claimant did not return to Dr. Speer and the ALJ finds that Dr. Speer, by cancelling the August 28, 2014 medical appointment, refused to provide treatment for claimant due to non-medical reasons.

19. On September 16, 2014, Dr. Sauerbrey sent a request to insurer requesting authorization for shoulder surgery consisting of a rotator cuff repair and subacromial decompression.

20. Claimant underwent an independent medical examination ("IME") with Dr. Fall on January 8, 2015. A copy of the audio recording of the IME was entered into evidence at hearing. Dr. Fall issued a report dated January 8, 2015 as a result of the IME.

21. Dr. Fall reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with her IME. Dr. Fall noted in her report that claimant was quite nonspecific and was not able to describe how she fell and the exact mechanism of injury that would lead to a rotator cuff and SLAP tears. Dr. Fall opined that the mechanism of injury described by claimant would not result in the numerous findings on the MRI. Dr. Fall opined that the MRI findings were consistent with age-related degenerative findings. Dr. Fall opined that she was not able to state within a reasonable degree of medical probability that the MRI findings of the shoulder were related to a fall or that the symptoms were related to the fall from March 2013.

22. Dr. Fall testified by deposition in this case consistent with her IME report.

23. The ALJ credits the testimony of claimant and Mr. Maldonaldo and the medical reports from Dr. Sauerbrey and Dr. Speer and finds that claimant has proven that it is more likely than not that she sustained a compensable injury to her left shoulder on March 1, 2013 when she fell at work. The ALJ rejects the opinions expressed by Dr. Fall that are contrary to this finding.

24. The ALJ finds that claimant did not request medical treatment from employer until reporting her injury in June 2014 and advising employer that she was seeking medical treatment. The ALJ finds that employer reported her injury to employer on March 1, 2013, but credits the testimony of Mr. Maldonaldo and finds that claimant advised employer on that date that she was not seeking medical treatment. The ALJ therefore finds that the medical treatment claimant received from Dr. Sauerbrey in 2014, while reasonable and necessary to treat claimant's injury, was not authorized.

25. The ALJ finds that the medical treatment claimant received from Dr. Speer was reasonable and necessary to cure and relieve claimant from the effects of the injury.

26. The ALJ credits the testimony of claimant and Jose and the supporting wage records and finds that claimant was advised by employer to stay at home from work due to her shoulder injury beginning July 24, 2014 and take sick leave. This testimony is supported by the wage records entered into evidence that establish that claimant began taking sick leave during this period of time. The ALJ credits this testimony and finds that claimant has proven that it is more likely than not that she is entitled to TTD benefits commencing July 24, 2014 and continuing until terminated by law.

27. Claimant testified at hearing that while working for employer, she held concurrent employment with another hotel beginning in May 2008. This is supported by the wage records and W-2 forms that document claimant's concurrent employment with employer and Steamboat Ski & Resort Corporation.

28. Claimant argues that the wage records from employer document that claimant was paid $3,723.46 for the time period between January 1, 2013 through February 22, 2013 and that claimant's AWW should be based off of this calculation. The ALJ is not persuaded. Notably, the wage record documents that claimant every two weeks. Therefore, the "year to date" amount does not mean that this covers only the time worked beginning January 1, 2013, but instead the wages paid, including wages paid for time earned prior to January 1, 2013 and covering 10 weeks. The ALJ had previously indicated that this would cover a period of 8 weeks, but the period in question would cover the time period back to December 28, 2014 with a pay check issued on January 4, 2015.

29. It is claimant's burden of proof to establish the AWW. Based on what was entered into evidence at hearing, the ALJ finds the most appropriate way to calculate the AWW with regard to claimant's earnings for employer is to divide the earnings in the paystub by 10 weeks. This results in an AWW for claimant for her work with employer of $372.35.

30. With regard to claimant's work with her concurrent employer, that ALJ determines that the most appropriate method for calculating the AWW is by using the W2 forms for 2012. The ALJ cannot ascertain with certainty claimant's AWW at the time of her injury based upon the records and claimant's testimony regarding the nature of her pay was not sufficient to establish that a different method should be used.

31. Claimant was paid $22,053.02 in wages by Steamboat Ski and Resort for 2012. This equates to an AWW of $424.10. Combining claimant's AWW for her work with employer and her concurrent employer comes to an AWW of $796.45.

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 fell at work on March 1, 2013. As found, the testimony from claimant and Mr. Maldonaldo are credible and persuasive on this point. As found, the medical records from Dr. Lile in connection with the MRI performed on March 19, 2014 is found to be credible and persuasive regarding the cause of claimant's complaints of shoulder pain.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, claimant did not report to employer that the fall caused claimant to need medical treatment until June 2014. As found, claimant's medical treatment with Dr. Sauerbrey prior to this date is not authorized. As found, claimant's medical treatment with Dr. Speer in July 2014 was authorized and reasonable and necessary to cure and relieve claimant from the effects of her work injury.

8. 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).

9. As found, claimant left work as of July 24, 2014 as a result of her injury. As found, claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits commencing July 24, 2014.

10. 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).

11. As found, claimant's AWW for her work with employer and her concurrent employer equates to an AWW of $796.45.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable and necessary medical treatment provided to claimant by Dr. Speer.

2. Claimant's request for payment of the medical treatment from Dr. Sauerbrey is denied as being not authorized under the Colorado Workers' Compensation Act.

3. Respondents shall pay claimant TTD benefits commencing July 24, 2014 and continuing until terminated by law or statute based on an AWW of $796.45.

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: June 17, 2015

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

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ISSUES

1. Whether treatment of Claimant's left inguinal hernia and umbilical hernia is reasonable, necessary, and related to his August 5, 2014 work injury.

2. Whether Claimant's base average weekly wage (AWW) should be increased to include compensation for the business use of his personal vehicle.

STIPULATIONS

At hearing, the parties stipulated that Claimant's base AWW is $645.83.

FINDINGS OF FACT

1. Claimant works for Employer as a Field Service Representative with duties that include maintaining, repairing, and servicing machines of various sizes and located at various locations.

2. Claimant uses his personal vehicle for business purposes and to travel to various locations where machines are located to service the machines.

3. Claimant was so employed on August 5, 2014 when he suffered a compensable injury to his low back.

4. On August 5, 2014 Claimant was at a Home Depot location servicing a paint tinting machine when he experienced severe left sided hip and leg pain while pulling himself up to a standing position from the floor area where he had been working.

5. Due to his pain, Claimant did not work on August 6 or August 7. Claimant was able to work on August 8 and August 9, but continued to have pain. Claimant worked a half-day on August 11 but went home due to his continued pain.

6. On August 6, 2014 Claimant filled out an accident/injury report describing the sharp pain, muscle spasm, and shooting pain in his lower back. Claimant did not seek immediate medical treatment and noted on the report that he was hopeful resting his back for a day or two will allow the symptoms to subside. *See* Exhibit 6.

7. On August 13, 2014 Claimant was evaluated by Kenneth Hahn, D.O. Claimant reported lifting himself up from where he was seated behind a machine when he felt like the top half of his body lifted but the bottom half did not. Claimant reported

pain in the lower spine area radiating to his hips and down to his knees. Dr. Hahn diagnosed acute radicular low back pain. *See* Exhibit 2.

8. On August 21, 2014 Claimant was at home when he felt a sneeze coming on. Claimant was concerned that the sneeze would increase his low back pain and he attempted to get to a couch to sit down to help brace himself before sneezing. Claimant did not fully make it to the couch or to a sitting position when he sneezed three times. When he sneezed, Claimant was one half standing and one half sitting and was in an awkward twisting position.

9. After sneezing, Claimant noticed a pulling sensation in his left groin area and felt abdominal weakness.

10. On August 27, 2014 Claimant was evaluated again by Dr. Hahn. Claimant reported he had been doing better, but that the pain flared up last Thursday, August 21 after sneezing. Claimant reported that after sneezing he had a few days of severe pain that were as bad as when he was first injured. Claimant thought that he pulled a muscle in his stomach or that he might have a left hernia from sneezing. *See* Exhibit 2.

11. On September 30, 2014 Claimant underwent a health maintenance exam performed by Philip Rosenblum, M.D. Dr. Rosenblum noted that Claimant's most recent health maintenance visit was one year prior. Dr. Rosenblum diagnosed Claimant with an umbilical hernia and a left inguinal hernia and noted Claimant reported the onset of symptoms along with Claimant's recent back injury. Dr. Rosenblum noted that the hernia findings were not previously observed. *See* Exhibit 2.

12. On October 7, 2014 Claimant was evaluated by Dr. Hahn. Dr. Hahn noted that Claimant had a recent wellness exam that found an umbilical and left inguinal hernia that were not present on Claimant's wellness exam one year ago. Dr. Hahn noted Claimant had a sudden onset of abdominal pain following sneezing six weeks prior when he was twisting to sit on a couch, sneezed in the middle of that movement, and felt pulling. Dr. Hahn noted that Claimant did not feel right in the stomach since and had vague abdominal pain since sneezing. Dr. Hahn opined that the hernias were related to the work injury and referred Claimant to a surgeon for repair. *See* Exhibit 2.

13. On October 15, 2014 Claimant was evaluated by Dr. Hahn. Dr. Hahn again noted the left inguinal and umbilical hernias, with sudden onset after Claimant braced himself for a sneeze due to Claimant's recent back injury. Dr. Hahn noted that Claimant felt weak in his core since sneezing. Dr. Hahn again opined that the hernias were related to the work injury and opined that Claimant had sneezed a few weeks after the original injury which caused an exacerbation of Claimant's low back pain and the onset of abdominal symptoms. *See* Exhibit 2.

14. Dr. Hahn testified via deposition consistent with his reports. He opined that Claimant's hernias were probably either caused by the initial injury on August 5, 2014 at work or were made more apparent after the August 21, 2014 sneezing incident. Dr. Hahn opined that sneezing can make an underlying hernia that is not symptomatic

become symptomatic. Dr. Hahn could not recall any patients who had hernias solely due to sneezing, and opined that it was probably a combination of the August 5, 2014 work injury and the August 21, 2014 sneezing incident that caused the hernias. Dr. Hahn opined that due to Claimant's back pain, Claimant was in an awkward position at the time of the sneezing incident. Dr. Hahn opined that the awkward position could have put additional strain on Claimant's abdominal muscles making them more susceptible to hernia injury during the sneezes. Dr. Hahn opined that if Claimant were in an awkward position during a sneeze, there wouldn't be even pressure on the abdominal muscles which might put more pressure on one part of the abdomen versus the other.

15. Dr. Hahn again opined that the hernias were related to the work injury. Dr. Hahn also disagreed with Dr. Hattem's opinion that the mechanism of injury at work on August 5, 2014 would not have caused any type of hernia and opined that the mechanism of injury on August 5, 2014 could have caused a hernia. Dr. Hahn opined that Claimant may have had a hernia and not reported it immediately as Claimant had significant back pain and may have been focused on his back.

16. On January 14, 2015 Claimant underwent an Independent Medical Evaluation (IME) performed by Albert Hattem, M.D. Dr. Hattem noted Claimant's prior medical history included a lumbar discectomy in 2003 and a right inguinal hernia in 2008. Dr. Hattem diagnosed mechanical nonspecific low back pain, umbilical hernia, and left inguinal hernia. *See* Exhibit E.

17. Dr. Hattem opined that the left inguinal hernia and the umbilical hernia were not related to the claim. Dr. Hattem opined that the hernias did not occur on August 5, 2014 as Claimant did not lift or strain and that rising from a seated position will not cause any type of hernia. Dr. Hattem noted that Claimant did not complain of groin pain, umbilical pain, or of any protrusions/masses at his first visit on August 13, 2014 and only complained of back pain. Dr. Hattem opined that if the hernia had occurred on August 5, 2014 he would have expected Claimant would have reported the condition earlier. Dr. Hattem noted that Claimant did not report the hernia until August 27, 2014 after sneezing. *See* Exhibit E.

18. Dr. Hattem opined that sneezing increases intra-abdominal pressure and is the likely cause of the hernias and opined that sneezing is not a work-related condition. *See* Exhibit E.

19. Dr. Hattem testified at hearing consistent with his IME report. Dr. Hattem opined that hernias generally come from an increase of pressure on an abdominal wall and a weak abdomen and that most abdominal weakness is congenital. Dr. Hattem opined that Claimant's prior hernia on the right side from 2008 would make it more likely that Claimant would develop another hernia due to Claimant's weakened abdominal wall. Dr. Hattem opined that a sneeze or a cough combined with a weak abdomen can cause a hernia and that he was not sure if being in an awkward position while sneezing would further increase abdominal pressure. Dr. Hattem believed that the sneezing incident caused the hernias or that small hernias were present for a long time and then

became apparent at the time of the sneezing. Dr. Hattem admitted that it was possible, but not likely, that the hernias developed during the change of position from sitting to standing at work on August 5, 2014. Dr. Hattem reviewed the testimony of Dr. Hahn which did not change any of his opinions.

20. Claimant testified that he has sneezed multiple times throughout his life without developing hernias. This testimony, and Claimant's testimony as a whole, is found credible and persuasive.

21. The opinion of Dr. Hahn that the hernias are causally related to the August 5, 2014 low back injury is found credible and persuasive and is found more credible and persuasive than the opinions of Dr. Hattem. Dr. Hahn identified Claimant's awkward positioning during sneezing and explained how that can increase pressure on the abdomen. Dr. Hahn also persuasively opined that Claimant may have suffered small hernias at the time of the August 5, 2014 work injury that became symptomatic at the time of the sneezes. Dr. Hattem agreed that sneezing could increase abdominal pressure, but was unsure as to awkward positioning. Dr. Hattem also opined that the sneezing either caused the hernias or that they were present for a long time and became apparent at the time of sneezing. The opinion that the hernias may have been present for a long time is not found consistent with Claimant's annual health maintenance exam showing no hernias were present a year prior. Further, Claimant's hernia symptoms and discomfort developed following the sneezing incident on August 21, 2014. After weighing the expert medical opinions, the ALJ finds the opinions of Dr. Hahn more persuasive.

22. On January 23, 2015 Claimant underwent surgery to repair the left inguinal and umbilical hernias. Respondents deny liability for this treatment and believe the hernias are not related to the work injury.

23. Claimant's base average weekly wage is $645.83.

24. On October 22, 2012 Claimant accepted terms of employment with Employer as a Field Service Representative that included an hourly rate of pay, and a bi-weekly auto allowance of $207.69. *See* Exhibit D.

25. On March 13, 2013 Employer issued a Memo for to all full time employees driving personal vehicles for business. This Memo noted that as of April 1, 2013 Employer was deploying Runzheimer's Business Vehicle Program. *See* Exhibit D

26. The Runzheimer plan allowed employees who drive their personal vehicles for business use to receive a cents-per-mile reimbursement for 100% of the business miles reported and to receive a fixed dollar reimbursement each month to offset a reasonable business use portion of their vehicles. *See* Exhibit D

27. The Runzheimer plan provided both the fixed and variable amounts paid to an employee would be paid on a non-taxed basis if the employee followed IRS guidelines and that the payments would not have any withholding or be subject to W-2 reporting. *See* Exhibit D

28. Claimant began receiving reimbursement for the business use of his personal vehicle under this plan in April of 2013, and at that time stopped receiving the bi-weekly auto allowance of $207.69. Claimant was reimbursed for variable operating costs including fuel, recommended maintenance, and tire wear at a variable rate based on the number of actual miles Claimant drove for work purposes. Claimant also was reimbursed for fixed costs including insurance, license and registration fees, taxes, and depreciation calculated based on his geographic area at a monthly fixed cost reimbursement rate.

29. Claimant was paid approximately $181.85 per week for both the variable and fixed costs in using his personal vehicle for business purposes during the six months prior to his work injury. The reimbursement paid to Claimant did not fully reimburse him for the costs associated with the business use of his personal vehicle, but reimbursed him for a majority of the cost to use his personal vehicle.

30. Claimant did not present sufficient evidence to show that he paid taxes on either the fixed or variable amounts paid to him for reimbursement nor did he present sufficient evidence to show that he claimed the reimbursement payments as income.

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); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is

subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994). The Claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Valley Tree Service v. Jimenez*, 787 P.2d 658 (Colo. App. 1990). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Section 8-41-301(1)(c), C.R.S., requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Consistent with this principle Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability the disability is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Price Mine Service, Inc. v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). If the injury leaves the body weakened and subject to an opportunistic infection, and the infection results in disability and need for treatment, the disability and need for treatment are proximate results of the industrial injury. *Johnson v. Industrial Commission,* 148 Colo. 561, 366 P.2d 864 (1961).

Although the ALJ agrees with Dr. Hattem that sneezing did not occur at work nor is sneezing at home generally a work related condition, Claimant has established by a preponderance of the evidence that treatment for his hernias is more likely than not

related to his August 5, 2014 work injury. The ALJ concludes Claimant's hernias were more likely than not caused by a combination of the effects of the initial injury on August 5, 2014, and the sneezing incident on August 21, 2014 and finds Dr. Hahn's opinions credible and persuasive. At the time of the sneezing incident, Claimant was in an awkward twisting position, attempting to brace himself due to back pain from his August 5, 2014 work injury. But for the initial injury to his low back, Claimant more than likely would not have had to assume an awkward, twisting position to prepare for sneezing. Claimant has shown that his positioning during the sneezes more likely than not increased his abdominal pressure to a level greater than it would have been during an otherwise "normal" sneeze, thereby either causing the hernias or causing the hernias to become symptomatic. As found above, Claimant did not have any hernias at his prior annual health exam, Claimant had never previously developed hernias from sneezing, and Claimant's had no prior hernia related symptoms or discomfort. Claimant's hernia discomfort started shortly after the sneezing incident. This sneezing incident was different than a normal sneeze due to Claimant's low back injury and his weakened low back condition.

The ALJ concludes that Dr. Hahn's opinions that the hernias are causally related to the August 5, 2014 work injury to be credible and persuasive and more persuasive than the contrary opinion of Dr. Hattem. Dr. Hahn credibly explained how awkward positioning can increase pressure on the abdomen and that Claimant could have had suffered small hernias from the mechanism of his August 5, 2014 injury that then became symptomatic at the time of the sneezing incident. Dr. Hattem was not persuasive as to whether or not awkward positioning would cause increased abdominal pressure and his opinion that the hernias may have been present for a long time is not consistent with Claimant's annual health examination showing no hernias were present one year prior. After weighing the medical opinions as a whole, the ALJ finds Dr. Hahn more persuasive.

Claimant has shown by a preponderance of the evidence that it is more likely than not that the hernias were proximately caused by his August 5, 2014 work injury to his low back and that the hernias are a compensable consequence of his low back injury. The treatment and surgery to repair both hernias was reasonable and necessary, and was related to his August 5, 2014 work injury.

Average Weekly Wage

The objective of wage calculation is to reach a fair approximation of the claimant's actual wage loss and diminished earning capacity resulting from the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Wages shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied. § 8-40-201(19)(a), C.R.S. If the contract of hire provides for an hourly wage, the average weekly wage is calculated by multiplying the hourly rate by the number of hours the employee worked per day at the time of injury. The daily amount is then multiplied by the average number of days per week the employee worked had the injury not

intervened. § 8-42-102(2)(d), C.R.S. If the statutory method of computing the average weekly wage of the employee will not fairly compute or fairly determine an average weekly wage, the ALJ has discretion to determine an average weekly wage that fairly reflects loss of earning capacity. § 8-42-102(3) and (5)(b), C.R.S.

No per diem payment shall be considered wages unless the per diem payment is also considered to be wages for federal income tax purposes. § 8-40-201(19)(c), C.R.S. Any remuneration representing a per diem payment shall be excluded from the calculation of average weekly wages unless such payment is considered wages for federal income tax purposes. § 8-42-102(2), C.R.S.

Exclusion of per diem payments to claimant from calculation of his weekly wages, for purposes of workers' compensation award, does not result in the disparate calculation of wages, but rather, serves to differentiate between payments intended to reimburse the employee for expenses incurred as a result of his employment and those meant to provide economic advantage. *Young v. Industrial Claim Appeals Office*, 969 P.2d 735 (Colo. App. 1998). An employer cannot limit its liability by arbitrarily labeling part of the employee's remuneration as an expense reimbursement if there is no rational or realistic relationship between the actual expenses and the amount claimed as an expense reimbursement. *Sneath v. Express Messenger,* 881 P.2d 453 (Colo. App. 1994)

Here, the Runzheimer reimbursement program was a tax-free reimbursement methodology allowing payments to be made to Claimant without impacting his W-2 income. The reimbursement was for actual expenses incurred in using his personal vehicle for business purposes and was not meant to be compensation paid to Claimant for Claimant's services. Rather, for his services, Claimant was paid compensation hourly and at an hourly rate. In this case Employer has not arbitrarily labeled part of Claimant's compensation as expense reimbursement. Rather, they have laid out a rational and realistic relationship between the expenses Claimant has incurred using his personal vehicle for business purposes and the amounts they have paid Claimant for reimbursement of those expenses. The Runzheimer reimbursement plan reimburses Claimant many of the costs for the business use of his personal vehicle and was intended and designed to do so. It was not intended to compensate Claimant for his services or provide advantages or fringe benefits to Claimant. Rather, it was designed to provide reasonable reimbursement of actual expenses incurred. The reimbursement plan covered most, but not all, of Claimant's actual expenses.

Further, the ALJ finds that the Runzheimer reimbursement program put into place by Employer on April 1, 2013 was a per diem reimbursement program. In this case, Claimant was paid a fixed per diem reimbursement to cover costs such as insurance, license and registration fees, taxes, and depreciation. Claimant was also paid a variable per diem reimbursement based on operating costs to cover costs including fuel, recommended maintenance and normal tire wear. The variable per diem reimbursement depended on the number of actual miles driven. Both the fixed and variable amounts were intended to offset a reasonable business use portion of an

Employees' vehicle. The statute states that these type of per-diem payments, if not reported on federal income taxes, are not included in the calculation of average weekly wage. Here, Employer's March 13, 2013 memo explicitly noted that the reimbursements were being paid on a non-taxed basis and that there would be no withholding of any kind and no W-2 reporting. Claimant also presented insufficient evidence that he paid taxes on the vehicle reimbursement or that he considered the reimbursement to be part of his W-2 income.

The ALJ thus concludes that the proper calculation of Claimant's average weekly wage is as per § 8-42-102(2)(d), C.R.S. The statutory method is adequate to fairly compute and determine Claimant's average weekly wage. The fixed per diem and variable per diem Claimant was paid for the business use of his personal vehicle is not properly included in Claimant's average weekly wage as neither reimbursement rate was considered wages for federal income tax purposes. Further, the ALJ concludes that the reimbursements were not meant to compensate Claimant for his services but were laid out specifically in the Runzheimer plan to reimburse actual expenses incurred in using a personal vehicle. Therefore, Claimant has failed to establish that his average weekly wage shall be increased to include any reimbursements he was paid at the time of his injury for the business use of his personal vehicle.

ORDER

It is therefore ordered that:

1. Claimant has met his burden to show that his left inguinal hernia and his umbilical hernia are causally related to his August 5, 2014 work injury. Respondents are liable for medical treatment reasonably necessary to cure or relieve Claimant from the effects of his hernias.

2. Claimants AWW is $645.83. Claimant has failed to meet his burden to show that the base AWW should be increased to include reimbursement amounts paid to Claimant for the business use of his personal vehicle.

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: June 17, 2015

/s/ Michelle E. Jones

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

ISSUES

- Whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

- The parties stipulated prior to the hearing that if claimant was not responsible for his termination of employment, he would be entitled to temporary total disability ("TTD") benefits beginning January 9, 2015 and continuing.

- The parties stipulated prior to the hearing to an average weekly wage of $579.00.

FINDINGS OF FACT

1. Claimant was employed by employer as a welder. Claimant was injured on August 6, 2014 when a sledge hammer that was placed on top of a tank slid off and struck claimant on the head. Claimant was referred for medical treatment with Dr. Stagg following the accident. Dr. Stagg diagnosed claimant with a closed head injury with mild concussion. Claimant was provided with work restrictions from Dr. Stagg that limited his lifting to 10 pounds and restricted claimant from working at heights.

2. Following claimant's injury, employer instituted a new safety rule that required all employees to wear hard hats when in the tank area. Mr. Salvucci, the manager for employer, testified that the tank area has employees working at heights with tools, and due to the danger of the tools falling on employees working below, the employer required all employees to wear hard hats in this area.

3. Mr. Salvucci testified that he provided claimant with a "bye" from this rule until his head and neck were more stable. Mr. Salvucci testified he allowed claimant to work without a hard hat because claimant said the extra weight of the hard hat made him uncomfortable. Despite Mr. Salvucci providing claimant with a pass from the safety rule, claimant was written up by Mr. Marengo on September 9, 2014 for failing to wear his hard hat.

4. Mr. Salvucci testified that he had hoped that claimant being written up on September 9, 2014 would cause claimant to get something in writing from his doctor exempting him from the hard hat policy. However, claimant did not provide employer with a note from a physician indicating he would be exempt from wearing a hard hat.

5. Despite claimant being written up by Mr. Magengo, Mr. Salvucci continued to provide claimant with a bye from wearing the hard hat. Mr. Salvucci testified that

employer obtained a special hard hat for claimant because his original hard hat was not a universal file with claimant's welding hood. Mr. Salvucci testified that there was friction between the other employees because the rule requiring employees to wear the hard hat was not being enforced on claimant.

6. Mr. Serve testified at hearing for employer. Mr. Serve is a foreman for employer and testified he spoke with claimant regarding employer's policy requiring hard hats. Mr. Serve testified claimant had advised him that Mr. Salvucci had given him a pass excluding him from the hard hat policy. Mr. Serve testified he asked claimant to wear a hard hat again on January 8, 2015 and was advised by claimant that the pass was still in effect. Mr. Serve testified he had a meeting the Mr. Grainy, the owner on January 8, 2015 and Mr. Grainy was mad because claimant was told that he had to go on light duty or comply with the hard hat policy and claimant agreed to comply with the hard hat policy.

7. Mr. Marengo testified at hearing for employer. Mr. Marengo testified that he is the tank shop supervisor and was hired after claimant's injury. Mr. Marengo wrote up claimant for failing to comply with the hard hat policy on September 9, 2014. Mr. Marengo testified claimant told him he had a doctor's excuse that allowed him to keep from wearing a hard hat. Mr. Marengo testified he requested a doctor's note from claimant exempting him from the hard hat policy, but never received a note.

8. Mr. Marengo testified Mr. Grainy was upset with claimant on January 8, 2015 because claimant agreed to wear his hard hat in compliance with policy after claiming he wouldn't be able to wear a hard hat due to his injury. Mr. Marengo testified it was Mr. Grainy's decision to terminate claimant and claimant was terminated for non-compliance.

9. Mr. Marengo testified on cross-examination that he was aware of Mr. Salvucci giving claimant a "bye" from wearing a hard hat. Mr. Salvucci testified he was not aware of when the pass Mr. Salvucci provided to claimant ended.

10. The termination slip in this case dated January 8, 2015 indicates claimant was terminated for non-compliance of company safety policies.

11. Claimant testified at hearing that he was injured on August 6, 2014 and returned to modified work after that date performing welding for employer. Claimant testified he provided employer with his physician notes from Dr. Stagg. Claimant testified Mr. Salvucci had provided him with a bye for the hard hat policy after it was implemented. Claimant testified he was aware of the hard hat policy and would wear a hard hat when in the tank area, but would not wear a hard hat while wearing his welding hood. Claimant testified Mr. Salvucci told him it was OK if he didn't wear a hard hat - welding hood combination so long as he wore a hard hat when not wearing his welding hood.

12. Claimant testified he was called into the office on January 8, 2015 and was asked to wear a hard hat – welding hood combination when working in the tank area. Claimant testified he agreed to wear the hard hat – welding hood combination at that time. Claimant testified he returned to work on January 9, 2015 and worked from 7:00 a.m. until approximately 11:00 a.m. and wore both the welding hood and hard hat while working. Claimant testified he was then called into the office at around 11:00 a.m. and fired.

13. Respondents argue that claimant was terminated because employer felt claimant had deceived them by claiming he had a medical excuse for not complying with the hard hat requirements. However, Mr. Salvucci testified that he provided claimant with an exception to the hard hat rule. While Mr. Salvucci had asked for a medical note, claimant was not fired for failing to produce the note. Moreover, Mr. Salvucci did not testify as to any specific date that he informed claimant that his "bye" for complying with the policy had ended.

14. In fact, when employer pressed the issue and demanded claimant comply with the policy, claimant agreed to try to comply with the policy. Claimant was then terminated because employer felt deceived by claimant's actions in failing to comply with the policy for several months. However, claimant's actions do not rise to the level of deception of the employer. Claimant complained that the hard hat – welding hood combination resulted in his developing headaches, and Mr. Salvucci provided claimant with an unwritten exception to the hard hat policy. Claimant utilizing that exception for a period of months is not a volitional act that claimant could reasonably expect would lead to his termination of employment.

15. Based on the foregoing, the ALJ determines that respondents have failed to demonstrate that claimant committed a volitional act that led to his termination of employment.

CONCLUSIONS OF LAW

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

2. The 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. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

4. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employment. As found, claimant was provided with an exception to the rule requiring employees to wear hard hats by Mr. Salvucci. As found, claimant's failure to wear a hard hat when he was provided with an exception to this rule by Mr. Salvucci was not a volitional act that claimant could have reasonably expected to lead to his termination of employment. As found, employer's perception that they were deceived by claimant was not the result of any volitional act on claimant's part, as he was utilizing an exception to the hard hat rule that was provided to him by Mr. Salvucci.

ORDER

It is therefore ordered that:

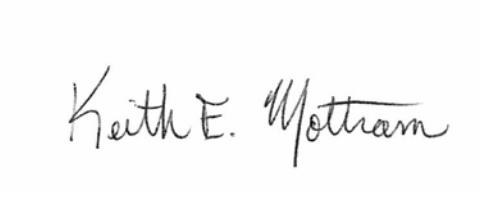
1. Respondents shall pay claimant TTD benefits commencing January 9, 2015 and continuing until terminated by law.

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

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: June 10, 2015



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

ISSUES

The issues to be determined by this decision are:

1. Whether the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee, specifically, a tear and rupture of her right anterior cruciate ligament (ACL) arising out, and in the course and scope of, her employment on July 29, 2014;

2. Whether, if the claim is found compensable, the claimant has proven by a preponderance of the evidence that the medical treatment for a right knee injury, specifically the right knee ACL surgery proposed by Robert E. Hunter, M.D. on August 26, 2014, is causally related to, and reasonably necessary to treat, the compensable injury arising out, and in the course and scope of, her employment on July 29, 2014;

3. Whether, if the claim is found compensable, the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits beginning July 31, 2014 and ongoing; and

4. Whether the claimant's average weekly wage (AWW) is $457.79, as proposed by claimant.

STIPULATIONS

1. At the onset of the hearing, the respondent represented that, should the claim be deemed compensable, the claimant's right knee ACL surgery proposed by Robert E. Hunter, M.D. on August 26, 2014, is causally related to, and reasonably necessary to treat, the injury arising out, and in the course and scope of, her employment on July 29, 2014.

2. The respondent also submitted that, if the Court finds the claimant has proven a compensable injury, the respondent would pay the claimant TTD benefits beginning July 31, 2014, and continuing.

3. The parties stipulated that if the claim is compensable, Dr. Hunter and Heart of the Rockies Regional Medical Center (HRRMC) are the authorized providers.

4. The claimant reserved the right to later request an increase in her AWW to include the cost of continuing any fringe benefit provided to the claimant by employer.

5. After the hearing concluded, the parties' attorneys stipulated that the claimant's AWW is $457.79 if the Court rules that the claimant's July 29, 2014, alleged injury is compensable.

6. These stipulations are approved and accepted by the ALJ.

7. The approval of these stipulations would resolve issues 2, 3, and 4 if the claim is found compensable.

FINDINGS OF FACT

1. The claimant works as an associate in the bakery department at the respondent-employer's super market in Buena Vista, Colorado. Her regular duties include unloading product from delivery trucks.

2. On July 29, 2014, the claimant unloaded frozen bakery items from a refrigerated truck. While she was unloading the truck, she slipped on a wet spot. Her right leg slid to the side, and stopped abruptly when her foot reached a dry spot on the floor. She felt a "pop" and immediate pain in the knee.

3. Shortly thereafter, the claimant described the incident to a coworker, Kira Jones. Ms. Jones subsequently completed an Employee Incident Witness Form at the request of the respondent-employer. Ms. Jones stated "I ask [sic] if she was okay and as she was kinda rubbing the hurt knee, I asked if it was the previously hurt one. She said yes to both questions. I asked her if she wanted to report it, and said she should report it to Doug or Larry. That same afternoon she came up to me in the deli, pulled up her pant leg. Her knee was swollen. I then asked if she had reported the incident to Larry or Doug and she said they had been busy. I told her that she needed to do it now as something was clearly wrong."

4. The claimant reported the incident to her supervisor, Paula Pratt, the afternoon of July 29, 2014. At that time, Ms. Pratt observed that the claimant's right knee appeared to be swollen.

5. The claimant and Ms. Pratt completed incident reports the following day, July 30, 2014. The claimant reported that "I was pushing the u-boat [stock cart] out of the trailer when I slipped and was wearing my slip free shoe's [sic] so when I tried to catch myself my knee popped." Ms. Pratt stated "[The claimant] came up front around 1:00 pm and told me she slipped and fell in the trailer while pulling the bakery load off the trailer. She showed me her right knee. It was swollen and black and blue."

6. The claimant worked a portion of her shift on July 30, 2014, but went home early due to knee pain and limited mobility.

7. The claimant has a history of previous right knee problems. She had a right knee ACL reconstruction surgery in June 2012 with Dr. Hunter. The procedure was successful, and she returned to work without restrictions or apparent limitations. There is no indication that her capacity to work was limited by her right knee in 2013 or 2014, prior to the July 29, 2014 incident.

8. The claimant saw PA-C Dimino on July 19, 2013 for right knee pain. She reported that "about three wks ago, she was hit by a shopping cart in her Rt knee. She has had anterior pain around her kneecap since, and slight swelling." ACL-specific provocative testing was negative. She was diagnosed with chondromalacia patella, and advised to return "PRN if symptoms persist." The claimant did not seek further treatment for the right knee until after the July 29, 2014 incident at work.

9. After she reported the July 29, 2014 work injury, the respondent-employer provided the claimant a list of designated providers, which included Heart of the Rockies Regional Medical Center (HRRMC).

10. The claimant went to the HRRMC emergency department on July 31, 2014. She reported that she "slipped and twisted knee in trailer at work Tuesday, swelling since w/ pain, HX of injury/surgical repair to right knee." The handwritten ER physician notes indicate "right knee swelling + 'looseness' after twisting." The anatomical drawing in the report reflects symptoms in the anterior portion of the knee. Physical examination showed effusion, a positive drawer sign, and "AC ligament laxity to stress." The physician diagnosed "R knee ligamentus injury." The claimant was given a knee brace, instructed to remain nonweightbearing, and advised to see Dr. Hunter if she was not better in a few days.

11. The claimant was subsequently evaluated by Karli Dimino, Dr. Hunter's PA-C, on August 4, 2014. The report documents that:

> [The claimant] is here today with a new injury that has occurred to her right knee,

> which previously underwent an ACLR on 6/2012. She describes sliding in a trailer in [sic] her right knee popped on 7/29/2014, 6 days ago. She states she had an immediate large amount of swelling which has since subsided slightly, and was seen in the emergency room where x-rays were done. They provided her with a knee immobilizer and crutches and advised her to be nonweightbearing until further follow up with Orthopedics.

Physical examination revealed "Moderate effusion. Positive pivot-shift without much provocation. Positive increased anterior drawer." The claimant was referred for an MRI to assess possible "ACL Tear."

12. A right knee MRI performed on August 26, 2014 revealed a complete tear of the ACL. She was evaluated by Dr. Hunter that same day. She reported "a history of having injured herself at work on July 29, when she slipped in a truck with one leg going one way and her going the other. She had a loud pop at that time and had immediate pain and swelling." Provocative maneuvers testing for an ACL tear continued to be significantly positive. Dr. Hunter diagnosed a "[r]erupture of right knee ACL." Dr. Hunter opined that "given the amount of laxity that she has and her inability to function, she is best served with a revision ACL."

13. The claimant has been unable to work her regular job since July 31, 2014 as a result of the injury.

14. Dr. Cebrian evaluated the claimant at the request of the respondent on November 28, 2014. Dr. Cebrian agreed that the claimant's ACL repair had re-torn, and that she needs surgery. However, Dr. Cebrian opined that the ACL rupture is not causally related to the July 29, 2014 incident.

15. Dr. Hunter testified in deposition on March 13, 2015. Dr. Hunter opined that the claimant's current right ACL rupture is causally related to the July 29, 2014 incident when she slipped in the trailer at work. Dr. Hunter opined that the mechanism of injury reported by the claimant was sufficient to tear her ACL graft. He opined that it is not medically probable that the claimant tore her ACL graft in July 2013 as a result of the shopping cart incident, because the physical examination after that time was negative for an ACL tear.

16. The ALJ finds the claimant to be credible.

17. The ALJ finds Dr. Hunter's analysis and medical opinions to be credible and more persuasive than medical evidence to the contrary.

18. The ALJ finds that the claimant has established that it is more likely than not that on July 29, 2014 she sustained a compensable injury to her right knee arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

2. The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

3. The claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

5. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the

case. *Colorado Jury Instructions, Civil*, 3:16.

6. The preponderance of persuasive evidence demonstrates that the claimant slipped on a wet floor while performing her work duties on July 29, 2014. As a result of that incident, she tore her previous ACL repair. She required medical treatment and became temporarily disabled as a direct result of the injury. Although she had a pre-existing condition, her work activity aggravated, accelerated, and combined with her pre-existing condition to produce the current disability and need for treatment. Therefore, she suffered a compensable injury to her right knee on July 29, 2014.

[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 for an injury to her right knee on July 29, 2014 is compensable.

2. Dr. Hunter and Heart of the Rockies Regional Medical Center (HRRMC) are authorized providers.

3. The respondent shall pay for all reasonable, necessary and related medical treatment, including the surgery recommended by Dr. Hunter.

4. The claimant's AWW on the date of injury was $457.79 (excluding health insurance cost, which issue was reserved).

5. The respondent shall pay TTD benefits commencing July 31, 2014 and continuing until terminated by law.

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

7. All matters not determined herein 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: June 17, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he was an employee of Respondent on January 30, 2014.

2. If Claimant was an employee of Respondent, whether Claimant is entitled to temporary total disability payments from January 30, 2014 and ongoing until terminated by statute.

3. If Claimant was an employee of Respondent, whether Claimant is entitled to penalties for a failure to timely admit or deny the Workers' Compensation claim in this matter.

4. If Claimant was an employee of Respondent, whether Claimant is entitled to a 50% increase in any indemnity benefits awarded for Respondent's failure to carry workers compensation insurance.

PROCEDURAL HISTORY

Claimant filed a Worker's Claim for Compensation which was received by the Division of Workers' Compensation on September 2 2014. Claimant named Respondent as the employer in this claim. Respondent filed a Notice of Contest that was received by the Division of Workers' Compensation on September 30, 2014 and asserted that Claimant was not an employee of Alpine Management Services. *See* Exhibit 34. The matter was set for hearing and a hearing commenced on March 19, 2015. The parties were unable to complete the testimony of all witnesses and the hearing was rescheduled to continue with additional testimony on May 4, 2015.

At the outset of the continued hearing on May 4, 2015 the parties advised the ALJ that Claimant had filed a new claim the day after the prior hearing on March 20, 2015 based on some of the testimony and information that had been presented at hearing. The parties advised the ALJ that the new claim was filed against Pagosa Pines Condominium Owner's Association (PPCOA) as a potential employer or statutory employer. The parties also advised the ALJ that the newly named Respondent had filed a notice of contest. Neither party wished to add PPCOA to this proceeding or to start this proceeding over and the parties wished to continue the hearing to reach resolution as pertaining to Alpine Management Services as a potential employer. The ALJ agreed, noted it would violate due process of PPCOA to add them to a proceeding half-way through without them having had opportunity to cross-examine prior witnesses, and made it clear to the parties that the order in this case would relate only to the named

Respondent. The ALJ declined to add any other parties and the proceeding continued on May 4, 2015 against Respondent Alpine Management Services.

FINDINGS OF FACT

1. Respondent is a property management company owned and operated by Jace Johnson.

2. The main property complex that Respondent manages, and Respondent's largest customer is Pagosa Pines Condominiums (PPC). In addition to PPC, Respondent provides property management services at other locations in Pagosa Springs, Colorado.

3. Respondent has a small home office and no other business location. Other than a bookkeeper, Respondent had no employees. Respondent is uninsured for Workers' Compensation.

4. On December 1, 2008 Pagosa Pines Condominium Owner's Association (PPCOA) and Jace Johnson, doing business as Alpine Management, Inc. (Respondent) entered into a management agreement. *See* Exhibit C.

5. The agreement provided that Respondent would provide for the day-to-day management of PPCOA. PPCOA appointed Respondent as the agent for PPCOA and the agreement provided that everything done by Respondent for PPCOA under the provisions of the agreement shall be done as Agent for PPCOA. *See* Exhibit C.

6. As PPCOA's agent, Respondent was required to arrange for the maintenance and repair of all common elements and to negotiate and execute contracts for necessary services. *See* Exhibit C.

7. As PPCOA's agent, Respondent was required to take care of the PPCOA financial accounts and was required to collect assessments from condominium owners, deposit the monies collected, and provide an accounting to the board on at least a quarterly basis. *See* Exhibit C.

8. As PPCOA's agent, Respondent was required to disburse funds necessary for the operation and maintenance of the PPCOA property in accordance with the budget adopted by the PPCOA board of directors. Respondent was required to prepare a statement of income and expenses and present it at monthly PPCOA board meetings. *See* Exhibit C.

9. Each year in the fourth quarter, Respondent and the board were required to prepare an operating budget setting forth anticipated income and expense for the upcoming year, which if approved, became the major fiscal document under with Respondent would operate during the next year. As PPCOA's agent, Respondent

would arrange for the maintenance of the property within the budget approved by PPCOA. *See* Exhibit C.

10. Respondent has operated under this agreement as PPCOA's agent since December 1, 2008. As agent for PPCOA, Respondent placed advertisements in the local paper requesting bids for specific contract work. Respondent collected the bids, presented them to the PPCOA board for review, and arranged for the hire of the contractor that the PPCOA board selected. Respondent ensured the work was performed properly by the contractor, issued payment to the contractor from PPCOA accounts, and also ensured the contractor carried proper insurance before beginning service.

11. As agent for PPCOA, Respondent had signatory authority on PPCOA accounts and signed the checks that PPCOA paid to contractors.

12. Contract work was generally for a 6 month period of time and regularly included snow removal during the snow season and flower bed/landscaping during the summer season.

13. In approximately March of 2011, consistent with his agreement with PPCOA, Respondent ran a newspaper advertisement seeking bids for a 6 month contract to perform flowerbed maintenance for PPCOA. The advertisement stated that Pagosa Pines COA was seeking a subcontractor to do light landscaping work.

14. Claimant responded to the advertisement with a resume for his company, "Above and Beyond, LLC." Claimant's resume stated that his objective was to "care for flower beds in the Pines Condos using my experience obtained through my years of owning and running my own landscaping maintenance business….beautifying the flower beds in the Pines Condos for owners and tenants would be my pleasure." *See* Exhibit K.

15. Respondent, as agent for PPCOA, negotiated a monthly contract price for the flowerbed work with Claimant. Claimant was aware that Respondent was the property manager for PPCOA. Claimant began performing flowerbed maintenance at the PPC property during the spring of 2011 at the agreed upon monthly rate.

16. Claimant and Respondent had no written agreement outlining the employment relationship. Claimant and Respondent had only verbal discussions about the rate of pay and what work was expected to be performed at the PPC property.

17. Claimant was paid by PPCOA for the flowerbed maintenance work. *See* Exhibit F.

18. Claimant was able to wear any clothing he wished while working at the PPC property. Claimant was not provided a shirt from Respondent with Respondent's

logo. Claimant was never told he was an employee of Respondent nor was he required to hold himself out as an employee of Respondent.

19. After the completion of the flowerbed contract, and for the next several years, Claimant continued to perform work at the PPC property under a verbal agreement and verbal contract of hire. Respondent, as agent for PPCOA, would ask Claimant if he was able to perform whatever work was needed, they agreed upon an hourly rate, and Claimant performed the work and submitted invoices.

20. For the next several years, the relationship continued with verbal agreements as to work and price per hour. During this time, Claimant continued to be paid by PPCOA. *See* Exhibit F.

21. In 2012 and 2013 for all the work performed at the PPC property, PPCOA issued Claimant 1099-Misc tax documents. *See* Exhibit E.

22. For the next several years, Claimant submitted his invoices to the condominium association, and addressed his invoices either "To: Pines" or "To: Pines Association" with c/o Alpine Management next to or below the address to Pines. *See* Exhibit G.

23. For the next several years, Claimant was authorized to make charges for tools or supplies on PPCOA's accounts at local hardware stores. *See* Exhibit M.

24. During this period of time, in addition to work at the PPC property, Claimant worked for San Juan Motel, Doug Dragoo/Paragon Properties, and Pagosa Opportunity Fund. Claimant also submitted invoices to these entities for his work. Claimant was authorized to make charges at local hardware stores on San Juan Motel's charge account.

25. No formal written contractual arrangement between PPCOA and Claimant ever existed. No formal written contractual arrangement between Respondent and Claimant ever existed.

26. During this period of time, Respondent was required to update PPCOA board as to the monthly expenses and was required to assist in the annual budgets.

27. In 2012, PPCOA decided to begin replacing the siding on the entire condominium complex and approved the budget for this project. Respondent negotiated an hourly rate with Claimant for this work and Claimant began to work on re-siding the entire condominium complex, building by building, subject to the funds available and the budget of PPCOA. Claimant performed siding work for PPCOA for approximately two years.

28. While performing siding work, Claimant fell off a ladder and was injured at the PPC property on January 30, 2014. Claimant suffered a shattered tibia and fractured fibula, and later developed complications from this injury.

29. Claimant has not worked since the date of his injury and remains on work restrictions.

30. Claimant filed a Worker's Claim for Compensation which was received by the Division of Workers' Compensation on September 2 2014. Claimant named Respondent as the Employer in this claim. Claimant did not name PPCOA as the Employer in this claim. *See* Exhibit 32.

31. Respondent filed a Notice of Contest that was received by the Division of Workers' Compensation on September 30, 2014 and asserted that Claimant was not an employee of Alpine Management Services. *See* Exhibit 34.

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. 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*, 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).

Contract of Hire

Claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, that he was performing service arising out of and in the course of his employment, and that the injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(a),(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." *See* § 8-40-203(1)(b), C.R.S. Similarly, the term "employee" is defined as including any person in the service of any person or corporation "under any contract of hire, express or implied." *See* § 8-40-202(1)(b), C.R.S. Any individual who performs services for pay for another shall be deemed to be an employee. *See* § 8-40-202(2)(a), C.R.S.

A contract of hire requires competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. However a contract of hire may be formed without every formality attending commercial contractual agreements if the fundamental elements of the contract are present. *Aspen Highlands Skiing Corp. v. Apostolou,* 866 P.2d 1384 (Colo. 1994). A contract of hire may be implied from the circumstances. Where there is conflicting evidence the existence of a contract of hire presents a question of fact for the ALJ. *Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216, 422 P.2d 630 (1966).

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957). The one for whom the action is to be taken is the principal, and the one who is to act is the agent. Id. § 1(2) and 1(3). Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Id. § 7. Agency is thus a legal relation having its source in the mutual consent of the parties. The existence of an agency relationship is ordinarily a question of fact. *Marron v. Helmecke*, 100 Colo. 364, 67 P.2d 1034 (1937); *Eckhardt v.*

Greeley Nat'l Bank, 79 Colo. 337, 245 P. 710 (1926); *Schoelkopf v. Leonard*, 8 Colo. 159, 6 P. 209 (1884). A general agent is "an agent authorized to conduct a series of transactions involving a continuity of service," Restatement (Second) of Agency § 3(1), such as one "who is an integral part of a business organization and does not require fresh authorization for each transaction." Id. § 3 comment a. An "agent" is generally one who acts for, or in place of, another, or is entrusted with the business of another. *Victorio Realty Group, Inc*. v. *Ironwood IX*, 713 P.2d 424, (Colo. App. 1985).

In the present case, the ALJ concludes that Respondent was acting as the general agent of PPCOA when entering into a verbal contract with Claimant to perform work at PPC property. As agent for PPCOA, Respondent was authorized to act on behalf of PPCOA and to bind PPCOA to this contractual relationship. Claimant was performing service at PPC property under the contract of hire. The contract of hire was made verbally when Respondent asked Claimant if he would continue to do various work projects around the PPC property and when Claimant and Respondent agreed upon pricing and rates per hour that Claimant could charge for the various work performed. Although Respondent negotiated the contract of hire with Claimant, the Respondent did so pursuant to his contractual requirement with PPCOA and as their agent. The agreement between Respondent and PPCOA required him to find and hire persons to perform various duties, to arrange for the maintenance and repair of common areas, and to act in PPCOA's best interest. Further, as found above, Respondent met with PPCOA board members monthly and was given instruction as to the budget, what projects could be performed, and what work Respondent should have completed on their behalf. Respondent carried out his acts as agent of PPCOA and in doing so, negotiated the contract of hire with Claimant. The contractual agreement between Respondent and PPCOA expressly states that the performance under the agreement and the duties required (including finding persons to perform duties) was to be done as the agent for PPCOA. Although Respondent negotiated this contract of hire, the contractual relationship was between PPCOA and Claimant. Respondent merely acted in accordance with his agreement with PPCOA as their agent to facilitate and hire necessary persons to complete maintenance work around the PPC property.

Further, as found above, all payments for any work performed at the PPC property were required under the agent agreement to be paid by PPCOA out of PPCOA accounts and funds. Consistent with the agent agreement between PPCOA and Respondent, Claimant was in fact paid by PPCOA. Claimant's 1099 tax documents were issued to him by PPCOA. Claimant was also able to make charges at local hardware stores to PPCOA's account. Claimant also submitted all of his invoices to "Pines" or "Pines Association," care of Respondent. The payment arrangement shows that Claimant billed PPCOA and was paid by PPCOA for all of the work he performed at the PPC property. This also supports the conclusion that Claimant was not performing services for pay for Respondent, but was performing services for pay for PPCOA.

The ALJ thus concludes that Claimant has failed to meet his burden of proof as to the threshold issue that a contractual relationship existed between Claimant and Respondent. Claimant has not established by a preponderance of the evidence that

Respondent is subject to the provisions of the Workers' Compensation Act. Rather, the ALJ finds that the totality of the evidence supports the conclusion that Respondent did not engage Claimant to work for Respondent. Rather, acting as the agent for PPCOA, Respondent engaged Claimant to work for PPCOA. The contract of hire was thus not between Claimant and Respondent but was between Claimant and PPCOA. Respondent was merely the agent that facilitated the contract of hire. As such, Claimant has no cause of action under the Workers' Compensation Act against Respondent. [1]

Contract of Hire by Estoppel

Although Claimant does not raise this issue, it is noted by the ALJ that a contract of hire may be implied by estoppel. *Olsen v. Industrial Claim Appeals Office of State of Colo.*, 819 P.2d 544 (Colo. App. 1991). In a workers' compensation setting, the requirement of a contract of hire should not be applied in a technical or formal way, but should be interpreted broadly to protect workers. *Romero v. U-Let-Us Skycap Services, Inc.*, 740 P.2d 1004 (Colo.App.1987); *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966). Under master and servant law, aspects of an employment arrangement may be enforced based on the doctrine of promissory estoppel. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo.1987). A contract of hire may arise even though the employer does not intend to enter one, if the employer's conduct causes the worker reasonably to believe that he or she is being employed. *Olsen v. Industrial Claim Appeals Office of State of Colo., supra*.

Here, the ALJ concludes that Respondent's conduct did not reasonably cause Claimant to believe that Respondent was Claimant's Employer. Claimant was aware that Respondent was the property manager for PPCOA. Claimant was paid by PPCOA. Claimant's tax documents were issued by PPCOA. Claimant was not required to represent Respondent or identify as an employee of Respondent. Although Claimant appeared to be surprised at hearing that his paychecks came from PPCOA and that the charge accounts at the local hardware stores were PPCOA's accounts and not Respondents, this confusion was not caused by Respondent nor did Respondent take any action to induce Claimant into believing the accounts were those of Respondent or that the paychecks came from Respondent. Claimant was simply not reasonable in assuming he was employed by Respondent when the relationship and even payment history over several years establishes otherwise. Therefore, Claimant was not employed by Respondent under a contract for hire by estoppel in this matter as Respondent's conduct did not cause Claimant to reasonably believe he was employed by Respondent.

[1] PPCOA was not a named Respondent in this matter. The ALJ declines to make any determination as to whether Claimant has a cause of action under the Workers' Compensation Act against PPCOA. The ALJ also declines to address whether Claimant is an employee or independent contractor of PPCOA

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that an employment relationship with Respondent existed on January 30, 2014.

2. The claim against Respondent is denied and dismissed. Respondent is not Claimant's Employer.

3. As Claimant has failed to meet his burden to show an employment relationship existed with Respondent, the remaining issues endorsed for hearing need not be addressed.

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: June 23, 2015

/s/ Michelle E. Jones

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

ISSUES

Whether the claimant has established by a preponderance of the evidence that he sustained an injury to his pectoralis major in an incident arising out of and in the course of his employment with the respondent-employer.

FINDINGS OF FACT

1. The claimant is employed as a police officer with the respondent-employer.

2. On September 8, 2014, the claimant was involved in the arrest of a criminal suspect. The claimant actively participated in the physical takedown and handcuffing of the criminal suspect and during this arrest event he felt a pull between his pectoral area and his shoulder.

3. The claimant did not report any injury on September 8, 2014. Cpl. Braun observed that the claimant made a general remark in passing that he had tweaked his shoulder but that the claimant did not have any specific conversation or report to him that he had sustained any injury.

4. The claimant did not seek any medical treatment on September 8, 2014 following the arrest incident. Instead, following the arrest incident, the claimant continued to work his regular duty shift without difficulty, responding to additional calls for service.

5. After the completion of his shift on September 8, 2014, the claimant was on "days off" and was not scheduled to work on September 9 and 10, 2014.

6. During his days off, the claimant was able to go about his usual activities of daily living and take care of household needs.

7. On September 10, 2014, while on his days off, the claimant went to Reps Gym in downtown Pueblo. The claimant pays for his own membership at Reps Gym.

8. The respondent-employer does not require the claimant or any other officer to maintain a gym membership or to work out any certain number of hours or days each week, or to be able to bench press a certain weight.

9. The respondent-employer offers a gym facility to its police officers but the claimant chose to purchase his own membership at the gym of his choice.

10. The claimant agreed that regardless of whether he was a police officer, he would work out at the gym regularly to keep him in shape and would maintain his own gym membership. He further stated that he typically works out four to five times a week.

11. While at the gym on September 10, 2014, the claimant engaged in weightlifting activities in the form of bench pressing approximately 185 pounds of weight. The claimant typically bench presses four sets of 225 pounds. During the bench press activity, when the claimant was pushing the weight back up from his chest, he experienced an immediate and searing pain, lost all strength in his left arm, and was forced to drop the weight because he could not sustain it.

12. The claimant described the sensation that he felt while bench pressing as a muscle tearing or a rubber band breaking and popping. He was in a lot of pain with a pain level of 7-8 on a scale of 10.

13. The claimant sought immediate medical treatment at the Parkview Medical Center Emergency Department where his pain level remained at 7-8 on a scale of 10.

14. Following the arrest incident on September 8, 2014, the claimant did not feel the need to seek medical treatment or to present to the emergency department. The September 8, 2014 incident resulted in a lingering pain much lower on the pain scale than that which he experienced on September 10, 2014 while bench pressing weight.

15. When the claimant presented to the Parkview Medical Center Emergency Department, he denied any other injuries prior to the weightlifting injury.

16. A physical examination of claimant at the Parkview Medical Center Emergency Department revealed that the claimant had no bruising present but rather that his skin was warm, dry, and normal in color.

17. The claimant was unable to work following the injury he sustained while lifting weights at the gym.

18. The claimant didn't start to have bruising until September 12, 2014.

19. The claimant did not report the injury as a work injury until September 12, 2014. On that date, he asked Cpl. Braun to prepare a casualty report (injury report) and told Cpl. Braun that the injury occurred on September 8, 2014 during the arrest event.

20. The claimant was referred to Emergicare as the Designated Provider on September 12, 2014, after Cpl. Braun completed the Casualty Report. He reported to the authorized treating provider, Dr. Elizabeth Arrington that he was weightlifting and felt a sharp pain and bulge over the pectoralis area. The claimant was then subsequently referred to orthopedist Dr. Michael Simpson who diagnosed the claimant as having suffered a torn pectoralis major tendon.

21. On September 17, 2014, Dr. Simpson submitted a request to the respondent for authorization to perform a surgical repair of the torn pectoralis major tendon.

22. The respondent retained Dr. Tashof Bernton to conduct a review of Dr. Simpson's request for authorization to perform surgery pursuant to W.C.R.P. Rule 16. Based on the findings and conclusions of Dr. Bernton, the respondent denied authorization for the surgery as not work related and therefore not reasonable and necessary as part of the workers' compensation claim. Additionally compensability of the claim had not been determined, thus the request for authorization for surgery was also denied on those grounds.

23. Dr. Bernton is Board certified in internal medical and occupational medicine. He is Level II accredited in the Colorado Workers' Compensation system and has been since the accreditation program started.

24. As part of his practice in occupational medicine, Dr. Bernton has evaluated mechanisms of injury, and causation and relatedness of injuries to employment for over 30 years.

25. As part of the Rule 16 review, Dr. Bernton reviewed the claimant's medical treatment records from Parkview Medical Center, Emergicare, Open MRI of Pueblo, Dr.

Michael Simpson, and the Premier Diagnostic Center. He also reviewed photographs submitted by the claimant of the bruising of the claimant's chest and shoulder area.

26. Dr. Bernton also attended the hearing in this matter by telephone and listened to the testimony offered by the claimant and the claimant's witness, Cpl. Braun, in the claimant's case in chief.

27. In his expert medical opinion, after completing his review the records and materials provided and after listening to the testimony offered in the claimant's case in chief, Dr. Bernton concluded that the claimant did not sustain a work related injury on September 8, 2014. Furthermore, he concluded that the injury that claimant sustained on September 10, 2014 was not related to the claimant's work.

28. Dr. Bernton relied on several factors in reaching his expert medical conclusion, to include but not limited to:

a. On September 8, 2014, the claimant did not experience immediate, acute pain following the arrest incident;

b. The claimant was able to complete his usual duty for the remainder of his shift on September 8, 2014;

c. The claimant did not seek medical care on September 8, 9 or 10, 2014 following the arrest incident but prior to the weightlifting incident;

d. A torn pectoralis major tendon would have been debilitating upon its occurrence. If the claimant had sustained a torn pectoralis major tendon on September 8, 2014, he would not have been able to function normally and perform his routine work duty or activities of daily living without significant pain, and he would not have been able to bench press any significant weight because to do so would have been extraordinarily painful.

29. Dr. Bernton further testified that the timeframe for the appearance of the claimant's bruising supports his expert medical conclusion that the claimant did not sustain a work related injury on September 8, 2014. Specifically, Dr. Bernton testified that the color of the bruise helps determine the time an injury originally occurred. Based on the bruising depicted in the photographs provided by claimant, Dr. Bernton was able to ascertain that the claimant did not sustain an injury on September 8, 2014 and,

moreover, that the bruising supports the objective medical conclusion that the claimant's injury was sustained on September 10, 2014.

30. Dr. Bernton also testified that the incident of "tweaking" of the shoulder as the claimant described as having occurred on September 8, 2014 did not predispose the claimant to an injury two days later on September 10, 2014. He explained that a strain or a "tweak" of the muscle is soreness in the muscle that may involve some inflammation around some of the fibers of the tendon, but it does not result in a weakening of the tensile strength. Conversely, a tear is an acute event in which the force exerted on the muscle exceeds the tensile strength of the tendon.

31. Dr. Bernton does not dispute that the claimant sustained a torn left pectoralis tendon. However, Dr. Bernton stated in his report and testified in his post-hearing evidentiary deposition that the medical evidence does not support that this is a work-related injury.

32. The ALJ finds that Dr. Bernton's analysis and opinions are credible and more persuasive then medical evidence to the contrary.

33. The ALJ finds that the claimant has failed to establish that it is more likely than not that the claimant sustained an injury to his Pectoralis Major in an incident arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo.

App. 2004).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

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

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The ALJ concludes that the claimant has failed to provide sufficient medical or lay evidence that his pectoralis major injury is related to his job duties.

9. The credible medical evidence and opinions indicate that the claimant's condition is not work related. As found above, the ALJ concludes that the opinions of Dr. Bernton are credible and entitled to persuasive weight.

10. The claimant has failed to establish by a preponderance of the evidence that the claimant sustained an injury to his pectoralis major in an incident arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: June 11, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the scope 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 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 benefits for the period of June 18, 2014 until February 2, 2015?

- Whether respondents have proven by a preponderance of the evidence that claimant is an independent contractor pursuant to Section 8-40-202(2)(b)(II), C.R.S.?

- Whether respondents have proven by a preponderance of the evidence that claimant's benefits are subject to a 50% penalty for a willful violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S.?

- At the commencement of the hearing, claimant sought to add the issue of penalties for failure to obtain workers' compensation insurance to the hearing, but the motion was denied by the ALJ. Therefore, whether Respondent properly obtained workers' compensation insurance is not an issue decided by this Order.

FINDINGS OF FACT

1. Claimant testified at hearing that she ran into Mr. Cintron, owner of Respondent, during the summer of 2014. Claimant testified Mr. Cintron told her he may have some work available for her as a painter over the summer. Claimant testified she subsequently had a meeting with Mr. Cintron in which he inquired as to whether she had insurance and she informed him that she had health insurance. Claimant testified that Mr. Cintron informed claimant that if he had enough work to keep claimant busy, she would need to get liability insurance. Claimant testified Mr. Cintron offered to take the money out of her check for the liability insurance. Claimant testified at hearing that she thought she was being hired as a temporary employee, and if Mr. Cintron hired her full time she would be an independent contractor and would need to get her own

insurance. Claimant testified at hearing that she did not have her own liability insurance at the time of her injury.

2. Mr. Cintron testified claimant approached him when he came to pick up his daughter from school on the last day of work. Mr. Cintron testified that claimant asked him if he had any work for her as a painter and he informed her that he did not, but took her phone number in case he had extra work. Mr. Cintron testified he subsequently set up two meetings with claimant, one at her house and one at his house. Mr. Cintron testified he inquired at the first meeting if claimant had insurance and she informed him that she had medical insurance through a concurrent employer. Mr. Cintron testified he informed claimant that "all of my guys carry liability insurance".

3. Mr. Cintron testified that at the second interview he again asked claimant if she had insurance and claimant assured him that she had the necessary insurance. Mr. Cintron apparently did not require claimant to present proof of the insurance, however.

4. Claimant began working for Respondent at the Rocky River Resort project on June 11, 2014. Mr. Cintron testified claimant worked two half days on this site. Claimant testified she was paid $15 per hour for her work with Respondent.

5. Mr. Cintron testified that he normally pays his sub-contractors a percentage of the painting contract. Mr. Cintron testified he paid claimant hourly because he was trying to figure out if claimant could paint and complete a job on her own.

6. Mr. Cintron testified that he does not hire any employees and does not oversee the work performed by his painters. Mr. Cintron testified that if a job is not properly performed by one of his painters, he does not call the painter back for the next job.

7. Mr. Cintron testified that he does not provide tools for his painters, but does provide materials, such as paint, stains, thinner, primer, and ladders. Mr. Cintron testified he provides his contractors 1099 forms at the end of the year unless the contractor does not earn the minimum amount for a 1099 form of $600. Mr. Cintron noted that claimant was not provided a 1099 form because she did not earn the minimum amount of $600 in her work with Respondent.

8. Claimant testified that she was instructed by Respondent to work from 9-3 each day. Mr. Cintron testified he did not instruct claimant to show up at a particular time and she had advised him that she could only work until 3:00 p.m. because she had a second job during the evening.

9. Mr. Cintron testified that during their meetings before painting, claimant informed Mr. Cintron that she was afraid of heights. Claimant testified that she informed Mr. Cintron that she would not go above the twelfth rung on the ladder because she was only being paid $12 per hour. Regardless, on the first job that claimant worked with Respondent, Mr. Cintron secured a ladder to a pole so claimant could climb onto the low roof in order to pain the fascia.

10. Conflicting evidence was presented at hearing regarding the amount of work claimant performed at the first job site. Regardless of the amount of painting claimant completed at the job site, the parties agree that claimant was paid for two days working approximately six hours each day.

11. Claimant testified at hearing that she was paid for her first job by check issued to her directly. Copies of the checks were entered into evidence and are issued from Respondent's business account to claimant individually. Claimant was paid $230 for her work on the first painting project which included $180 for 12 hours of work at $15 per hour and $50 for a bonus.

12. Claimant was issued a second check for her work on the second project that was for $140, representing 10 hours at $14 per hour. This check was made out to claimant individually. Claimant kept track of her own hours and submitted the hours to Respondent to be paid.

13. Mr. Cintron testified at hearing that he did not require claimant to work exclusively for his company. This is evidenced by the fact that claimant had concurrent employment while working for Mr. Cintron.

14. Claimant worked on the second project, a painting job at Wild Goose Lane, on June 16, 2014. Claimant testified she worked June 16, 2014 painting areas on the condominium she could reach with 12 rungs on the ladder. Claimant testified Mr. Cintron was present and instructed the painters on what to do. On June 17, 2014, claimant arrived at work and set up a ladder to paint the peak of an awning at the entrance of the condominium when the ladder collapsed and claimant fell fracturing her right wrist and suffering a laceration on her face.

15. Claimant was taken by another painter from the project site to the emergency room ("ER") where she was treated for her injuries. Claimant underwent x-rays of her right hand and wrist along with computed tomography studies of her face, cervical spine, thoracic spine and head. Claimant was diagnosed with a right comminuted fracture of the distal radius.

16. Following her treatment at the ER, claimant followed up with Dr. Griggs. Dr. Griggs performed surgery on her right distal radius fracture on June 17, 2014. Claimant followed up with Dr. Griggs after her surgery and she was given work

restrictions as of July 28, 2014 that limited her lifting to no more than 10 pounds. Claimant's work restrictions were increased to 30 pounds as of September 8, 2014 and to 50 pounds on November 16, 2014. Dr. Griggs eventually placed claimant at maximum medical improvement as of February 2, 2015.

17. Mr. Cintron testified that on June 17, 2014 he noticed the ladder laying on the ground and realized it was the top half of a 24' ladder that did not have the bottom half with the feet on it. Mr. Cintron testified he knew the ladder belonged to another painter and had considered using it until he realized the ladder did not have the feet. Mr. Cintron testified he moved the ladder back to the owner's truck. Mr. Cintron testified he found out later when standing on the other side of the condominium complex of claimant's fall from the ladder.

18. Conflicting testimony was presented as to whether claimant used brushes on the second job provided by Respondent. Claimant testified she used her own brushes on the first job, but because the second job was an oil based job, and she didn't own oil based brushes, she used brushes belonging to Mr. Cintron. Mr. Cintron denied allowing claimant to use his brushes.

19. Respondent presented the testimony of Mr. Brokos, a friend of Mr. Cintron who was present when Mr. Cintron and claimant in June at Mr. Cintron's residence. Mr. Brokos testified he heard Mr. Cintron ask claimant if she had insurance and heard claimant tell Mr. Cintron she did and that she had insurance through her concurrent employer.

20. Respondent presented the testimony of Mr. Hyatt, a painter for Respondent. Mr. Hyatt testified he works as a sub-contractor for employer. Mr. Hyatt testified that he has also worked as an employee of painting companies and testified the work performed as an employee is different than the work performed as an independent contractor. On cross-examination, Mr. Hyatt noted that his current employer provides brushes, paints, shirts and other materials. Mr. Hyatt testified that as an independent contractor, he provides his own brushes, paints and ladders.

21. Respondent presented the testimony of Mr. McDougal who testified he has worked as an independent contractor for Respondent. Mr. McDougal testified he carries his own general liability insurance and completed paperwork for Respondent. Mr. McDougal testified he has requested Respondent hire his friend as painters in years past, but was told his friend could not be hired because his friend did not have insurance.

22. Claimant testified that following the injury, she was unable to continue working for her concurrent employer. Claimant eventually filed a claim for workers' compensation benefits and a hearing was set on the matter.

23. Conflicting testimony was presented at the hearing as to whether claimant represented to Mr. Cintron that she had liability insurance. Nonetheless, the evidence does establish that Mr. Cintron did not require claimant to provide a certificate of insurance prior to hiring claimant to perform work as a painter. Mr. Cintron paid claimant per hour and made checks payable to claimant directly, and not to a trade name. Mr. Cintron provided claimant with the paint and drop cloths and ladders used to perform the painting. While the paint would be considered material and not tools, the ALJ determines the drop cloths and ladders would be considered tools.

24. Conflicting testimony was presented regarding whether Mr. Cintron provided brushes for claimant to use on the second job. The testimony did establish that claimant provided her own brushes for the first job. Mr. Cintron denied providing claimant with brushes for the second job, but the ALJ finds claimant's testimony that she did not have oil based brushes for the second job to be credible and persuasive. Claimant's testimony regarding the oil based work performed on the second job is supported by the photographs of the condominium entered into evidence and is found to be credible and persuasive. Therefore, the ALJ finds that claimant's testimony that Respondent provided tools consisting of brushes for the second job is accepted by the ALJ.

25. The ALJ notes that the evidence establishes that claimant was paid in a different method than the other painters who identified as independent contractors. While those contractors were paid a percentage of the painting contract, claimant was paid an hourly rate. Mr. Cintron testified that this occurred because he was gauging whether claimant was a capable enough painter to handle the work, but the evidence leads the trier of fact to determine that claimant's different method of payment leads one to the conclusion that claimant was under an employer-employee relationship with Respondent at the time of her injury.

26. The ALJ concludes from a review of the evidence that claimant has established that it is more probable than not that she was an employee of Respondent at the time of her injury. The ALJ finds that claimant was paid an hourly rate, with checks made directly payable to claimant, and that Respondent provided certain tools for claimant, including ladders, drop cloths and brushes for the second job. The ALJ finds that Respondent oversaw claimant's work as evidenced by the fact that he secured the ladder to the pole at the first job site, allowing claimant access to the fascia that was to be painted.

27. The ALJ concludes that Respondent did not require claimant to work particular hours, but arranged for claimant to work six hour days from 9:00 a.m. until 3:00 p.m. so claimant could continue to work for her concurrent employer. These work hours are established by the fact that claimant worked two days at the first job site for a total of 12 hours and worked an additional 1 ½ days at the second job site before she was injured. The ALJ finds Respondent did not provide training for claimant and could

terminate her job at any time by virtue of simply asking her to leave the job site. The ALJ further finds that claimant was not required to work exclusively for Respondent.

28. The ALJ credits the testimony of Mr. Hyatt and claimant and finds that the employment of a painter can take different forms, as either an employee or as an independent contractor. While Mr. Cintron testified he only hired independent contractors, the evidence presented established that some painting contractors will hire employees. Therefore, the ALJ credits the testimony of claimant in this case and finds that the claimant in this case, who had performed painting in the past, was not customarily engaged in an independent trade or business.

29. The ALJ credits the testimony at hearing that claimant had performed painting work previously for a different company in Crested Butte, but did not hold herself out as a painting contractor and performed other work not associated with painting, including that of a substitute teacher, part time bartender and her work with her concurrent employer.

30. Taking the relationship between claimant and Respondent into account, the ALJ finds claimant was an employee of Respondent and was not an independent contractor.

31. The ALJ credits the medical records and determines that claimant has established that it is more likely true than not that the medical treatment she received from the ER and from Dr. Griggs was reasonable and necessary to cure and relieve claimant from the effects of her industrial injury. The ALJ finds that the claimant has proven that it is more likely true than not that the ER treatment was authorized as emergency treatment as claimant was taken directly to the ER following her injury with a broken wrist.

32. The ALJ credits claimant's testimony that she was unable to continue her work with her concurrent employer after her work injury and finds that claimant is entitled to an award of temporary total disability ("TTD") benefits commencing July 18, 2014 and continuing until she was placed at MMI.

33. Respondent argues that claimant's benefits should be reduced by 50% for claimant's violation of a safety rule. The ALJ is not persuaded. Presumably, the safety rule violation involves claimant using the ladder, or using a ladder without feet. However, there was no credible evidence presented that claimant was ever instructed not to use the ladder. In fact, Mr. Cintron testified he helped claimant use a ladder on the first painting job by securing the ladder to the pole allowing claimant to climb on the roof to access the fascia.

34. The ALJ determines that Respondent has failed to demonstrate that the claimant willfully violated a safety rule resulting in her injury. Respondent's request to have claimant's benefits reduced by 50% is therefore denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2009). A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-41-301, 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., 2011. 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 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 P2d 1205 (1936); CJI, Civil 3:16 (2008).

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. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. The ALJ credits the testimony of claimant and finds that claimant has proven that she was in the service of Respondent under an implied contract of hire as of June 17, 2014. The ALJ credits the paychecks establishing that claimant was paid for her work with Respondent as evidence of the contract of hire.

6. Respondents have the burden of proving any affirmative defenses raised at hearing by a preponderance of the evidence. In this case, the issue involving claimant's status as an independent contractor requires respondents to meet the appropriate burden of proof. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

7. With regard to claimant's employment status, Respondent argues that Claimant is an independent contractor pursuant to Section 8-40-202. The ALJ is not persuaded.

8. Section 8-40-202(2)(b)(II) sets out a nine part test to establish whether an individual is an independent contractor. Section 8-40-202(2)(b)(II) provides in pertinent part that in order to prove independence it must be shown that the person for whom services are performed does not:

- Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of specified in the document;

- Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

- Pay a salary or at an hourly rate instead of a fixed or contract rate;

- Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

- Provide more than minimal training for the individual;

- Provide tools or benefits to the individual; except that materials and equipment may be supplied;

- Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

- Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

- Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

9. Section 8-40-202(2)(b)(II), C.R.S. allows for these provisions to be proven through a written document. Pursuant to Section 8-40-202(2)(b)(IV), C.R.S. the written agreement then creates a rebuttable presumption that an independent contractor relationship between the parties exists. However, the written agreement must be signed by both parties, must contain a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. Section 8-40-202(2)(b)(IV) also requires that all signatures on any such document must be duly notarized.

10. In this case, no written documentation was presented between the parties, and therefore, the burden of proof remained with Respondent to establish that claimant was an independent contractor.

11. The ALJ makes the following findings regarding the employment relationship between claimant and Respondent:

- Claimant was paid at an hourly rate.

- Claimant was issued checks made personally to her as opposed to payable to a trade or business name.

- Respondent provided tools in the form of ladders, drop cloths at the first and second job site and paint brushes for claimant at the second job site.

- Respondent oversaw the work as it was performed as evidenced by Mr. Cintron securing the ladder to the pole to allow claimant the ability to get on the roof and paint the fascia on the first pain job.

12. As found, the ALJ determines that Respondent has failed to prove by a preponderance of the evidence that claimant was an independent contractor of Respondent. As found, while Mr. Cintron may have wanted to hire claimant as an

independent contractor, his actions in paying claimant as an hourly worker and providing claimant with tools to perform her work represents a degree of control over claimant's work that results in claimant being considered an employee of Respondent.

13. As found, claimant has proven by a preponderance of the evidence that the injury resulted in the need for medical treatment from the ER and Dr. Griggs that was reasonable and necessary to cure and relieve claimant from the effects of her work injury. As found, Respondent is liable for the cost of the medical treatment provided by the ER and Dr. Griggs.

14. 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).

15. As found, claimant has proven by a preponderance of the evidence that her injury resulted in a wage loss based on the fact that claimant could no longer continue her work for Respondent or for her concurrent employer.

16.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the reasonable medical benefits necessary to cure and relieve claimant from the effects of her work injury including the medical bills from the ER and Dr. Griggs.

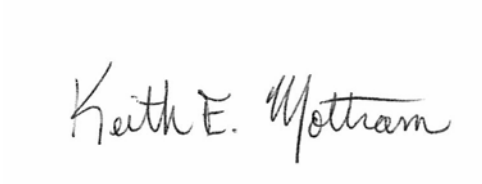
2. Respondent shall pay claimant TTD benefits for the period of July 18, 2014 through February 2, 2015.

3. Respondent 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: June 24, 2015



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

ISSUE

Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving Temporary Total Disability (TTD) benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATIONS

1. Claimant earned an Average Weekly Wage (AWW) of $1,297.96.

2. If Claimant was not responsible for his termination from employment he is entitled to TTD benefits for the period December 13, 2014 through March 29, 2015 subject to any statutory offset for the receipt of unemployment compensation benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a Truck Driver. On September 5, 2014 Claimant injured his shoulder and neck during the course and scope of his employment with Employer.

2. On September 8, 2014 Claimant was assigned a transitional position in Employer's Denver, Colorado terminal. Claimant's light duty assignment for Employer included a 10 pound weight restriction. Claimant's transitional job duties included sweeping and ensuring that hub caps were securely fastened on trucks in the terminal yard. Terminal Manager Ben Van'tHul was Claimant's immediate supervisor.

3. Claimant testified that on December 12, 2014 he arrived at work at approximately 6:30 a.m. After performing various light duty activities Claimant helped Mr. Van'tHul set up the terminal front office reception area for an annual holiday luncheon. Several management representatives from Employer's headquarters located in Spokane, Washington were scheduled to attend. Claimant noted that he began setting up the eating area at approximately 10:30 a.m. and completed the task by about 11:30 a.m. to 11:45 a.m. The executives arrived at the terminal at about 11:45 a.m. or 12:00 p.m.

4. Claimant testified that he normally took his lunch break between 10:30 a.m. and 11:30 a.m. but he waited until 11:45 a.m. on December 12, 2014 because he had to finish preparing the dining area. He remarked that he was required to clock out on a specific computer when taking his lunch break. However, because the computer was located in the area as the holiday luncheon, he was unable to access the computer and clock out for his lunch break.

5. Claimant explained that when he previously had problems clocking in or out on the computer he contacted Stephanie Macabeo in Employer's Spokane, Washington office. Ms. Macabeo had previously corrected Claimant's timesheet issues.

6. Claimant stated that he usually took his lunch break at a desk located in the center of an unheated portion of Employer's warehouse shop adjacent to the terminal front offices. The door to the area was located near the luncheon that had been set up for the visiting management personnel. Claimant remarked that, because the warehouse shop area was unheated, other light duty employees had set up a space heater and a five foot tall cardboard barricade around the desk to retain the heat. Claimant commented that the desk was not visible from the shop entrance door because of the cardboard enclosure.

7. Claimant testified that while taking his lunch break on December 12, 2014 he sat at the shop area desk and listened to music with one headphone. He stated that he typically listens to music while working and on his lunch breaks but had never been reprimanded for the practice. Claimant acknowledged that he might have closed his eyes while listening to music but did not fall asleep while on his lunch break.

8. Employer's President Dennis Williams testified that he visited Employer's Denver terminal on December 12, 2014 and toured the facility from approximately 11:30 a.m. to 12:00 p.m. preceding the holiday luncheon. While touring the shop area he saw Claimant snoring with his eyes closed while sitting at a desk. He maintained that he did not recognize Claimant or know his name. Mr. Williams commented that Employer does not tolerate sleeping on the job and that the offense merits termination. Shortly after touring the terminal Mr. Williams told Mr. Van'tHul that one of his employees was sleeping in the warehouse.

9. Claimant testified that after completing his 30-45 minute lunch break he resumed his typical light duty work until trucks started returning to the terminal. A few hours after he returned to work Mr. Van'tHul advised Claimant that he had a telephone call from Employer's Director of Risk Management Charles Perry. Mr. Perry informed Claimant that he had been terminated for sleeping on the job.

10. Mr. Perry testified that he terminated Claimant on December 12, 2014 for sleeping on the job. He noted that prior to terminating Claimant he reviewed payroll records and determined Claimant was on the clock at the time he was sleeping. Nevertheless, Mr. Perry acknowledged that light duty employees had previously had problems clocking in and out. The proper procedure to correct timecards was to contact Ms. Macabeo in Spokane, Washington. Mr. Perry also acknowledged that he did not ask Claimant whether he was on his lunch break while sleeping. He commented that, if Claimant had been on his lunch break while sleeping, he would not have terminated Claimant.

11. Respondents have failed to establish that it is more probably true than not that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment. On December 12, 2014 Mr. Perry terminated

Claimant for sleeping on the job. The termination was predicated on Mr. Williams' observations of Claimant snoring with his eyes closed while sitting at a desk in the shop area of the terminal. Mr. Williams had been touring the Denver facility prior to a holiday luncheon. As the President of Employer Mr. Williams commented that the company does not tolerate sleeping on the job and the offense merits termination. However, Claimant credibly explained that while taking his lunch break on December 12, 2014 he sat at the shop area desk and listened to music with one headphone. He stated that he typically listens to music while working and on his lunch breaks but had never been reprimanded for the practice. Claimant acknowledged that he might have closed his eyes while listening to music but did not fall asleep on his lunch break. Claimant recognized that he did not clock out for lunch because the computer was located in the same area as the holiday luncheon. He commented that he planned to contact Ms. Macabeo in Employer's Spokane, Washington office because she had previously helped him correct timecard problems. The record thus demonstrates that Claimant's actions of resting while listening to music at a desk in the shop area during his lunch break did not constitute a volitional act that he would reasonably expect to cause the loss of employment. In fact, Mr. Perry acknowledged that he did not ask Claimant whether he was on his lunch break while resting at the desk in the shop area. He commented that, if Claimant had been on his lunch break while sleeping, he would not have terminated Claimant. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment.

CONCLUSIONS OF LAW

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

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

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

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

4. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. Respondents have failed to establish by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment. On December 12, 2014 Mr. Perry terminated Claimant for sleeping on the job. The termination was predicated on Mr. Williams' observations of Claimant snoring with his eyes closed while sitting at a desk in the shop area of the terminal. Mr. Williams had been touring the Denver facility prior to a holiday luncheon. As the President of Employer Mr. Williams commented that the company does not tolerate sleeping on the job and the offense merits termination. However, Claimant credibly explained that while taking his lunch break on December 5, 2014 he sat at the shop area desk and listened to music with one headphone. He stated that he typically listens to music while working and on his lunch breaks but had never been reprimanded for the practice. Claimant acknowledged that he might have closed his eyes while listening to music but did not fall asleep on his lunch break. Claimant recognized that he did not clock out for lunch because the computer was located in the same area as the holiday luncheon. He commented that he planned to contact Ms. Macabeo in Employer's Spokane, Washington office because she had previously helped him correct timecard problems. The record thus demonstrates that Claimant's actions of resting while listening to music at a desk in the shop area during his lunch break did not constitute a volitional act that he would reasonably expect to cause the loss of employment. In fact, Mr. Perry acknowledged that he did not ask Claimant whether he was on his lunch break while resting at the desk in the shop area. He commented that, if Claimant had been on his lunch break while sleeping, he would not have terminated Claimant. Accordingly, under the totality of the circumstances

Claimant did not commit a volitional act or exercise some control over his termination from employment.

ORDER

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

1. Claimant earned an AWW of $1,297.96.

2. Claimant shall receive TTD benefits for the period December 13, 2014 through March 29, 2015 subject to any statutory offset for the receipt of unemployment compensation benefits.

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, 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 form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 8, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on October 17, 2014 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Employer operates a property that stores RV's and boats for customers. Vicki Reavis is the owner of Employer. Ms. Reavis' father, Wally Clary, manages Employer's leasing facility.

2. Employer hired Claimant as a Groundskeeper. Claimant had previously worked for MAACO performing auto body work. His job duties for Employer involved completing yard work, checking vehicles and performing other duties as assigned by Mr. Clary.

3. Mr. Clary is involved in the personal hobby of automobile restoration. He has a garage on Employer's property. Mr. Clary is permitted to work on his cars on Employer's premises but also performs automobile restoration at his home.

4. Claimant's scheduled work hours for Employer were from 10:00 a.m. until 3:00 p.m. He lived on Employer's property in an apartment and received a reduced rental fee as part of his compensation from Employer. Claimant also stored his own RV on Employer's property. Finally, Claimant operated a side business working on cars before and after his normal work hours.

5. Claimant explained that in addition to maintaining Employer's property he performs work on Mr. Clary's antique vehicles. Claimant remarked that Mr. Clary directed him to work on the antique vehicles or he would lose his job.

6. On October 16, 2014 Claimant traveled with Mr. Clary to pick up a new radiator for one of Mr. Clary's antique vehicles. On October 17, 2014 Mr. Clary told Claimant to install the new radiator and thermostat in an antique Studebaker truck. Claimant explained that he worked all morning installing the new radiator. He noted that, while he was under the truck, Mr. Clary revved the engine. One of the radiator hoses came loose and sprayed Claimant with boiling radiator fluid.

7. Claimant remarked that Mr. Clary refused to take him to a hospital for medical treatment. Instead, Mr. Clary gave Claimant some cream to apply to his burns.

8. Mr. Clary testified that he paid others to work on his antique cars. Employer did not pay for the work on his personal vehicles. Mr. Clary maintained that Claimant volunteered to install a radiator on the Studebaker truck.

9. Mr. Clary remarked that on October 17, 2014 sometime after 3:00 p.m. he was working on one of his antique vehicles in a garage. He was attempting to start the engine but it began overheating. Mr. Clary explained that Claimant voluntarily entered the garage, stated "I smell gas," moved underneath the vehicle and removed the radiator hose. Hot radiator fluid then came out of the hose and burned Claimant's face and upper body area.

10. On October 19, 2014 Claimant visited the University of Colorado Emergency Room for treatment. He reported that he was "working under a car when a radiator hose became disconnected. [Patient] was hit in head by radiator hose and got some radiator fluid in the mouth." Claimant had been taking Ibuprofen and applying Bacitracin to his wounds but his symptoms continued to progress. The medical report reflects that Claimant "did not initially come to the ED because his boss threatened him."

11. On October 27, 2014 Claimant visited Denver Health Medical Center for treatment. Claimant reported hearing loss after antifreeze exposure on October 17, 2014. The record reflects that Claimant had suffered burns to his face, chest and neck areas as the result of a radiator fluid leak. Physicians diagnosed Claimant with acute otitis media and referred him to an ENT specialist for additional evaluation.

12. Ms. Reavis testified at the hearing in this matter. She explained that Claimant performed maintenance duties including tree trimming, lawn care, changing light bulbs and general cleaning around Employer's property. Although Ms. Reavis acknowledged that Mr. Clary stored approximately 10-12 vehicles on Employer's property, she maintained that Claimant was not hired to work on automobiles for Employer.

13. Claimant has established that it is more probably true than not that he suffered compensable injuries on October 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that, in addition to maintaining Employer's property, he performed work on Mr. Clary's antique vehicles. On October 16, 2014 Claimant traveled with Mr. Clary to pick up a new radiator for one of Mr. Clary's antique vehicles. On October 17, 2014 Mr. Clary told Claimant to install the new radiator and a thermostat in a Studebaker truck. Claimant explained that he worked all morning installing the new radiator. He noted that, while he was under the truck, Mr. Clary revved the engine. One of the radiator hoses came loose and sprayed Claimant with boiling radiator fluid. The medical records reveal that Claimant suffered burn injuries to his face, chest and neck areas as well as hearing loss as a result of the

October 17, 2014 incident. The medical records are consistent with Claimant's account of the incident.

14. In contrast, Mr. Clary testified that Claimant voluntarily entered a garage while he was working on an antique vehicle. Claimant stated "I smell gas," moved underneath the vehicle and removed the radiator hose. However, based on the circumstances surrounding Claimant's injuries, Mr. Clary's account is not credible. Specifically, it is unlikely that an individual would move underneath a vehicle from outside a garage after smelling gas. More generally, Claimant occasionally performed work on Mr. Clary's vehicles at Mr. Clary's direction. Claimant's injuries occurred while he was performing automobile repair work at the direction of Mr. Clary as part of his job duties. Claimant's injuries thus had their origins in his work-related functions for Employer. Accordingly, Claimant's injuries arose out of and occurred within the course and scope of his employment for Employer.

15. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. After the October 17, 2014 accident Claimant sought emergency treatment at the University of Colorado Emergency Room. He subsequently received treatment at the Denver Health Medical Center for hearing loss and was referred to an ENT specialist for an evaluation. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his October 17, 2014 injuries. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injuries.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower and requires a claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* at 641-62.

5. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries on October 17, 2014 during the course and scope of his employment with Employer. Claimant credibly explained that, in addition to maintaining Employer's property, he performed work on Mr. Clary's antique vehicles. On October 16, 2014 Claimant traveled with Mr. Clary to pick up a new radiator for one of Mr. Clary's antique vehicles. On October 17, 2014 Mr. Clary told Claimant to install the new radiator and a thermostat in a Studebaker truck. Claimant explained that he worked all morning installing the new radiator. He noted that, while he was under the truck, Mr. Clary revved the engine. One of the radiator hoses came loose and sprayed Claimant with boiling radiator fluid. The medical records reveal that Claimant suffered burn injuries to his face, chest and neck areas as well as hearing loss as a result of the October 17, 2014 incident. The medical records are consistent with Claimant's account of the incident.

6. As found, in contrast, Mr. Clary testified that Claimant voluntarily entered a garage while he was working on an antique vehicle. Claimant stated "I smell gas," moved underneath the vehicle and removed the radiator hose. However, based on the circumstances surrounding Claimant's injuries, Mr. Clary's account is not credible. Specifically, it is unlikely that an individual would move underneath a vehicle from outside a garage after smelling gas. More generally, Claimant occasionally performed work on Mr. Clary's vehicles at Mr. Clary's direction. Claimant's injuries occurred while he was performing automobile repair work at the direction of Mr. Clary as part of his job duties. Claimant's injuries thus had their origins in his work-related functions for Employer. Accordingly, Claimant's injuries arose out of and occurred within the course and scope of his employment for Employer.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. After the October 17, 2014 accident Claimant sought emergency treatment at the University of Colorado Emergency Room. He subsequently received treatment at the Denver Health Medical Center for hearing loss and was referred to an ENT specialist for an evaluation. The treatment was reasonable and necessary to cure or relieve Claimant from the effects of his October 17, 2014 injuries. Respondent is thus liable for the preceding medical treatment as well as all additional treatment necessary to cure or relieve the effects of the injuries.

ORDER

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

1. Claimant suffered compensable injuries during the course and scope of his employment with Employer on October 17, 2014.

2. Employer is financially liable for Claimant's reasonable and necessary medical treatment that is designed to cure or relieve the effects of his October 17, 2014 industrial injuries.

In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $5,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $5,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation <u>or</u>

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

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

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

DATED: June 17, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period August 7, 2014 through August 24, 2014.

FINDINGS OF FACT

1. Employer is a seasonal gardening business. Betsey Kiehl is the owner of Employer and Claimant was one of her employees.

2. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant was unable to contact Ms. Kiehl. Ms. Kiehl was on an airline flight returning from Vermont. A co-employee thus took Claimant to the Vail Valley Medical Center for emergency treatment. After undergoing x-rays Claimant was diagnosed with a non-displaced fracture of the right third metatarsal. The cost of the emergency room visit was $2061.35. Ms. Kiehl signed a promissory note for the cost of the emergency room services.

3. On August 6, 2014 Employer did not possess Workers' Compensation insurance.

4. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014. Instead, Employer challenges Claimant's medical treatment.

5. On August 13, 2014 Claimant visited John Paul Elton, M.D. at Vail-Summit Orthopaedics in Edwards, Colorado for an examination. He noted that Claimant was wearing a splint and using crutches for her right foot injury. Claimant reported that her foot pain had improved but she was still experiencing intermittent symptoms that became worse with any weight-bearing. Dr. Elton diagnosed Claimant with a right third metatarsal fracture but expressed concerns about a possible Lisfranc injury. He thus

ordered an MRI of the right midfoot to "further examine the ligamentous structures of the Lisfranc complex to develop a safe treatment plan." Dr. Elton directed Claimant to wear a compression stocking in a boot, use crutches and remain non-weight-bearing.

6. On August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics. The MRI revealed a right foot third metatarsal non-displaced fracture. The Lisfranc ligament was "intact and unremarkable." The cost of the MRI was $1837.00.

7. Ms. Kiehl contends that Employer is self-insured and would accept responsibility for Claimant's medical bills if she obtained treatment from the following: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers.

8. On August 21, 2014 Claimant returned to Dr. Elton for an examination. After reviewing the MRI, Dr. Elton remarked that Claimant had a "stable Lisfranc complex with a minimally displaced third metatarsal base fracture." He directed Claimant to continue to use her fracture boot until a follow-up appointment in four to five weeks. Dr. Elton remarked that with her boot in place Claimant could progressively increase her weight-bearing as tolerated.

9. Claimant and her father Jerry Stevens credibly testified that Claimant's August 6, 2014 right foot injury prevented her from returning to work for Employer. Claimant was unable to perform her job duties because she was taking pain medications and wearing a boot on her right foot. On August 25, 2014 Claimant returned to school at the University of Colorado in Boulder. Accordingly, Claimant seeks TTD benefits for the period August 7, 2014 through August 24, 2014.

10. In the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50.

11. Claimant also maintained concurrent employment with Vail Myriad when she was injured on August 6, 2014. She was unable to perform her job duties for Vail Myriad because of her right foot injury. Claimant's earnings from Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by 7 yields an AWW of $321.43.

12. Based on her earnings from Employer and Vail Myriad Claimant earned a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

13. On August 29, 2014 Employer paid Claimant $618.60 to cover wage loss benefits. Employer has also made partial payments for Claimant's medical treatment and diagnostic studies.

14. During the Fall of 2014 Claimant returned to Dr. Elton for follow-up visits. By January 7, 2015 Dr. Elton noted that Claimant's right foot fracture appeared to be healed and she could undertake activities as tolerated.

15. On March 2, 2015 Dr. Elton drafted a letter explaining Claimant's need to obtain an MRI from Vail Summit Orthopedics instead of Touchstone Imaging. He noted that Claimant suffered a right foot injury in August 2014 and he ordered an MRI to evaluate a possible ligamentous injury. Dr. Elton explained that, because of quality limitations at various imaging facilities, he recommended a facility with "optimal imaging capabilities and musculoskeletal trained radiologists." He thus stated "we recommended against Touchstone Imaging and [Claimant's] MRI was performed at Vail Summit Orthopedics in Edwards, CO."

16. Claimant has established that it is more probably true than not that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

17. Claimant has proven that it is more probably true than not that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

18. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

19. For the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from

Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

20. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 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. Multiplying Claimant's AWW of $809.83 by 66.67% yields a weekly TTD rate of $539.91.

21. Employer was not insured on August 6, 2014. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The period covers 18 days. Claimant's TTD rate is $539.91, increased by 50% for a lack of insurance, to a TTD rate of $809.83 each week. Multiplying $809.83 each week for a total period of 18 days yields a total TTD amount of $2,082.42.

CONCLUSIONS OF LAW

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

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

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

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

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

Medical Benefits

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

8. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996

P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least two designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least two physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list in compliance with C.R.S. §8-43-404(5)(a)(I)(A)." W.C.R.P. Rule 8-2(D) additionally provides that the remedy for failure to comply with the requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

9. As found, Claimant has proven by a preponderance of the evidence that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

10. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

Average Weekly Wage

11. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair

approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

12. As found, for the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, 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 his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 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. Multiplying Claimant's AWW of $809.83 by 66.67% yields a weekly TTD rate of $539.91.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

15. Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1), C.R.S. provides that an injured employee's benefits shall be increased by 50% for an employer's failure to comply with the insurance provisions of the Act. If compensation is awarded the Judge shall compute and require the employer to pay a

trustee an amount equal to the present value of all unpaid compensation or require the employer to file a bond within 10 days of the order. §8-43-408(2), C.R.S. The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005).

16. As found, Employer was not insured on August 6, 2014. Claimant's disability benefits shall be increased by 50% because of Employer's failure to comply with the insurance provisions of the Act. Claimant is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The period covers 18 days. Claimant's TTD rate is $539.91, increased by 50% for a lack of insurance, to a TTD rate of $809.83 each week. Multiplying $809.83 each week for a total period of 18 days yields a total TTD amount of $2,082.42.

ORDER

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

1. Claimant suffered a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of her right foot injury as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her August 6, 2014 industrial injury.

3. Claimant earned an AWW of $809.83.

4. Claimant shall receive TTD benefits for the period August 7, 2014 through August 24, 2014. The period covers 18 days. Claimant is entitled to a TTD rate of $539.91, increased by 50% for a lack of insurance, to a TTD rate of $809.83 each week. Multiplying $809.83 each week for a total period of 18 days yields a total TTD amount of $2,082.42. Accordingly, total TTD benefits due equal $2,082.42.

5. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $7,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of $7,000 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

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

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

DATED: June 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 established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period August 7, 2014 through August 24, 2014.

FINDINGS OF FACT

1. Employer is a seasonal gardening business. Betsey Kiehl is the owner of Employer and Claimant was one of her employees.

2. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant was unable to contact Ms. Kiehl. Ms. Kiehl was on an airline flight returning from Vermont. A co-employee thus took Claimant to the Vail Valley Medical Center for emergency treatment. After undergoing x-rays Claimant was diagnosed with a non-displaced fracture of the right third metatarsal. The cost of the emergency room visit was $2061.35. Ms. Kiehl signed a promissory note for the cost of the emergency room services.

3. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014. Instead, Employer challenges Claimant's medical treatment.

4. On August 13, 2014 Claimant visited John Paul Elton, M.D. at Vail-Summit Orthopaedics in Edwards, Colorado for an examination. He noted that Claimant was wearing a splint and using crutches for her right foot injury. Claimant reported that her foot pain had improved but she was still experiencing intermittent symptoms that became worse with any weight-bearing. Dr. Elton diagnosed Claimant with a right third metatarsal fracture but expressed concerns about a possible Lisfranc injury. He thus ordered an MRI of the right midfoot to "further examine the ligamentous structures of the Lisfranc complex to develop a safe treatment plan." Dr. Elton directed Claimant to wear a compression stocking in a boot, use crutches and remain non-weight-bearing.

5. On August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics. The MRI revealed a right foot third metatarsal non-displaced fracture. The Lisfranc ligament was "intact and unremarkable." The cost of the MRI was $1837.00.

6. Ms. Kiehl contends that Employer is self-insured and would accept responsibility for Claimant's medical bills if she obtained treatment from the following: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers.

7. On August 21, 2014 Claimant returned to Dr. Elton for an examination. After reviewing the MRI, Dr. Elton remarked that Claimant had a "stable Lisfranc complex with a minimally displaced third metatarsal base fracture." He directed Claimant to continue to use her fracture boot until a follow-up appointment in four to five weeks. Dr. Elton remarked that with her boot in place Claimant could progressively increase her weight-bearing as tolerated.

8. Claimant and her father Jerry Stevens credibly testified that Claimant's August 6, 2014 right foot injury prevented her from returning to work for Employer. Claimant was unable to perform her job duties because she was taking pain medications and wearing a boot on her right foot. On August 25, 2014 Claimant returned to school at the University of Colorado in Boulder. Accordingly, Claimant seeks TTD benefits for the period August 7, 2014 through August 24, 2014.

9. In the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50.

10. Claimant also maintained concurrent employment with Vail Myriad when she was injured on August 6, 2014. She was unable to perform her job duties for Vail Myriad because of her right foot injury. Claimant's earnings from Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by 7 yields an AWW of $321.43.

11. Based on her earnings from Employer and Vail Myriad Claimant earned a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

12. On August 29, 2014 Employer paid Claimant $618.60 to cover wage loss benefits. Employer has also made partial payments for Claimant's medical treatment and diagnostic studies.

13. During the Fall of 2014 Claimant returned to Dr. Elton for follow-up visits. By January 7, 2015 Dr. Elton noted that Claimant's right foot fracture appeared to be healed and she could undertake activities as tolerated.

14. On March 2, 2015 Dr. Elton drafted a letter explaining Claimant's need to obtain an MRI from Vail Summit Orthopedics instead of Touchstone Imaging. He noted that Claimant suffered a right foot injury in August 2014 and he ordered an MRI to evaluate a possible ligamentous injury. Dr. Elton explained that, because of quality limitations at various imaging facilities, he recommended a facility with "optimal imaging capabilities and musculoskeletal trained radiologists." He thus stated "we recommended against Touchstone Imaging and [Claimant's] MRI was performed at Vail Summit Orthopedics in Edwards, CO."

15. Claimant has established that it is more probably true than not that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

16. Claimant has proven that it is more probably true than not that the right of medical selection passed to her because Employer failed to designate at least two medical providers in writing after receiving notice of the August 6, 2014 injury. Claimant informed Employer of the accident and Ms. Kiehl mentioned the following as preferred providers: (1) Vail Valley Medical Center; (2) Vail Summit Orthopedics including Dr. Elton; and (3) Touchstone Imaging. However, the record is devoid of credible evidence that Employer furnished Claimant with a written list of at least two designated medical providers. Accordingly, pursuant to statute and rule the right to select an authorized medical provider passed to Claimant.

17. Claimant has demonstrated that it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. On August 6, 2014 Claimant visited the Vail Valley Medical Center for emergency treatment. Claimant also visited Dr. Elton for medical treatment and diagnosis on several occasions. Finally, on August 20, 2014 Claimant underwent a right foot MRI at Vail-Summit Orthopaedics based on the recommendation of Dr. Elton. All of the preceding medical treatment was reasonable, necessary and related to Claimant's August 6, 2014 right foot injury. Employer is thus financially responsible for the payment of Claimant's medical expenses for the treatment of her right foot injury.

18. For the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

19. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 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.

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).

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6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer. On August 6, 2014 Claimant was weeding a property during the course and scope of her employment when a rock fell on her right foot. Claimant suffered a minimally displaced third metatarsal fracture to her right foot. Employer does not dispute that Claimant suffered a right foot injury during the course and scope of her employment on August 6, 2014.

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12. As found, for the 10 weeks preceding Claimant's August 6, 2014 right foot injury she earned wages from Employer totaling $4,885.04. Dividing $4,885.04 by 10 yields an AWW of $488.50. Claimant's earnings from her concurrent employment at Vail Myriad for the seven weeks preceding her industrial injury totaled $2,250. Dividing $2,250 by seven yields an AWW of $321.43. Combining Claimant's AWW from Employer and her AWW from Vail Myriad yields a total AWW of $809.83. An AWW of $809.83 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, 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 his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

14. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period August 7, 2014 through August 24, 2014. The medical records and Claimant's testimony reveal that she was unable to perform her job duties between August 7, 2014 and August 24, 2014. Claimant was taking pain medications and wearing a boot on her right foot. She is entitled to an award of TTD benefits because her August 6, 2014 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.

ORDER

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

1. Claimant suffered a compensable right foot injury on August 6, 2014 during the course and scope of her employment with Employer.

2. Employer is financially responsible for payment of Claimant's medical expenses for the treatment of her right foot injury as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her August 6, 2014 industrial injury.

3. Claimant earned an AWW of $809.83.

4. Claimant shall receive TTD benefits for the period August 7, 2014 through August 24, 2014.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

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

DATED: June 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
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. 4-966-479-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 26, 2015. The hearing was digitally recorded (reference 4/26/2015, Courtroom 1, from 8:30 AM and 10:30 AM and 12:15 AM). The official Spanish/English Interpreter was David Roberts.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection. The Claimant's objection to Respondents' Exhibit J was sustained, and the ALJ reserved ruling, allowing portions of J to be used for impeachment purposes.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; and, if compensable; medical benefits; temporary total disability (TTD) benefits from November 11, 2014 to November 13, 2014; and, temporary partial disability (TPD) benefits from November 14, 2014 to February 6, 2015. The Respondents raised the affirmative defense to TTD of "responsibility for termination." The Claimant did not designate the issue of average weekly Wage (AWW), the Respondents declined to agree to an

addition of the AWW issue and therefore, this issue is precluded from this hearing and any determinations concerning TTD and/or TPD would be academic and interlocutory.

The Claimant bears the burden of proof, by a preponderance of the evidence, to establish that a compensable injury occurred on November 1, 2014, while the Claimant was working for the Employer. In addition, the Claimant bears the burden of proof on the issue of TTD benefits from November 1, 2014 through November 13, 2014, as well as TPD benefits from November 14, 2014 through February 6, 2015.

The Respondents bear the burden of proof, by a preponderance of the evidence, the affirmative defense of "responsibility for termination."

FINDINGS OF FACT

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

1. The Claimant is a 33-year-old male who began working as a dishwasher for the Employer on October 8, 2014. His duties include, washing dishes, some fruit preparation, emptying full trash cans into a dumpster, and taking full linen bags outside to be placed in a bin.

2. On November 2, 2014, the Claimant left work early, due to back pain that the Claimant alleges was a result of a back injury he had sustained while working on November 1, 2014, the previous day. The evidence is unclear whether the Claimant reported the work-related nature of his back pain when he left work early on November 2, however, the Employer became ware, or should have been aware, that the Claimant was claiming work-related back pain prior to November 10, 2014.

3. On November 3, 2014, the Claimant went to Sisters of Charity of Leavenworth Hospital (SCL), and was treated for a back strain. He was released, with instructions that he may return to work on November 5, 2015. This treatment was causally related to the November 1 back strain and it was reasonably necessary to cure and relieve the effects of that injury.

4. On November 8, 2014, the Claimant returned to SCL, and was treated in the emergency room (ER) for back pain. He was released, with instructions that he may return to work on November 12, 2014. This treatment was causally related to the November 1 back strain and it was reasonably necessary to cure and relieve the effects of that injury.

5. On November 10, 2014, the Claimant went to Concentra Medical Center (hereinafter "Concentra"), on referral by his Employer, and was diagnosed with lumbar strain, as well as disorders of the sacrum. Under the care of Elizabeth R. Palmer, PA-C, the Claimant was released, with instructions that he may return to work on November 11, 2014, with restricted activity. The restricted activity included not lifting, pushing, or pulling anything over 10 lbs. In addition, it permitted, occasional bending and walking,

and prohibiting squatting. The Claimant was scheduled for weekly follow up visits, and was given an anticipated date of maximum medical improvement (MMI) of January 10, 2015. The work restrictions remained unchanged until December 16, 2014.

6. On November 10, 2014, the Claimant filed a Claim for Worker's Compensation with the Colorado Division of Workers' Compensation (DOWC).

7. On December 8, 2014, the Respondents filed a Notice of Contest in response to the Claimant's Workers' Claim.

8. On December 16, 2014, the Claimant's lifting, pushing, and pulling related restrictions were changed from a 10 lb restriction, to a 20 lb restriction.

9. The Claimant actually worked from November 5, 2014 through February 5, 2015. The evidence is unclear concerning whether he worked full duty, full hours or restricted duty at lesser hours during this time period. Therefore, the Claimant has failed to prove TPD by preponderant evidence during this period of time.

10. On February 6, 2015, the Claimant was called into a meeting with Joel Glentzer (hereinafter "Glentzer"), the General Manager of the location the Claimant was employed at, and was asked to provide a correct Social Security number. It had been discovered by the Human Resources Department of the Employer that the Claimant had supplied an incorrect Social Security number when hired. The Claimant was given one week to provide a correct number.

11. The Claimant did not return to the Employer after the February 6, 2015 meeting, and he did not provide a correct Social Security number. He was subsequently terminated from employment.

<u>The Injury, According to the Claimant</u>

12. The Claimant alleges that he sustained an injury while working on November 1, 2014. According to the Claimant, he was asked by the acting kitchen manager, Tim Downs (hereinafter "Downs"), to help take out the kitchen trash. The Claimant tried to lift the can, but could not, because it was "too heavy." The Claimant then proceeded to try again, lifting "really hard," and managed to get the trash can to his knee. At this point, the trash can was tipped into the dumpster by 2 other employees. The Claimant described the dumpster as not requiring much lifting, but rather, that you could just tip the trash can into it. He described the trash can as being 3 ft in height, 2 ft around, and weighing approximately 120 lbs. According to the Claimant, it was during the time when he lifted the trash can to his knee that he felt a "pull" in his back. He did not report the injury that day, and continued to work the remainder of his scheduled shift.

13. On the following day, November 2, the Claimant went to work, and worked for a "little while," before reporting to a manager that he "felt bad." He was sent home, and did not finish that shift.

14. On November 3, 2014, the Claimant sought medical attention at SCL, due to the back pain that allegedly resulted from the trash can incident on November 1, 2014.

15. The Claimant reports that he is no longer able to perform normal dishwasher tasks.

16. According to the Claimant, he was working 5 days, or 40 hours, a week. Yet, after the injury, he was only scheduled for 1-2 days a week.

17. On cross examination, the Claimant was asked to account for an earlier deposition that may have implied that there were only 2 other witnesses present: Downs, the kitchen manager, and an employee named José. The Claimant stated that there were 3 witnesses present: Downs, a "white guy," and José. The ALJ notes that this is an inconsistent statement, but finds that the difference between 2 and 3 witnesses does not make a material difference, under the facts of this case. In addition, neither the "white guy," nor José were present to be called as witnesses.

The Injury, According to Respondents' Witness, Tim Downs

18. Tim Downs (hereinafter "Downs") was the acting kitchen manager for the Employer at the time of the alleged injury, and was working with the Claimant when the injury is said to have occurred. Downs is no longer employed by the Employer.

19. Downs stated that he did not recall the actual injury taking place, but did remember opening the door so that the Claimant could take out the trash. It is a policy and procedure of the Employer that at least two employees are present when trash is being taken out: a "certified employee," and "staff". The doors that lead to the dumpster are locked, and require the certified employee to unlock the door, and stay there until the trash has been emptied.

20. Downs stated that even though he did not recall any injury taking place, if he had observed an injury, he would have followed the procedures required by the Employer. The ALJ notes that Downs does **not** assert that he knows whether the Claimant was injured while working on November 1, 2014. Rather, Downs asserts that he does not remember any injury.

Termination of Employment

21. On cross examination, the Claimant admitted that he was terminated from his employment with the Employer due to a ""bad" Social Security card. He further admitted that he does not have a valid United States Social Security card. The

Claimant was reminded by the ALJ that the he had a Fifth Amendment right not to incriminate himself when asked about his true identity, and he chose not to invoke this right.

22. On direct examination, Glentzer, the General Manager of the Employer, confirmed that the Claimant was terminated on February 13, 2015, after failing to provide a valid Social Security number, following a meeting on February 6, 2015, regarding the matter.

Ultimate Findings

23. The ALJ makes a rational choice to accept the Claimant's account of his work-related injury. In addition, although Downs was credible, and had stated that he did not remember witnessing the Claimant injure himself on November 1, 2014, the ALJ sees no rational reason to infer that such an injury did **not** take place. The Claimant was sufficiently credible to sustain his burden of proof with respect to compensability.

24. The Claimant has proven, by a preponderance of the evidence, that he sustained a work-related back injury while working for the Employer on November 1, 2014. Therefore, the Claimant has proven that he sustained a compensable injury, as he alleges.

25. The medical care at SCL on November 3, without an Employer referral, was of an emergent nature. The medical care at SCL on November 8, 2014 was also of an emergent nature although not the result of an Employer referral. The medical care at Concentra was the result of an Employer referral and, therefore, authorized. All of the medical care and treatment for the Claimant's low back strain of November 1, 2014, reflected in the evidence, was causally related and reasonably necessary to cure and relieve the effects thereof.

26. Because the Claimant failed to designate the issue of AWW, as well as provide records for calculation of an AWW, the Claimant provided no persuasive evidence to suggest that he suffered a "wage loss" as a result of his injury. Therefore, his claim for TTD and TPD benefits is incapable of quantification or determination.

27. The Claimant acted volitionally by knowingly providing an invalid Social Security number to the Employer, and he reasonably understood or should have understood that this was a terminable offense.

28. In addition, the Respondents have proven, by a preponderance of the evidence, the affirmative defense of "responsible for termination."

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* 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 was sufficiently credible to sustain his burden of proof with respect to compensability. Further, each and every other witness was 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, ALJ made a rational choice to accept the fact that the Claimant's medical records, as well as his testimony, provided substantial evidence to support the fact that the Claimant sustained a compensable work-related injury on November 1, 2014.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable work-related injury on November, 1 2014.

Medical Benefits

d. Because this matter is compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Employer referred the Claimant to Concentra, which is, therefore, an authorized medical provider.

e. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the first visits to SCL on November 3, 2014 and

November 8 were of an emergent nature and Respondents should be liable for the costs thereof.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the low back strain on November 1, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, as reflected in the evidence, was reasonably necessary.

Temporary Disability Benefits

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). As found, the Claimant **failed** to prove, by a preponderance of the evidence, that he is entitled to TTD benefits from November 1, 2014 through November 13, 2014. There was not persuasive evidence presented that the Claimant suffered wage loss during this period of time. In addition, as noted previously, the Claimant failed to designate the issue of AWW, and did not present any records for calculation. Additionally, the Respondents have proven their affirmative defense of "responsibility for termination" on February 6, 2015. Therefore, TPD from November 14, 2014 through February 6, 2015 is unwarranted.

Responsibility for Termination

h. Section 8-42-105 (4), C.R.S., provides that an employee responsible for his/her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be

through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether the claimant is responsible, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. The Supreme Court has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, the Claimant acted volitionally by knowingly providing an invalid Social Security number to the Employer, and reasonably understood or should have understood that such an act is a terminable offense. *See Ernest Olaes v. Elkhorn Construction Co,* W.C. No. 4-782-977 (ICAO, April 12, 2011). As found, Respondents satisfied their burden of proof on the affirmative defense that Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised a degree of control over the circumstances leading to termination.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has satisfied his burden with respect to "compensability." He has failed to satisfy his burden with respect to **ascertainable** temporary disability benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable low back strain on November 1, 2014.

B. The respondents shall pay the costs of medical care and treatment for the Claimant's low back strain of November 1, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all claims for temporary total and temporary partial disability benefits from November 1, 2014 through May 26, 2015, are hereby denied and dismissed.

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

DATED this_____day of June 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 MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** by U.S. Mail, or by e-mail addressed as follows:

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

Date: _____ _____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with Employer on October 29, 2014.

2. If the claim is compensable, whether Claimant has established by a preponderance of the evidence that the bilateral L3-4 transforaminal epidural injections recommended by Roberta Anderson-Oeser, M.D. are reasonable, necessary, and related to Claimant's October 29, 2014 work injury.

STIPULATIONS

1. If the claim is found compensable, Claimant's average weekly wage at the time of his injury was $916.29.

2. If the claim is found compensable, Claimant is entitled to temporary total disability benefits, subject to applicable offsets, from November 5, 2014 and until terminated by statute.

3. If the claim is found compensable, the treatment Claimant has received to date at Health One Occupational Medicine and Rehabilitation, Colorado Chiropractic Sports Injury Specialists, and Colorado Rehabilitation Occupational Medicine including care by Jeffrey Hawke, M.D., Katherine Drapeau, D.O, Paul Raford, M.D. Scott Parker, D.C., and Roberta Anderson-Oeser, M.D. is authorized treatment.

FINDINGS OF FACT

1. Claimant works for Employer as a highway maintenance technician with duties including guardrail maintenance, filling pot holes, plowing, landscaping, and fence repair. Claimant has been employed in this position since October 1, 2007. *See* Exhibit B.

2. On Wednesday, October 29, 2014, Claimant was performing his job duties and was weed whacking on a slope when he lost his footing, his right knee gave out, and he fell to the ground. Claimant landed mostly on his buttocks on the left side with his left leg bent and his right leg straight out in front of him and in a position which he described was similar to a baseball player sliding into a base.

3. At the time of his fall, Claimant was holding onto a weed whacker. Claimant was unable to brace his fall with his hands due to the concern that the metal blade of the weed whacker would cut him if he let it go. As he fell, he attempted to hold the weed whacker off to the right and away from his body so he would not be cut. Although the fall to the ground was not far, Claimant is morbidly obese which caused the un-braced impact with the ground to be significant.

4. After the fall, Claimant had immediate pain in his left elbow, left quadriceps area, right knee, right hip, and on the right side of his back.

5. Although Claimant was working with a crew, no one witnessed his fall. Claimant's fellow employees were working ahead of him with their backs to him.

6. Claimant immediately notified his supervisor of the fall. Claimant also filled out an Employee Incident Statement indicating that his right knee had given out and he had fallen onto his buttocks. Claimant left work early that afternoon.

7. Claimant did not seek immediate medical treatment and believed he would simply be sore for a few days and that the pain would get better on its own.

8. Due to his pain, Claimant took the next day off work. Claimant returned to work on Friday, October 31, 2014 and worked a normal shift. Claimant had the weekend off work and returned to work on Monday November 3, 2014 and Tuesday, November 4, 2014. On Monday and Tuesday, Claimant performed shoveling duties and was bent over for most of the day. His back pain became worse.

9. One week after the fall, Claimant's left elbow, left quadriceps, and right knee pain had resolved on its own. However, Claimant's back pain had not resolved. Claimant decided to request medical treatment from Employer for his continuing back pain.

10. On November 5, 2014, Claimant was evaluated by Jeffrey Hawke, M.D. at Health One Occupational Medicine and Rehabilitation (Health One). Claimant reported that he was using a weed whacker on a sloped abutment when he slipped and fell into a seated position. Claimant reported that he had pain in his left elbow, left quadriceps, right knee, and right hip that had gone away but that he had a nagging pain in the right side of his low back that had not gone away. Claimant reported when laying flat and scooting his weight he gets a stinger into his right buttock and that he had no numbness or tingling into the legs, feet, or toes. *See* Exhibit 4.

11. Claimant reported prior events in the past related to football and wrestling twenty or more years prior where he had strained muscles in his back but always had fully recovered. Claimant also reported a prior work related lower back muscle strain in 2013 and a prior work related right knee medial meniscus tear in 2012. *See* Exhibit 4.

12. On physical examination Claimant was 6'2'' tall and 393 pounds. *See* Exhibit 4.

13. Dr. Hawke diagnosed Claimant with lumbar strain. Dr. Hawke opined that it was work related, and that the objective findings were consistent with history and a work related mechanism of injury. Dr. Hawke provided work restrictions of no lifting, carrying, pushing, or pulling over 10 pounds and indicated Claimant should minimize bending at the waist, stooping, and squatting. *See* Exhibit 4.

14. Employer was unable to accommodate Claimant's restrictions. Claimant has not worked since being placed on restrictions.

15. On December 2, 2014 Claimant was evaluated by Scott Parker, D.C. Claimant reported that after his fall he had immediate left quadriceps pain, right knee pain, and elbow pain that resolved on its own within a week. Claimant reported he also had immediate right sided lower thoracic and lumbar pain that did not resolve. Claimant reported his right sided thoracolumbar pain flares up when rotating his body to the right. Claimant reported while lying supine and shifting hips, he experiences right side shock type sensation in the gluteal and thigh region and reported that after standing or walking for a few minutes he has global bilateral leg "falling asleep" sensations. Dr. Parker opined that Claimant had a thoracolumbar strain and provided treatment. *See* Exhibit 5.

16. Claimant treated with Dr. Parker several times between December 2, 2014 and January 8, 2015 when Claimant was released from treatment. Dr. Parker reported on January 8, 2015 that Claimant had some improvements with treatment but that Claimant had reached a plateau in his thoracolumbar pain that was still right sided and fluctuating between pain levels of 1/10 and 2/10. *See* Exhibit 5.

17. During this period of time, Claimant also continued to treat with Dr. Hawke, and other providers at Health One. Claimant reported that he was still having pain under the rib cage in the middle of the back on the right side, pain that was sharp in the right buttock, low back pain, and bilateral leg pain. All of the providers who evaluated Claimant reported that objective findings were consistent with history and a work related mechanism of injury. *See* Exhibit 4.

18. Claimant was referred by Health One to Roberta Anderson-Oeser, M.D. *See* Exhibit 4.

19. On January 12, 2015 Claimant was evaluated by Dr. Anderson-Oeser. Claimant reported an aching, stabbing sensation in his lower lumbar region, right greater than left and numbness in the posterior aspect of his legs. Claimant reported that twisting or bending to the right aggravated his pain. Dr. Anderson-Oeser noted on examination that Claimant was tender over the lower lumbar facet joints and intradiscal spaces and that his lumbar range of motion was restricted with forward flexion and extension and increased pain with extension and rotation. *See* Exhibit 7.

20. Dr. Anderson-Oeser noted that although Claimant completed a course of physical therapy and chiropractic treatment, his pain and paresthesias had not resolved. Dr. Anderson-Oeser recommended an MRI of the lumbar spine and opined that depending on the results Claimant may or may not be a candidate for injection therapy. *See* Exhibit 7.

21. On January 15, 2015 Claimant underwent an MRI of the lumbar spine that was interpreted by radiologist Brian Ravert, M.D. Dr. Ravert's impression was: L2/3 canal stenosis measuring 6 mm in minimum AP diameter with moderate to severe bilateral foraminal narrowing; L3/4 severe right and moderate to severe left foraminal narrowing with canal stenosis measuring 6 mm in minimum AP diameter; L4/5 moderate right and severe left foraminal narrowing; and L5/S1 moderate bilateral foraminal narrowing. *See* Exhibit 6.

22. Dr. Ravert found an intervertebral disc desiccation with posterior disc bulge and facet and unconvertebral hypertrophy at L3/4, which resulted in the severe right and moderate to severe left foraminal narrowing and canal stenosis at that level. *See* Exhibit 6.

23. On January 28, 2015 Claimant was evaluated by Dr. Anderson-Oeser following his MRI. Claimant continued to report low back pain, primarily right sided in nature, in addition to numbness in his legs while standing and walking. He continued to report that bending or twisting to the right aggravated his pain. Dr. Anderson-Oeser opined that Claimant had lumbar radiculitis, bilateral L3-4 foraminal stenosis, lumbar spondylosis, and degenerative disk disease of the lumbar spine. Dr. Anderson-Oeser recommended Claimant undergo diagnostic/therapeutic bilateral L3-4 transforaminal epidural steroid injections to determine if that was his primary pain generator and was accounting for the numbness and tingling in his lower extremities. *See* Exhibit 7.

24. Dr. Anderson-Oeser submitted a request for authorization for bilateral L3-4 transforaminal epidural injections. The request was denied by Respondents on February 11, 2015. *See* Exhibit 7.

25. On February 27, 2015, Claimant underwent an independent medical examination performed by Stephen Lindenbaum, M.D. Claimant reported his main problem as pain in the right thoracolumbar area and reported at times, when he twists, he gets a stabling feeling. *See* Exhibit F.

26. Dr. Lindenbaum opined that it was hard to determine if Claimant sustained an injury to his back on October 29, 2014 due to the severity of Claimant's chronic thoracolumbar and lumbar disease as well as thoracic degenerative disease. *See* Exhibit F.

27. Dr. Lindenbaum opined that Claimant had significant underlying degenerative disease with severe spinal stenosis that was pre-existing and not caused by the work injury. Dr. Lindenbaum opined that he did not see any evidence of any

acute process in the MRI findings, and that Claimant's fall did not cause or exacerbate the MRI findings. Further, Dr. Lindenbaum opined that the L3-4 transforaminal epidural steroid injections would not significantly improve Claimant's overall process. *See* Exhibit F.

28. In the same report, Dr. Lindenbaum opined that the L3-4 transforaminal epidural steroid injections were actually indicated, but were not related to the work injury and were related to Claimant's severe underlying spinal stenosis. *See* Exhibit F.

29. Dr. Lindenbaum also opined that Claimant's weight of 400 pounds could have generated enough force to cause discomfort during the fall, that it was possible the fall could have irritated the arthritic facet joints, that it was possible that the fall could have irritated Claimant's back and paraspinal muscular areas, and that it was possible that the fall contributed to Claimant's acute discomfort in the upper lumbar area. Although Dr. Lindenbaum opined the above was possible, he concluded it was not probable that it had occurred in this case without objective findings on exam to suggest an acute process. *See* Exhibit F.

30. Dr. Lindenbaum's opinion is not found persuasive. Dr. Lindenbaum's report is inconsistent as to whether the L3-4 transforaminal epidural steroid injections are indicated, does not address the posterior disc bulge shown by MRI at L3-4, and does not address the objective examination findings of Claimant's treating providers regarding his acute tenderness in the lower lumbar area or his restricted range of motion.

31. Claimant's testimony that he was not suffering from any right side low back pain just prior to October 29, 2014 is found credible and persuasive. Claimant was working full duty with no restrictions just prior to October 29, 2014 in a physically demanding job.

32. Claimant credibly reported prior injuries or strains to his lower back while playing football and wrestling that occurred twenty or more years ago that resolved on their own, and also credibly reported two prior work related injuries including a 2012 right knee meniscal injury and a 2013 muscle strain in his lower left back.

33. The evidence also shows that on August 24, 2012 Claimant sought treatment at Kaiser for pain in his right hip/buttocks with no radiation down his leg and that he reported pain if he tried to roll over using his right leg. On September 5, 2012 Claimant followed up with Kaiser and reported he was still sore but was improving. *See* Exhibit D.

34. Although Claimant had this pain in his right hip/buttocks, Claimant reported it was improving in September of 2012 and did not seek any further treatment for pain in these areas until after his October 29, 2014 work injury. Claimant is credible that his current pain is different from any prior pain or strains he has experienced in his back.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of

proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P.3d 999 (Colo.App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Indus. Comm'n v. Newton Lumber & Mfg. Co.,* 314 P.2d 297 (Colo. 1957). Additionally, if the industrial injury aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. ICAO, supra.*

Claimant has met his burden to show by a preponderance of the evidence that there is a causal relationship between his fall at work on October 29, 2014 while weed whipping and his current low back pain and need for treatment. The medical records and Claimant's recent MRI show that Claimant has degenerative issues throughout his lumbar spine. However, despite any pre-existing degenerative conditions that may have existed at the time of Claimant's fall at work, the fall produced immediate pain, disability, and need for treatment. The ALJ concludes that the fall and the impact of the fall at a minimum aggravated Claimant's pre-existing degenerative condition, if not causing a new acute disc injury. Respondents argue that Claimant's current back pain is unrelated to the fall at work and is simply the natural progression of Claimant's pre-existing degenerative spinal stenosis. This is not found persuasive. The ALJ finds it more likely than not that the fall at work caused an acute injury/aggravation and need for treatment. Claimant is credible that he was not experiencing or suffering from any low back pain leading up to his October 29, 2014 fall. Objective examinations of Claimant noted acute tenderness in the back following the work injury and showed on MRI a disc bulge at L3-4 that contributed, in part, to Claimant's severe right and moderate to severe left foraminal narrowing and canal stenosis. Further, Claimant's treating providers at Health One have all opined that the objective findings are consistent with a work related mechanism of injury. Claimant has shown that the fall at work caused an immediate onset of back pain that did not exist prior to October 29, 2014, objective findings support Claimant's subjective pain complaints, and the fall was the direct cause of his need for treatment.

As found above, Claimant is credible and persuasive. At the time of his October 29, 2014 work injury, Claimant was not under any work restrictions and did not have any existing back pain or limitations. Claimant is credible that although he has had minor strains of his lower back in the past, he had no back pain leading up to his October 29,

2014 work injury. Also, as found above, Claimant's job duties require physical activity on a regular basis and leading up to the October 29, 2014 work injury Claimant had no work restrictions or problems in performing his normal job duties. After the work injury, Claimant was placed on restrictions and remains unable to perform his normal job duties.

Further, as found above, the opinion of Dr. Lindenbaum is not credible or persuasive. Dr. Lindenbaum initially opined that it was hard to determine if Claimant sustained an injury to his back on October 29, 2014 due to the severity of Claimant's chronic thoracolumbar disease, lumbar disease, and thoracic degenerative disease. Dr. Lindenbaum opined overall that it was possible that Claimant's weight could have generated enough force during the fall to cause discomfort, to irritate the already arthritic facet joints, to irritate Claimant's back and paraspinal muscle areas, and to cause Claimant's acute discomfort in the lumbar area. Although acknowledging this possibility, Dr. Lindenbaum disagreed with Claimant's treating providers as to the work relatedness of the lumbar pain and believed it was not probable that the fall caused Claimant's pain complaints. Dr. Lindenbaum's opinion failed to address the objective examination findings of acute tenderness in the lumbar region following the work fall, failed to address the MRI imaging showing at L3-4 a disc bulge, and failed to explain Claimant's subjective acute onset of pain. Further, Dr. Lindenbaum also was inconsistent in whether or not the L3-4 transforaminal epidural steroid injections were indicated in this case. As a whole, Dr. Lindenbaum's opinion is not persuasive, is inconsistent with Claimant's credible reports of acute onset of pain, and is inconsistent with the opinions of Claimant's treating providers who opine that Claimant's pain complaints are work related.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has met his burden to show that the bilateral L3-4 transforaminal epidural steroid injections are reasonable and necessary to cure and relieve the effects of his industrial injury. These injections, as requested by Dr. Anderson-Oeser are specifically intended to address the L3-4 symptoms and back pain that Claimant developed when he fell at work. The Claimant did not have pain in these areas prior to the work fall and, although Claimant had pre-existing degenerative changes as shown by MRI, the work fall caused Claimant's need for treatment as he was otherwise non-symptomatic prior to the work fall. The injections are for diagnostic and therapeutic purposes and to address Claimant's acute pain complaints which are causally related to his work fall. The ALJ defers to the medical opinion of Dr. Anderson-Oeser that the

injections are both reasonable and necessary to treat Claimant's current pain complaints and to provide both diagnostic and therapeutic benefits.

ORDER

It is, therefore, ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his back on October 29, 2014.

2. The bilateral L3-4 transforaminal epidural steroid injections recommended by Dr. Anderson-Oeser are reasonable and necessary to cure and relieve the effects of Claimant's industrial injury and Claimant is entitled to this medical treatment.

3. The medical care rendered at Health One Occupational Medicine and Rehabilitation, Colorado Chiropractic Sports Injury Specialists, and Colorado Rehabilitation and Occupational Medicine is authorized treatment.

4. Claimant's average weekly wage is $916.29.

5. Claimant is entitled to temporary total disability benefits from November 5, 2014 and until terminated by statute, subject to applicable offsets including, but not limited to short term disability benefits.

6. Respondents shall pay Claimant interest at a rate of 8% per annum on all amounts of compensation not paid when due.

7. Any issues 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: June 10, 2015

/s/ Michelle E. Jones

_____

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

ISSUE

The sole issue presented for adjudication at the hearing was:

1. Whether Respondent has proven it is entitled to a fifty percent (50%) reduction in compensation because the Claimant's November 18, 2014 injury was caused by a willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

FINDINGS OF FACT

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

1. The Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.

2. The Claimant suffered a compensable injury on November 18, 2014, when he slipped on ice while in the process of delivering product for the Employer.

3. The only witness to the accident was the Claimant.

4. On their General Admission of Liability filed on December 3, 2014, the Respondents claimed a safety rule violation and remarked that "50% of TTD to be withheld due to safety rule violation (Claimant's Exhibit 1; Respondents' Exhibit A). The Claimant has challenged this.

5. The Respondents assert that the Claimant violated a safety rule because at the time of the incident he was not aware of his surroundings, which is a rule implemented by the Employer to prevent employee accidents.

6. The Claimant credibly testified that on November 18, 2014, he was delivering product to King Soopers. When he arrived at his delivery destination, the entire parking lot was covered in ice. The Claimant credibly testified that he parked closest to the point of delivery because he believed this would be the safest way to proceed. In his statement of the incident he declared that he "slipped on ice coming down truck ramp with a stack of bagels" (Respondents' Exhibit E, p. 41).

7. The Claimant completed an "Employee's Statement of Incident" and in response to the question, "What advice can you give to prevent this kind of incident/accident in the future?" the Claimant stated that the Employer should "get ramps that aren't so steep or go back to trays" (Respondents' Exhibit E, p. 42).

8. The Claimant credibly testified that the method for unloading his delivery truck previously had been to unload trays and he would be in a flat standing position on

the ground. This has recently been changed and the trays have been replaced with universal baskets. The baskets are stacked onto a dolly and then the dolly has to be manipulated down a steep ramp. He said that during the delivery process there is a downward pulling of the product on the ramp. The Claimant testified that in this particular case, he slipped on ice when he was on the bottom of the ramp.

9. The Respondents called Mr. Rod Nordman, a sales manager for the Employer and a supervisor of the Claimant. Mr. Nordman did not witness the accident but opined that the Claimant could have avoided the accident. He also testified that the Claimant agreed that the accident was avoidable.

10. Mr. Nordman testified that when he visited the King Soopers parking lot on November 20, 2014 to perform a 'root cause investigation', the area where the Claimant had parked his truck was the only area that was icy and the rest of the parking lot was clear. The Claimant did not disagree with Mr. Nordman's characterization on how the lot was on November 20, 2014, but testified that the entire parking lot was iced on the day of the incident and he parked in the safest area.

11. The Claimant also testified that he never told Mr. Nordman that he had violated a safety rule or was purposely not paying attention to his surroundings. Thus, he disagrees with the characterization given by Mr. Nordman concerning their conversation about how the accident occurred and he denies making the admissions that Mr. Nordman attributes to the Claimant.

12. The Claimant's testimony is found credible in light of the totality of circumstances, including his written comments found on the Employer's Incident Report at Respondents' Exhibit E, pp. 41 – 42).

13. The ALJ finds that the Employer adopted a safety rule which was reasonable. This rule required employees to be aware of their surroundings and to work safely. The ALJ finds that this rule is reasonable and is intended to assist in avoiding accidents. However, the facts of this case do not support the imposition of any penalty for violation of the rule.

14. The ALJ finds as fact, that the Claimant's actions on November 18, 2014, were not willful and that his testimony concerning both the icy conditions in the King Soopers parking lot and his intent to safely park where he did is credible.

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. § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. Respondent bears the burden of establishing that Claimant's injury was caused by a willful violation of a safety rule. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. § 8-43-201 (2008) C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The 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).

Safety Rule Violation

C.R.S. § 8-42-112(1)(a) provides for a 50% reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by the willful failure obey any reasonable rule adopted by the employer for the safety of the employee. The Respondents carry the burden of establishing all five elements of a safety rule violation, which are:

1. There must be a specific, unambiguous and definite safety rule adopted by the employer.

2. The safety rule must be reasonable.

3. The safety rule must be "brought home" to the employee and diligently enforced.

4. Violation of the safety rule must be willful.

5. The violation of the safety rule must be a cause of the claimant's injury.

Here, the evidence established that the Employer adopted a safety rule requiring employees to be aware of their surroundings and work safely. This is a reasonable rule for the safety of the Employer's employees.

However, the Respondents have failed to establish that the Claimant acted willfully and with deliberate intent. The safety rule penalty is only applicable if the violation is willful. The question of whether the respondents proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). intention. Violation of a rule is not willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946); *In re Alverado,* W.C. No. 4-559-275 (ICAO December 10, 2003). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Here, there was some conflict in the testimony as to whether the Claimant's conduct in parking his vehicle was willful. The Employer's witness testified that the Claimant committed a preventable accident by parking in an area of the parking lot at his delivery destination that was shadowed and iced over. The supervisor further testified that this activity violates the safety rule of 'being aware of his surroundings' and a committee of the Employer found that this was the cause of the accident and elected to discipline the Claimant due to causing a preventable accident since they determined that the Claimant should have parked somewhere safer. On the other hand, the Claimant testified that that he never acknowledged that he committed a preventable accident and, on the company paperwork, and during testimony, the Claimant indicated that he slipped on a truck ramp because the ramp was too steep and instead of using trays to carry products, the company switched to baskets placed on dollies which had to be taken down a ramp at a 45 degree angle. The Claimant further testified that when he arrived at the parking lot of his delivery destination, the entire lot was snow-covered and icy that day, so he chose a parking spot that was closer to the building which he believed to be a safer place to park.

The conflict in evidence was resolved in favor of the Claimant who was the only witness to the accident. The Claimant's supervisor did not view the parking lot where the accident occurred until two days after the incident and, at that point, it is likely that the snow and ice that covered the whole lot had melted and there was only ice in the shaded area where the Claimant had parked the vehicle. As the Claimant's testimony was uncontroverted and he was found to be a credible witness, it was found that his decision to park in the spot that was closer to the building was reasonable and not an indication that he was unaware of his surroundings. It was also found that the Claimant slipped on the ramp and not on ice that was on the ground, and it was not established

that the location where the Claimant parked would have prevented him from slipping on the ramp.

As the Respondents failed to establish that the Claimant's injury resulted from his willful failure to obey a reasonable rule adopted by the Employer for his safety, the Claimant's benefits shall not be reduced by fifty percent.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish that Claimant's injury resulted from his willful failure to obey a reasonable safety rule adopted for the safety of the employees and therefore Respondents are not entitled to a reduction in benefits pursuant to §8-42-112(1).

2. Insurer shall pay eight percent (8%) per annum on all compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 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: June 29, 2015

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

ISSUES

The issues presented for determination are whether the Claimant suffered a compensable injury to his right shoulder; and if so, what treatment is reasonable, necessary and related to the injury.

FINDINGS OF FACT

1. Claimant was born on April 4, 1968 and began work for Respondent in May 1989. He was rehired in May 1999. Claimant works for the Parks and Recreation Department and his duties have included general parks maintenance and upkeep, trimming trees and shrubs, etc.

2. The Claimant has a history of right shoulder problems dating back to 2010. In April 2010, an MRI of Claimant's right shoulder, showed "evidence of a high-grade partial-thickness tear of the supraspinatus tendon, low-grade tendon tear of the infraspinatus, and significant degenerative joint disease of the acromioclavicular joint."

3. On April 15, 2010, Claimant sought treatment for this condition with his physician, Dr. Bradley Vilims of Colorado Pain Specialists, who noted right shoulder pain and a high-grade partial tear of the supraspinatus tendon. Dr. Vilims referred the Claimant to Dr. Noonan who recommended shoulder surgery. Claimant postponed the shoulder surgery indefinitely until he could accumulate a sufficient amount of sick leave.

4. In October 2011, Claimant sought medical care with Complete Care of Colorado for an aching pain in his shoulder. Dr. Gregory Kaczmarczyk noted that Claimant was experiencing aching pain in his shoulder that had set in "years ago" and was not due to any specific injury. Claimant was unable to elevate his arm secondary to pain and weakness, managing only a nine-degree abduction/elevation. Claimant received an injection for the shoulder problems.

5. Claimant followed up with Dr. Kaczmarczyk on May 29, 2012 who reviewed Claimant's numerous medical problems and diagnosed "chronic shoulder pain" among other things. The plan regarding the shoulder included "need to get this repaired" and obtaining records from Dr. Noonan.

6. Several years later, on June 17, 2014, Claimant fell while picking up trash in a ditch. He reported the trip-and-fall to his employer, but he had no lost time. He complained of shoulder pain following the accident, which resolved with conservative treatment. The June 17, 2014 claim was closed on August 1, 2014.

7. On August 24, 2014, Claimant again fell while on the job, suffering a thumb injury and contusions and lacerations to his face, but did not complain of an

injury to his shoulder. Although Claimant did not complain of an injury to his shoulder, he did indicate that he was experiencing an aching pain in his right shoulder. Claimant was treated for the thumb injury and lacerations and reached maximum medical improvement on September 3, 2014, with no impairment rating or maintenance medical treatment indicated.

8. On November 5, 2014, Claimant stepped into an animal burrow, tripped, and fell to the ground. He alleges that the trip-and-fall caused him to tear his rotator cuff, resulting in his present complaints of shoulder pain and weakness. Claimant was carrying a sharp tool in his right hand when he stepped in an animal hole and fell forward. To avoid being stabbed by the tool he was carrying, he put his right arm against his upper chest as he fell. The outside of his right shoulder struck the ground.

9. Claimant testified that he heard a popping sound in his right shoulder when he fell.

10. The Employer referred Claimant to the Denver Health Center for Occupational Safety and Health where Dr. Moses evaluated him on November 6, 2014. Dr. Moses' report indicates that a few months prior, Claimant fell at work and injured his right shoulder, but that the shoulder healed and he had no residual difficulties at work. Dr. Moses' handwritten notes from the November 6 evaluation appear to state that Claimant had residual difficulty working overhead following the fall from a few months prior.

11. On November 26, 2014, Claimant had an MRI of his right shoulder. Dr. Tomsick interpreted the MRI scans and his impressions included:

> "massive rotator cuff tear with complete tears of the subscapularis and supraspinatus tendons. There is extensive full-thickness tearing of the majority of the infraspinatus tendon, with minimal few residual posterior fibers remaining. Teres minor tendon is intact. Subscapularis tendon fibers are retracted and displaced superomedially into the superior joint space. Supraspinatus tendon fibers are retracted nearly to the glenoid joint."

12. Dr. Tomsick also noted significant atrophy of a severe degree involving the subscapularis and infraspinatus musculatures and milder atrophy of the supraspinatus musculature.

13. On December 2, 2014, Dr. Moses, Claimant's authorized treating physician, reviewed the November 26, 2014 MRI report and concluded that Claimant had "massive tears of his rotator cuff tendons which (due to the retraction and muscular atrophy) appear to have occurred some time ago and are chronic in nature." In comparing the MRI report to Claimant's report of having been fully functional in his job the day before the accident, Dr. Moses observed, "given the apparent age of these severe injuries it is unclear to me how that is possible."

14. Dr. Moses noted that Claimant was convinced that his shoulder injuries were work-related whether due to the fall on November 5, 2014, or previous work-related incidents. Dr. Moses told the Claimant that "it is not possible to classify these injuries as related to the 11/05/2014 injury due to the chronic changes that were seen on the MRI." Dr. Moses stated that the prior undocumented falls at work could have caused Claimant's injuries, but because he had no documentation of such falls he could not causally relate the injuries to Claimant's work. Dr. Moses referred Claimant to Dr. Michael Hewitt, for an orthopedic consultation and causality assessment.

15. On January 7, 2015, Dr. Hewitt examined Claimant and reviewed his MRI. Dr. Hewitt commented that the MRI showed only mild atrophy of the supraspinatus musculature but that the other two muscles show more advanced atrophy. On the issue of causation, Dr. Hewitt concluded that atrophy would not be evident on an MRI three weeks after an acute injury. Claimant reported to Dr. Hewitt that had multiple falls prior to November 5, and that he could raise his right arm over his head prior to the November 5 incident. Dr. Hewitt stated Claimant's report suggested an acute-on-chronic injury to his shoulder. Dr. Hewitt felt an attempt a rotator cuff repair surgery was warranted although he felt Claimant was a relatively poor surgical candidate for various reasons.

16. Upon hearing from Claimant that Dr. Hewitt had made a determination of causation, Dr. Moses deferred to Dr. Hewitt on the issue. Both physicians concluded that the majority of the atrophy evident on the MRI precluded a finding that the rotator cuff tears could have resulted from his November 5, 2014 trip-and-fall.

17. Respondent requested that Dr. McBride review Claimant's medical records and render opinions as to whether Claimant's shoulder condition was caused by or due to the effects of the November 5 fall. Dr. McBride reviewed Claimant's medical history, including the most recent MRI. Dr. McBride opined that, "atrophy would not be present in a normal rotator cuff or an acute rotator cuff tear. . . . [H]is rotator cuff injury is an old, chronic injury that has not significantly changed since the fall on November 5, 2014."

18. Dr. Messenbaugh is a Board Certified orthopedic surgeon who has a Level II Accreditation in Orthopedics performed an independent medical examination of Claimant. Dr. Messenbaugh concurred with Drs. Moses and McBride that Claimant's rotator cuff tears were not the result of Claimant's trip-and-fall, stating,

> ""It is my opinion that Mr. Montoya's shoulder pathology predated any events of November 5, 2014 by several years resulting in the severe atrophy noted in the shoulder musculature as well as the severe rotator cuff tendon retractions."

19. Dr. Messenbaugh testified about Claimant's history of shoulder problems and opined that the pathology shown on the November 26, 2014 MRI study pre-dated the November 5, 2014 incident. The significant abnormalities shown on the November 26, 2014 MRI were a natural progression of the rotator cuff tears seen in the April 12,

2010 MRI. Dr. Messenbaugh explained that rotator cuff injuries like those seen in April 2010 do not heal themselves. The tears grow over time resulting in abnormal movement of the humeral head in the glenoid process. This abnormal movement increases the wear on the rotator cuff caused by the acromion and also causes abnormal wear in the labrum.

20. Dr. Messenbaugh testified that the weakness and limited shoulder motion reported in October 2011 were symptoms of a worsening rotator cuff injury. The shoulder injection was intended to reduce swelling and relieve symptoms. However, the injection would not heal the rotator cuff tears.

21. Dr. Messenbaugh explained that the mechanism of the November 5, 2014 fall resulted in pushing the humeral head in against the glenoid process. This would not cause or aggravate rotator cuff tears. The popping sound Claimant heard when his shoulder struck the ground probably was snapping of the acromioclavicular joint or the humeral head striking the labrum.

22. Dr. Messenbaugh testified that the pre-existing degeneration of the right shoulder would primarily affect Claimant's ability to perform overhead work. Claimant's ability to drive and pass a DOT physical examination would not have been affected because driving does not involve overhead activities. Claimant would also have been able to use tools such as limb saws if he did not raise his arm above shoulder level. Dr. Messenbaugh could identify no acute trauma in the right shoulder that could have resulted from the November 5, 2014 incident. Dr. Messenbaugh was puzzled by Claimant's assertion that he could perform all work duties without problem prior to November 5, 2014 or throw a football long distances despite the significant rotator cuff tears and advanced arthritis in the right shoulder.

23. Dr. Messenbaugh explained that Claimant is not a good candidate for a rotator cuff repair surgery due to the advanced deterioration and retraction of the rotator cuff tendons. The only viable alternative is shoulder replacement surgery. However, the shoulder replacement surgery is necessary due to the pre-existing and advanced deterioration of Claimant's shoulder but not due to any problems caused by the November 5, 2014 accident.

24. Both Drs. Messenbaugh and McBride agreed Claimant have sustained a contusion or strain when he fell on November 5, 2014, but a strain or contusion would not result in the need for the invasive procedure Claimant now needs to repair pre-existing rotator cuff tears.

25. The ALJ finds the opinions of Dr. McBride and Dr. Messenbaugh to be credible and persuasive.

26. Claimant has failed to prove by a preponderance of the evidence that the November 5, 2014 incident caused a new injury to his right shoulder or aggravated the pre-existing rotator cuff tears.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. Compensable injuries involve an "injury" which requires medical treatment or causes 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 participating 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*, supra; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

6. 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).

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. Section 8-40-201(1), C.R.S. An "injury" refers to the physical trauma cased 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." A compensable injury requires medical treatment or causes a disability.

8. The ALJ acknowledges that Claimant fell on November 5, 2014 while in the course and scope of his employment; however, no injury occurred other than a possible contusion or strain. The credible and persuasive medical evidence reflects that Claimant's chronic and severe shoulder pathology pre-dates the November 5, 2014 fall, and that it is the chronic degenerative condition that has produced the need for medical treatment. Specifically, the medical records reflect that in 2010, Claimant had received a recommendation for shoulder surgery, but he elected not to pursue it at that time. He also received an injection in 2011 after reporting to a physician that he had limited range of motion in his right arm and shoulder. Dr. Messenbaugh credibly explained that an injection would not repair the rotator cuff and the atrophy present is indicative of longstanding problems.

Contrary to Claimant's assertions, Dr. Hewitt did not specifically opine that Claimant suffered new structural damage to the right shoulder as result of the November 5 fall. Rather, Dr. Hewitt noted that Claimant's reports that he could raise his right arm over his head prior to November 5, 2014, combined with the mild atrophy (rather than advanced atrophy present in the other two rotator cuff muscles) of the supraspinatus suggested an "acute on chronic" injury. Moreover, Dr. Hewitt appeared to consider Claimant's other falls which are not part of this claim. Dr. Hewitt did note that atrophy would not be present on MRI three weeks after an acute injury, which suggests that Dr. Hewitt did not believe the November 5 fall caused any structural changes to Claimant's right shoulder.

Based on the foregoing, the Claimant has failed to meet his burden of proof. At most, Claimant fell and suffered a mild contusion or strain but nothing in the record supports that the need for a shoulder replacement is due to the November 5, 2014 fall at work.

ORDER

It is therefore ordered that Claimant's claim for workers' compensation is denied and dismissed. Claimant is not entitled to medical benefits, including shoulder surgery, because the claim is denied.

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

DATED: June 12, 2015

DIGITAL SIGNATURE:

L. Broniak

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

ISSUES

The issues to be determined are:

1. What is the claimant's correct average weekly wage (AWW); and,

2. Has the respondent-insurer established by a preponderance of the evidence that the claimant's indemnity benefit should be reduced by 50% for a willful violation of a safety rule?

FINDINGS OF FACT

1. On November 24, 2014, the claimant was an Independent Contractor (IC) under contract with the respondent-employer when she injured her neck and right knee in a motor vehicle accident while in the course and scope of her employment.

2. The claimant first entered into an IC agreement (IC-1) with the respondent-employer on September 10, 2014. IC-1 indicates that the claimant is not an employee of the respondent-employer and that the claimant is not entitled to receive Workers' Compensation benefits traditionally associated with an employee/employer relationship. IC-1 basically reads that the respondent-employer will, for a fee, provide the claimant with a taxicab, governmental permits, access to a dispatching service, and certain confidential information to allow the claimant to operate and build her business as a taxicab driver. IC-1 also indicated that both the respondent-employer and the claimant agree to comply with any service agreement, laws, ordinances, statutes, rules, and regulations including federal, state, county, municipal and any other governmental entities pertaining to the utilization and operation of a taxicab. There is no specific mandate in IC-1 that the claimant wear a safety belt while driving a taxicab. Pursuant to the terms of the IC-1, it is automatically terminated if the claimant enters into any other agreement to operate taxicabs.

3. On October 28, 2014, the claimant signed a second Independent Contractor Agreement (IC-2) to become an owner/operator of a cab. IC-2 reiterates that the claimant is not an employee of the respondent-employer and that the claimant has to provide her own Workers' Compensation insurance. IC-2 in paragraph (4)(d) reads that the IC has "complete discretion" with regard to the operation of the taxicab provided

such operation is within all the parameters set forth in IC-2 and within all applicable federal, state, county, and local statutes, rules, regulations ordinances, and the respondent-employer Certificates of Authority. There is no provision in IC-2 which specifically requires Claimant to wear a safety belt while driving a taxicab.

4. The claimant attended the orientation class on September 9, 2014. At that class, various representatives of the respondent-employer went over being an independent contractor for the respondent-employer and what is asked of each independent contractor. As part of that class, the claimant was told that its independent contractors should follow all of the traffic laws. The claimant said most of the safety rules presented involved how a driver can protect him or herself from getting into dangerous situations. At this same class, the respondent-employer talked about ways to increase your income as an independent contractor such as getting the permits to work at the airport, working the dispatch system, developing your own clientele by giving out your card, keeping your cab clean, maintaining a crisp personal appearance, and learning the city and zones well so as to become more efficient. In addition Yellow Cab presented cab drivers who told the attendees that one can earn up to $1,000 to $1,500 per week being an IC for the respondent-employer.

5. The claimant's injury occurred when she was driving a taxicab westbound on Woodmen Road east of Powers Blvd. As the claimant was driving, her taxicab slipped and she ended up losing control, crossing into the eastbound lanes of Woodmen Road, and colliding head on with another vehicle. As the claimant started to cross over the median she quickly unbuckled her safety belt and therefore was unrestrained at the time of impact. The claimant testified that just before the collision she unbuckled her safety belt out of a fear of being trapped in her vehicle after impact. The claimant explained the reason for unbuckling her safety belt was that when she was a young child, she and her brother were passengers in her mother's vehicle when she was involved in an automobile accident. The vehicle caught fire with the claimant trapped in the vehicle as a result of wearing a safety belt. On cross examination, the claimant knew that under Colorado law she was to wear a safety belt while driving a cab.

6. The claimant, as an independent contractor, and self-employed, did not have a policy safety policy requiring her to wear a seat belt during the operation of her business.

7. The ALJ finds that the respondent-insurer has not established that it is more likely than not that the claimant violated a safety rule adopted by the employer (i.e. the claimant).

8. The claimant's net wages as an IC are determined by looking at the claimant's gross receipts from transporting passengers and then deducting her expenses of driving a cab. Such expenses include but are not limited to payments for the cab, dispatch system, Workers' Compensation insurance, and maintenance.

9. The respondents used the claimant's gross receipts and expenses from October 10, 2014 up to November 19, 2014 and computed an average weekly wage of $336.19. At the time the claimant was injured she had worked as an IC for the respondent-employer for 71 days.

10. Bruce Magnuson, M.A., an expert in the field of vocational rehabilitation, opined as to the median net annual income for a cab driver in the Colorado Springs area based upon the Occupational Employment Survey of Employees conducted in each state by economists contracted by the U.S. Department of Labor. The ALJ finds that the median net annual income is speculative and not relevant to a determination of the claimant's actual average weekly wage.

11. The claimant testified that during her tenure as an IC for the respondent-employer, she was increasing her personal clientele and was learning how to work the dispatch system as well as learn which zones to work in. The claimant also testified that at the orientation meeting, the attendees were told that one could earn $1,000 to $1,500 a week. The claimant's wage records reflect an increase in net wages the longer she worked as an IC.

12. Fred Hair, general manager of the respondent-employer, testified that the claimant, as an IC, is self employed and essentially sets her own rules regarding how to work.

13. Regarding the claimant's AWW, Mr. Hair testified that the claimant's net wages were determined by calculating the claimant's gross receipts and then deducting the associated expenses in driving the cab. Mr. Hair testified that he used the time period of October 10, 2014 through November 15, 2014 to determine the claimant's AWW because it takes time to learn how to be an IC for the respondent-employer. On cross examination, Mr. Hair agreed that as an IC for the respondent-employer, it takes time to build up your clientele, learn how to work the dispatch, learn how to work at the airport, and to learn other tricks of the trade in order to increase ones income.

14. Mr. Hair, based upon his calculations using the above formula, determined the claimant's AWW to be $336.19.

15. The ALJ finds that the claimant's AWW is fairly calculated using the

method described by Mr. Hair.

16. The ALJ finds that the respondent-insurer has established that it is more likely than not that the claimant's AWW is $336.19 per week.

CONCLUSIONS OF LAW

1. Section 8-42-112 (1)(b), C.R.S. provides for a 50% reduction in compensation in cases of "willful failure to obey any reasonable rule" adopted by the employer for the claimant's safety. Under § 8-42-112 (1)(b), C.R.S., it is the respondents' burden to prove every element justifying a reduction in compensation for the willful failure to obey a reasonable safety rule. *Triplett v, Evergreen Builders, Inc.*, W.C. No. 4-576-463 (May 13, 2004). The question of whether, the respondents met their burden to prove a willful safety rule violation is generally one of fact for the determination by the A.L.J. See *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo.App.1995) The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness, and oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). The respondents are not required to present direct evidence concerning the claimant's state of mind or prove the claimant had the rule in mind when she did the prohibited act. Rather a "willful" violation may be inferred from evidence that the claimant knew the safety rule and did the prohibited act.

2. The first step is to determine whether or not the employer adopted a reasonable "safety rule". A safety rule does not have to be formally adopted, does not have to be in writing, and does not have to be posted. Rather, it is necessary that the safety rule was heard and understood and given by someone generally in authority. *Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246P.2d 902 (Colo. 1952) *McCulloch v. Industrial Commission*, 109 Colo. 123, 123 P.2d 414 (Colo. 1942).

3. This is an unusual case, in that, by statute the named respondent-employer herein, is required to include in their lease with the claimant a provision including the provision of workers' compensation insurance. See generally section 40-11.5-102 C.R.S. Yet, the claimant is, as found above, not an employee of the respondent-employer but a self-employed independent contractor. The ALJ concludes there is insufficient credible evidence that the claimant adopted a safety rule requiring that she wear a safety belt while driving a cab.

4. The ALJ concludes that the respondent-insurer has failed to establish by a

preponderance of the evidence that the claimant willfully violated a safety rule adopted by the employer for the employee's safety.

5. Pursuant to Section 8-42-102 C.R.S. 2013 Average Weekly Wage (AWW) for the purpose of computing benefits under the Workers' Compensation Act of Colorado shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured employee was receiving at the time of the injury.

6. However, section 8-42-102(3) provides that if the prescribed methods will not fairly calculate the wage by reason of the fact that the injured employee has been self employed or had not worked a sufficient length of time, or for any other reason will not fairly compute the AWW the ALJ has discretion to compute the AWW in such other manner and by such other method as will, based upon the facts presented, fairly determine the injured employee's AWW. In this claim, at the time she was injured, the claimant had been self employed as an IC for 71 days. As an IC for the respondent-employer, it is not disputed that the claimant's AWW is computed by totaling her gross receipts and then deducting her expenses. Using this method, Mr. Hair computed the claimant's AWW by using her net receipts from October 10, 2014 through November 19, 2014. By doing this he came up with an AWW of $336.19.

7. Although the claimant had not been self-employed for a long period of time, the ALJ concludes this method fairly computes her AWW being received at the time of the injury.

8. The ALJ concludes that the claimant's AWW is $336.19 per week.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The respondent-insurer shall pay the claimant indemnity benefits based upon the claimant's AWW without any reduction for a safety rule violation.

2. The claimant's AWW is $336.19.

3. The respondent-insurer shall pay indemnity benefits based upon an AWW of $336.19.

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.

DATE: June 12, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-968-072-01

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 April 2, 2015 and June 15, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 4/2/15, Courtroom 3, beginning at 1:30 PM, and ending at 5:00 PM; and, 6/15/15, Courtroom 3, beginning at 1:40 PM and ending at 2:40 PM).

Claimant's Exhibits 1 through 6 were admitted into evidence, without objection. Respondents' Exhibits A through D 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. The proposed decision was filed, electronically, on June 18, 2015. On the same date, the Respondents filed objections. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

Three telephonic depositions were taken by the Respondents. The telephonic deposition of Priscilla Tumangan was taken on March 17, 2015. The telephonic deposition of Kristen Jacoby was taken on May 5, 2015. The telephonic deposition of Kathleen Cuddihy was taken on May 5, 2015. Written transcripts of the three telephonic

deposition were filed and reviewed by the ALJ prior to the concluding June 15 session of the hearing.

ISSUES

The issues to be determined by this decision concern compensability; causally-related medical benefits; and, reasonably necessary medical treatment including 18 physical therapy visits and ultrasound, recommended by authorized treating physician (ATP) Robert Dupper, M.D.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant began work for Employer in February 2014. Claimant was employed as a qualified medication administration personnel "QMAP," earning $10.50 an hour for 40 hours per week plus time and a half for overtime.

2. Although the Claimant was previously treated at the University of Missouri Medical Center from July 31, 2012 to April 3, 2013, for symptoms relating to epilepsy, PTSD, MS and some other minor issues with her right shoulder, it is undisputed that she did not have any temporary or permanent restrictions prior to being hired by the Employer herein in February 2014. She was assigned to the "dementia unit" at the time of the incident of November 11, 2014.

3. The Employer has a policy that was in effect as of the date of this industrial accident that employees cannot fight back when being attacked by a resident. They can only raise their hands in front of them as their sole and only defense should they be attacked. Respondents' witness, Andrew Paul, confirmed the fact that employees cannot assault or fight back against a resident if attacked but can merely touch them to get them back into their room.

The Incident

4. On November 11, 2014, the Claimant was working a 10 PM to 6 AM shift. The incident in question happened at approximately 1:35 AM. A resident in the dementia unit, by the name of Marlene Blummer, was in an agitated state and out of control at the date and time of the incident. The Claimant was attempting to keep this

resident away from the exit door when the patient attacked her. The Claimant was punched, kicked and grabbed by her hair and was slammed into the exit door. The resident continued to punch the Claimant in her face and head and also tried to bite the Claimant, and the Claimant was bleeding from her face. The resident was approximately five feet tall and weighed approximately 120-135 lbs. and because of her violent actions, the Claimant had contacted her supervisor, Lacey Cox, on two different occasions before the actual incident. Specifically, at 12 AM, the Claimant called Lacey Cox to complain about the resident's very agitated state and wanted directions in terms of how to handle the resident. Lacey Cox instructed the Claimant to call 911 if the resident got out of control and that in fact is what the Claimant did after the incident. The second call was made to Lacey Cox to confirm that the incident occurred.

5. After the incident, Claimant finished her shift as there were no other employees to cover her shift which ended at 6 a.m. When Lacey Cox appeared at the facility at approximately 8 a.m. on November 11, 2014, she requested that the Claimant complete an employee accident report and this report was signed by the Claimant and Lacey Cox. The accident report (Claimant's Exhibit 2) confirmed exactly how the Claimant was attacked on November 11, 2014 while the Claimant was performing her job duties and was trying to keep the resident safely inside the facility. Claimant also depicted multiple body parts which were injured in this incident.

Respondents' Witnesses

6. Andrew Paul was not working in the dementia unit when the incident in question occurred. He confirmed, however, that Marlene Blummer was in an agitated state at the time of the incident, and he observed that Claimant had an injury on her face towards her left eye. According to Paul, the Claimant was given an ice pack for her eye and Paul indicated that multiple injuries could have been sustained based upon the resident being out of control.

7. Michelle Gutierrez also was not working in the dementia unit at the time of the accident, and she was in a completely different part of the facility. Gutierrez was not present at the time of the incident and she doesn't recall the Claimant talking about any of her injuries that were sustained. Gutierrez, however, was aware that the resident attacked the Claimant and Gutierrez was aware that the Claimant sustained injuries at least to her left eye. Even though Gutierrez never saw the incident, she stated that the Claimant, Andrew Paul and another employee were sitting at a table in the cafeteria but Gutierrez never really spoke with the Claimant.

8. Lacey Cox confirmed that the Claimant talked to her on two different occasions on the date and time of the accident and Cox was aware that the resident was out of control and that 911 was called. Cox also confirmed that she requested that the Claimant fill out the employee accident report and Cox signed off on the contents thereof as to how the accident occurred and the injuries sustained.

9. Priscilla Tumangan testified by deposition on March 17, 2015. She stated that she did not see or witness the attack/incident that took place on November 11, 2014. Tumangan, however, was aware of the fact that the resident "went wild" on the night of the incident.

10. Kristen Jacoby testified by deposition that she was not there on the date of the accident or at the time of the accident. She had no first-hand knowledge regarding what transpired during this time because she was simply not on the premises. (*See* Jacoby Depo. Tr. P. 6, lines 18-25; p. 7, lines 1-7). Moreover, Kathleen Cuddihy stated that she did not observe the accident/assault which occurred on November 11, 2014. (*See* Cuddihy Depo. Tr. P. 12, lines 20-25; p. 14, lines 9-11).

Authorized Medical

11. The Claimant was referred by Lacey Cox to the Employer's designated medical facility. The treating provider at Work Well Occupational Medicine Clinic (hereinafter "Work Well"). The authorized treating physician (ATP) at Work Well was Robert Dupper, M.D. The Claimant reported to Work Well on the date of the incident, November 11, 2014, as soon as Lacey Cox referred her to the facility. An evaluation took place at approximately 9:30 or 10:00 AM on November 11, 2014. Within ATP Dr. Dupper's report of November 11, 2014, (Claimant's Exhibit 6), it was once again noted by the Claimant that she was hit, knocked down and kicked by a resident and she had pain located in her neck, left shoulder, low back, hip, left thigh on the posterior aspect and the left knee. The Claimant described symptoms of numbness, sharp shooting, stabbing, swelling, throbbing and tingling. ATP Dr. Dupper once again noted a history of one of the residents becoming very agitated, angry and aggressive and while the Claimant was trying to calm and redirect the resident, the resident became violent and starting hitting her with a metal edged sign. Once again, it was confirmed that the Claimant was knocked to the floor and then hit and kicked on the side of her neck and shoulder. Multiple complaints were noted within this initial report and they are consistent with the Claimant's testimony.

12. ATP Dr. Dupper diagnosed a strain of the left shoulder, contusion of the left shoulder, strain of the acromioclavicular joint, left, contusion, left knee, sprain left knee, left hip contusion, cervical spine strain, lumbar spine sprain and contusion of the buttocks on the left side. Claimant was given prescription medication and further diagnostic studies were ordered.

13. The Claimant was placed on restricted work of seated work only and breaks five minutes every hour to change positions. ATP Dr. Dupper prescribed crutches and a leg brace and the Claimant continued to use the crutches and the brace from November 11, 2014 to the present time and ongoing. On December 16, 2014, ATP Dr. Dupper once again set forth similar diagnoses from the initial evaluation of

November 11, 2014, and noted that the medical causation was related to the Claimant's work activities. Continued restricted duty was ordered but all treatment was denied by the Respondents and ATP Dr. Dupper could not take any further action subsequent to December 16, 2014. Dr. Dupper also recommended 18 physical therapy visits and ultrasound.

Respondents' Independent Medical Examiner (IME), Carlos Cebiran, M.D.

14. IME Dr. Cebrian performed an IME on February 20, 2015. He never spoke with the treating provider, ATP Dr. Dupper. Dr. Cebrian noted the multiple complaints of the Claimant and stated the opinion that the Claimant's medical condition should have improved between the time that ATP Dr. Dupper last evaluated her on December 16, 2014 and the date of Dr. Cebrian's evaluation on February 20, 2015. Dr. Cebrian was of the opinion that the Claimant had **not** sustained any accident or injury for which medical care would be necessary. Based on the totality of the evidence, the ALJ finds that Dr. Cebrian's opinion is contrary to the weight of the evidence, based in part on non-medical credibility factors and, therefore, lacking in credibility.

Ultimate Findings

15. The Claimant presented and testified credibly. None of the Claimant's witnesses were eyewitnesses to the incident nor did they credibly contradict the Claimant's testimony. The Respondents' theory paints a circumstantial case of Respondents' witnesses only seeing facial scratches after the incident. One Respondents' witness, however, saw the Claimant on the ground after the incident. This corroborates the Claimant's version of events. None of the witnesses could see inside the Claimant's anatomy to observe the injuries seen and diagnosed by ATP Dr. Duper on the same day as the incident, November 11, 2014. The opinions of ATP Dr. Dupper are more persuasive and credible than the opinions of Respondents' IME Dr. Cebrian.

16. Between conflicting sets of evidence, the ALJ makes a rational choice to accept the testimony of the Claimant and the opinion of ATP Dr. Dupper and to reject the ultimate causation opinion of IME Dr. Cebrian.

17. The Claimant has proven, by a preponderance of the evidence, that she sustained an work-related accident, arising out of the course and scope of her employment for the Employer, resulting in multiple injuries to her body including injuriesto her left shoulder, left acromioclavicular joint, left knee, left hip, cervical spine, lumbar spine and buttocks on her left side. Medical treatment at the hands of ATP Dr. Dupper and Work Well and any referrals there from are authorized; within the authorized chain of referrals; causally related to the incident of November 11, 2014, and reasonably necessary to cure and relieve the effects thereof.

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. The opinions of ATP Dr. Dupper are more persuasive and credible than the opinions of Respondents' IME Dr. Cebrian.

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). Between conflicting sets of evidence, the ALJ makes a rational choice to accept the testimony of the Claimant and the opinion of ATP Dr. Dupper and to reject the ultimate causation opinion of IME Dr. Cebrian.

Medical Benefits

c. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the Claimant's medical treatment as reflected in the evidence is causally related to the work-related incident of November 11, 2014.

d. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, including the recommended 18 physical therapy visits and the ultrasound, was and is reasonably necessary to cure and relieve the effects of the work-related injuries..

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). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on all designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant having sustained multiple injuries as a result of the compensable injuries of November 11, 2014, consisting of injuries to her left shoulder, left acromioclavicular joint, left knee, left hip, cervical spine, lumbar spine and left buttocks, the Respondents shall pay the costs of all causally related and reasonably necessary medical care and treatment, including the costs of 18 physical therapy visits

and ultrasound, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of June 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 June 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on April 25, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) and Temporary Total Disability (TTD) benefits for the period June 30, 2014 until terminated by statute.

4. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant has intermittently worked for Employer since 1999. In late February 2014 Employer hired Claimant as a Foreman to supervise the scaffolding crew. His duties involved driving his crew to various construction sites in the Denver Metropolitan area to construct and remove scaffolding. Claimant picked up a 42 foot flatbed truck from Employer's Commerce City facility in order to transport his crew and materials to jobsites.

2. On April 25, 2014 Claimant arrived at Employer's Commerce City facility at approximately 7:00 a.m. Employer directed Claimant to take a flatbed truck and co-employees Vastian Sanchez and Cesar Aguilar to a jobsite near 137th Street and I-25. Upon arriving at the jobsite Claimant determined that the scaffolding could not be removed because plastering work had not been completed.

3. Claimant explained that at approximately 10:30 a.m. he sent a text message to Employer's Safety Manager Ivan Vilchis. He inquired whether he and his crew could travel to a jobsite in the Denver Tech Center to complete a scaffolding job. Claimant remarked that Mr. Vilchis told him to return the flatbed truck to the Commerce City facility, retrieve safety equipment, collect tools and proceed to the Denver Tech Center project.

4. Claimant testified that he returned to Employer's Commerce City facility, retrieved his safety equipment and collected his tools. He explained that he drove his

personal truck to the Denver Tech Center jobsite because he planned to travel directly home to 2104 South Richfield Way in Aurora after work. He did not take the flatbed truck because he did not want to drive all the way back to the Commerce City facility after he completed his work day. Claimant noted that Mr. Sanchez and Mr. Aguilar traveled to the Denver Tech Center jobsite in a personal vehicle.

5. Claimant drove from Employer's Commerce City facility down to I-70 and then merged onto I-225. He exited the highway at Colfax Avenue to purchase gas. Claimant bought gas at a station approximately four to five blocks west of I-225 on Colfax Avenue near University Hospital. Claimant explained that he then drove east in the right hand lane of Colfax Avenue until he switched to the left hand lane because of construction. Claimant testified that he intended to turn onto the frontage road northbound to take the 17th Place bridge over the highway to merge back onto I-225 northbound. However, if Claimant had continued east on Colfax Avenue and then turned south onto Airport Road he would have reached his home at 2104 South Richfield Way near Buckley Air force base.

6. While waiting at a red light at I-225 and Colfax Avenue Claimant's truck was rear-ended by another vehicle. The accident report reflects that Claimant was in the far left lane or three lanes away from the on-ramp for I-225 South. Claimant commented that he contacted a mechanic at Employer's Commerce City facility and stated that he might need help with his flatbed truck. However, after receiving assistance from a tow truck driver Claimant drove himself to University Hospital to obtain medical treatment.

7. The time cards for Mr. Sanchez and Mr. Aguilar reflect that they worked complete shifts on April 25, 2014. However, Claimant's time card reveals that he only worked until 8:30 a.m. on the day of the motor vehicle accident. Moreover, the time sheet that Claimant submitted to receive pay for the work week encompassing April 25, 2014 did not include any notation that he had been injured at work.

8. Mr. Vilchis denied that he had received a text message from Claimant on April 25, 2014 about performing work at the Denver Tech Center jobsite. Moreover, Mr. Vilchis did not discuss any work at the Denver Tech Center with Claimant or authorize him to perform work at the site. He noted that Claimant and his crew would not have been dispatched to a jobsite without a flatbed truck because they would have been either constructing or removing scaffolding.

9. Mr. Vilchis testified that a couple of days after April 25, 2014 he was informed that Claimant had been involved in a motor vehicle accident. However, Mr. Vilchis was not advised that the motor vehicle accident was associated with Claimant's work activities.

10. In late June 2014 Claimant asked Mr. Vilchis if he could have one week off to travel to Mexico for medical treatment. Mr. Vilchis approved Claimant's request.

11. While in Mexico Claimant contacted Mr. Vilchis and stated that he would be out of work for longer than one week. He remarked that he was unsure when he would return. Claimant did not return from Mexico until the latter half of October 2014.

12. After returning from Mexico Claimant sought to resume work with Employer. However, Employer responded that Claimant's position was no longer available. Claimant subsequently filed a Workers' Claim for Compensation on December 3, 2014.

13. On November 14, 2014 Claimant visited Pamela A. Knight, M.D. at Denver-Vail Orthopedics for an examination. Dr. Knight diagnosed Claimant with cervical whiplash, a disc protrusion at C6-C7 and cervical radiculitis. On December 5, 2014 Dr. Knight referred Claimant to Dr. Solberg for C6-C7 epidural steroid injections. Claimant testified that he has subsequently received three separate neck injections but continues to suffer neck discomfort. Dr. Knight has recommended that Claimant remain off work.

14. Claimant has failed to establish that it is more probably true than not that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on April 25, 2014. On April 25, 2014 Claimant was involved in a motor vehicle accident while driving his personal vehicle as he was waiting at a red light at I-225 and Colfax Avenue. The facts and circumstances of the accident reflect that it did not occur while Claimant was performing work duties for Employer. The critical inquiry is whether travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. Claimant's job duties involved driving his crew to various construction sites in the Denver Metropolitan area to construct and remove scaffolding. Claimant picked up a 42 foot flatbed truck from Employer's Commerce City facility in order to transport his crew and materials to jobsites. Claimant's personal vehicle was not a mandatory part of his work environment for Employer. Employer thus did not receive any benefit from Claimant's use of his personal vehicle other than his mere arrival at work.

15. Claimant was driving his personal vehicle at the time of the motor vehicle accident. Mr. Vilchis credibly noted that Employer's flatbed truck was required to transport scaffolding to and from jobsites. Moreover, Claimant explained that he had received approval from Mr. Vilchis to perform scaffolding work in the Denver Tech Center area on the date of the motor vehicle accident. However, Claimant's timecard for April 25, 2014 reflects that he completed his work for the day at 8:30 a.m. or well before the accident occurred. Mr. Vilchis also credibly denied that he received a text message from Claimant on April 25, 2014 about performing work at the Denver Tech Center jobsite. Furthermore, the accident occurred while Claimant was on Colfax Avenue three lanes away from the on-ramp to southbound I-225. Claimant needed to travel on I-225 to get to the jobsite but could have continued driving east on Colfax and then south on Airport Road to arrive home. The record thus reflects that Claimant was not performing job duties for Employer when he was involved in a motor vehicle accident on April 25, 2014. Accordingly, Claimant has failed to demonstrate a nexus between his injuries and job duties for Employer.

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. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower and requires a claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* at 641-62.

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the

injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

6. "Special circumstances" may be found where the employment contract contemplates the employee's travel or the employer delineates the employee's travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds,* 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in travel with the express or implied consent of the employer and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risks of the travel become the risks of the employment. *Breidenbach v. Black Diamond, Inc.,* W.C. No. 4-761-479 (ICAP, Dec. 30, 2009).

7. In considering whether travel was contemplated by the employment contract, case law reflects that the exception applies when a claimant is required by an employer to come to work in an automobile that is then used to perform job duties. The vehicle confers a benefit to the employer beyond the employee's mere arrival at work. *See Whale Communications v. Osborn,* 759 P.2d 848 (Colo. App. 1988). As explained in 1 A. Larson, *Workmen's Compensation Law*, §17.50 (1985), "[t]he rationale for this exception is that the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes. Such a requirement causes the job duties to extend beyond the workplace and makes the vehicle a mandatory part of the work environment."

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on April 25, 2014. On April 25, 2014 Claimant was involved in a motor vehicle accident while driving his personal vehicle as he was waiting at a red light at I-225 and Colfax Avenue. The facts and circumstances of the accident reflect that it did not occur while Claimant was performing work duties for Employer. The critical inquiry is whether travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. Claimant's job duties involved driving his crew to various construction sites in the Denver Metropolitan area to construct and remove scaffolding. Claimant picked up a 42

foot flatbed truck from Employer's Commerce City facility in order to transport his crew and materials to jobsites. Claimant's personal vehicle was not a mandatory part of his work environment for Employer. Employer thus did not receive any benefit from Claimant's use of his personal vehicle other than his mere arrival at work.

9. As found, Claimant was driving his personal vehicle at the time of the motor vehicle accident. Mr. Vilchis credibly noted that Employer's flatbed truck was required to transport scaffolding to and from jobsites. Moreover, Claimant explained that he had received approval from Mr. Vilchis to perform scaffolding work in the Denver Tech Center area on the date of the motor vehicle accident. However, Claimant's timecard for April 25, 2014 reflects that he completed his work for the day at 8:30 a.m. or well before the accident occurred. Mr. Vilchis also credibly denied that he received a text message from Claimant on April 25, 2014 about performing work at the Denver Tech Center jobsite. Furthermore, the accident occurred while Claimant was on Colfax Avenue three lanes away from the on-ramp to southbound I-225. Claimant needed to travel on I-225 to get to the jobsite but could have continued driving east on Colfax and then south on Airport Road to arrive home. The record thus reflects that Claimant was not performing job duties for Employer when he was involved in a motor vehicle accident on April 25, 2014. Accordingly, Claimant has failed to demonstrate a nexus between his injuries and job duties for Employer. *Compare In Re Rieks,* W.C. No. 4-921-644 (ICAP, Aug. 12, 2014) (where employer required the claimant to come to work in an automobile to attend appointments and meet with customers, transport of car was contemplated by the employment contract and the claimant's motor vehicle accident on the way to work occurred in the course of and arose out of his employment); *Lopez v. Labor Ready,* W.C. 4-538-791 (ICAP, Sept. 26, 2003) (where the claimant's job required her to spend large parts of her day in her personal vehicle and she was injured in a motor vehicle accident while driving home for lunch, claim was compensable because it conferred a benefit to the employer beyond the claimant's mere arrival at work).

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: June 5, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

- 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 respondent employer?

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment with respondent employer?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury or occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the compensable injury and/or occupational disease?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury or occupational disease, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits from November 14, 2014 and continuing?

- The parties stipulated prior to the hearing to an average weekly wage ("AWW") of $560.00.

FINDINGS OF FACT

1. Claimant was employed with employer as an auto tech beginning approximately August, 2012. Claimant's job duties included changing tires. Claimant had previously been employed with employer in various capacities.

2. Claimant testified at hearing that he was injured on October 20, 2013 when he was lifting a tire and felt something pop in his back. Claimant testified he would bend, stoop and twist to change tires and he performed this most of the day. Claimant testified he reported his injury to Mr. Lucero, but Mr. Lucero paid him no attention. Claimant testified he had pain in his back before the lifting incident, but the pain in his back after the lifting incident was different.

3. Claimant admitted on cross examination that he arrived late to work on October 20, 2014 and informed his employer that he had cancer. Claimant further admitted on cross-examination that he does not have cancer.

4. Claimant was evaluated by Dr. Kurz on October 20, 2014 and reported complaints of back pain. Claimant did not report any specific cause of his back pain to Dr. Kurz. Claimant returned to Dr. Kurz on October 21, 2014 again complaining of low back pain. Claimant reported to Dr. Kurz that the back pain was present for several years and was not due to accident or trauma.

5. Claimant testified at hearing that he reported to Dr. Kurz on October 20, 2014 that he had injured his back lifting a tire. The ALJ credits the reports of Dr. Kurz dated October 20 and October 21, 2014 that denied any specific trauma over claimant's testimony that he reported to Dr. Kurz that he injured himself at work.

6. Claimant underwent x-rays of the lumbar spine on October 31, 2014. The x-rays noted that claimant had degenerative changes in the lumbar spine, most pronounced at L5-S1.

7. Claimant was referred for a magnetic resonance image ("MRI") of the lumbar spine on November 6, 2014. The MRI showed disc bulging at the L5-S1 level with moderate left and mild right facet arthopathy with severe left foraminal narrowing at the L5-S1 level impinging on the exiting left L5 nerve.

8. Claimant returned to Dr. Kurz on November 12, 2014 and Dr. Kurz noted that claimant shared that he was working alone the day before his last visit and felt like the lifting he did that day worsening his condition. Dr. Kurz noted the findings from claimant's MRI and provided claimant with a referral for orthopedic evaluation and provided claimant with work restrictions of no lifting greater the 5 pounds with no bending or squatting.

9. Claimant took the work restrictions to employer. Ms. Smith, one of the owners with employer, testified she found the work restrictions on her desk and determined that they could not accommodate the restrictions. Ms. Smith testified claimant had previous work restrictions of 15 pounds and employer provided claimant with work within his restrictions and made sure claimant did not lift over 15 pounds. However, employer could not accommodate the 5 pound lifting restriction. Ms. Smith testified she was unaware that the restrictions were alleged as part of a work injury.

10. Ms. Smith testified she found out claimant was alleging a work injury when she received a written note from claimant alleging a work injury on October 20, 2014. The ALJ finds the testimony of Ms. Smith to be credible and persuasive.

11. Mr. Lattin testified at hearing in this matter. Mr. Lattin is a co-owner for employer. Mr. Lattin testified that claimant did not report a work injury to Mr. Lattin. Mr. Lattin testified that on October 20, 2014 claimant arrived at work late and told Mr. Lattin he had pancreatic cancer. Mr. Lattin testified claimant did not perform much work that day and was on his cell phone quite a bit making arrangements to see a doctor. Mr.

Lattin testified he did not work on big tires on October 20, 2014 and did not recall if claimant worked on big tires on October 20, 2014.

12. Mr. Lucero testified at hearing in this matter. Mr. Lucero testified claimant was working on heavier tires in the back with Mr. Lattin. Mr. Lucero testified claimant did not report a work injury to him on October 20, 2014.

13. Conflicting evidence was presented regarding whether claimant worked on the bigger tires on October 20, 2014. However, regardless of whether claimant worked with the bigger tires on October 20, 2014, claimant reported to employer only issues involving his potential cancer diagnosis. Most problematic is the fact that claimant did not report a lifting injury to Dr. Kurz when he was evaluated immediately after the injury nor the next day, and specifically denied any trauma leading to the back pain. Instead, claimant noted that the back pain was present for "years".

14. The ALJ rejects claimant's testimony that he reported the injury on October 20, 2014 to Mr. Lucero. The ALJ further finds that the first time claimant reported his injury as being related to his work was to Dr. Kurz on November 12, 2014 and to employer on November 19, 2014.

15. The ALJ finds claimant not credible in this case and instead credits the testimony of Ms. Smith, Mr. Lattin and Mr. Lucero and Mr. Lattin over the testimony of claimant. The ALJ finds that claimant did not complain of a lifting injury to employer on October 20, 2014 and did not report his injury to employer until November 19, 2014 after employer indicated that they could no longer comply with his work restrictions.

16. In discrediting claimant's testimony in this case, the ALJ finds that claimant has failed to prove that it is more probable than not that he sustained a compensable work injury while lifting tires on October 20, 2014. The ALJ notes that claimant did not complain of an injury from lifting to Dr. Kurz on October 20 or October 21, 2014. The October 21, 2014 report notes that claimant's back pain was ongoing for several years.

17. Insofar as the medical records from Dr. Kurz document claimant denying a specific trauma and reporting several years of ongoing pain, the ALJ finds these records more credible than the testimony of claimant and determines claimant has failed to demonstrate that it is more likely than not that he suffered a compensable injury arising out of and in the course of his employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, the ALJ credits the records from Dr. Kurz over the testimony of claimant and finds that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course of his employment with employer.

ORDER

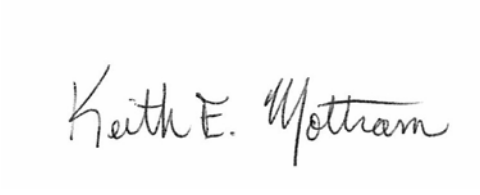
It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

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

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2015



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

ISSUES

The issues for hearing upon the claimant's Application for Expedited Hearing were compensability and medical benefits.

FINDINGS OF FACT

1. The claimant is a 42 year old woman who has been employed by the respondent-employer since October 2007. The claimant has worked from home during the last seven years, functioning as a call center.

2. The claimant began to notice symptoms in her forearms in November/December 2014. There was a sensation of fatigue. This then progressed to pain, tingling, numbness, throbbing, and burning sensations.

3. The claimant's work station consists of a computer with a keyboard and mouse.

4. The claimant has previously been diagnosed with rheumatoid arthritis (RA) and fibromyalgia. The RA has been diagnosed in her wrist and hand only.

5. The claimant has had the fibromyalgia for years and has flare-ups. This occurs only on the back of her thighs and occurs about one to two times a month.

6. She has not previously had symptoms above the wrists and into the arms.

7. The claimant reported her symptoms to her supervisor during the week of December 13, 2014.

8. She was given a list of providers and since the claimant's personal care provider was listed, Dr. Harris, she chose to be treated by him.

9. The respondent-insurer has paid for all of the claimant's visits in relation to her claim up to the point where the claim was denied.

10. The claimant's symptoms occur at work and increase with her work. The symptoms subside when she rests. The symptoms do however, continue at night.

11. Dr. Harris ordered an EMG to see if there was a cervical radiculopathy and the results were normal.

12. A present Dr. Harris does not have a diagnosis for the claimant's symptoms. He is trying to rule out various possibilities.

13. A job site evaluation was conducted by Colleen Waterous, who works for Genex Services, LLC. The evaluation used the Colorado Workers' Compensation Guidelines to determine risk factors. The claimant disagrees with the way the evaluation was conducted observing that she has changed how she uses her work station based upon the recommendations of Dr. Harris.

14. The results of the risk analysis indicate that only one risk factor was present, the use of a mouse for greater than four hours per day. However, that was a check mark under Risk Factor Assessment. The underlying data in the report indicates that the claimant does not use a mouse in excess of four hours per day. The ALJ finds that the totality of the report establishes that the claimant does not use a mouse in excess of four hours per day.

15. Dr. Jonathan Sollender completed a record review of the claimant's case at the request of the respondent-insurer.

16. Dr. Sollender opined that the claimant lacks a diagnosis from the treating physician and that a diagnosis is the first prerequisite under the Guidelines. Additionally, based upon the job demands analysis by Ms Waterous, there was a lack of necessary occupational risk factors from her work.

17. Dr. Sollender opined that based upon the Guidelines, Rule 17, Exhibit 5 (Cumulative Trauma Conditions) the claimant's symptoms are not work related. He opined that the claimant lacked one or more primary risk factors. Additionally, she lacked two or more secondary risk factors.

18. He ultimately opined that the claimant's medical complaints are not work related.

19. The ALJ finds Dr. Sollender's opinions to be credible and persuasive.

20. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffers from an occupational disease arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

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

7. The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

8. The test for distinguishing between an accidental injury and an occupational disease or condition 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 the employment.

9. 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. Indus. 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.*

10. W.C.R.P. Rule 17, Exhibit 5 sets forth the treatment guidelines for Cumulative Trauma Conditions. Rule 17 set forth care that is generally considered reasonable for most injured workers. Further, while an ALJ is not required to utilize

Rule 17 as the sole basis for making determinations as to whether medical treatment is reasonable, necessary and related to an industrial injury, it is appropriate for the ALJ to consider Rule 17 in making such determinations. § 8-43-201(3), C.R.S.

11. The ALJ concludes that the credible and persuasive evidence presented at hearing established that there is not a causal relationship between the claimant's alleged conditions and her work exposure, especially in light of the credible analysis and opinions of Dr. Sollender.

12. Given the foregoing, the ALJ determines and finds that the claimant has not met her burden of proof in establishing that she suffered a compensable occupational injury. Accordingly, the claimant has not demonstrated that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her bilateral upper extremity conditions. *Anderson*, 859 P.2d at 824.

13. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant suffers from an occupational disease arising out of and occurring in the performance of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: June 12, 2015

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906