## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right hip and groin on July 5, 2014.

2. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her left hip on October 5, 2014.

3. Whether Claimant has established by a preponderance of the evidence that she aggravated her right hip on October 5, 2014.

4. Whether Claimant has established by a preponderance of the evidence that she aggravated both her right and her left hip on October 20, 2015.

5. If compensable, determination of Claimant's average weekly wage.

## STIPULATIONS

If the claim is compensable:

Claimant is entitled to temporary total disability benefits from November 21, 2014 and ongoing until terminated by law; the providers at Colorado Plains Medical Group are authorized providers, including Dr. Manchester; the medical treatment provided and recommended by the providers at Colorado Plains Medical Group is reasonable and necessary; and the issue of applicable offsets is reserved for future determination.

## FINDINGS OF FACT

1. Claimant has worked for Employer since November 11, 2013. Claimant initially worked as a lab technician with duties that primarily involved testing food products produced by Employer.

2. On June 15, 2014 Claimant began working as a wet mix operator. Her duties involved: taking samples from the production floor to the lab; data entry; climbing ladders; lifting up to 50 pound salt bags overhead to dump into salter; changing out screens, pulling off grates; lifting hoses; and tearing down, cleaning, and assembling equipment. Claimant frequently had to lift amounts up to 50 pounds, squat, bend, twist, and crawl.

3. On July 3, 2014 Claimant was evaluated by Laura Cieslik, M.D. Claimant complained of pelvic pain for the past several weeks on the right side. Claimant also reported a bulge in her right groin area and complained of pain in the right groin area on palpation. Dr. Cieslik referred Claimant to a general surgeon for possible inguinal hernia. *See* Exhibit I.

4. On July 5, 2014 Claimant was at work and attempted to hook up a production line to begin cheese production. Claimant was unable to line up the pipes by using her arms. Claimant placed her right thigh underneath a pipe and used her leg to push up on the pipe to align it in place. Claimant alleges that she felt a ripping burning sensation in her lower groin.

5. Claimant left work early on July 5, 2014 and reported to a supervisor that her hernia was bothering her and that she needed to go home. *See* Exhibit R.

6. On July 6, 2014 Claimant called in to work reporting she would not be in because her hernia was bothering her. *See* Exhibit R.

7. On July 7, 2014 Warren Welker contacted Claimant after he heard she had gone home early on July 5, 2014 after feeling a pull in her right groin. Claimant reported to him that she had scheduled an ultrasound for the issue and that it was a previous non work related injury. Mr. Welker explained to Claimant that if the issue was work related they needed to follow protocol and the ultrasound would need to be scheduled through workers' compensation. Claimant reassured Mr. Welker that the issue was not related to workers' compensation. *See* Exhibit S.

8. On July 7, 2014 Claimant underwent an ultrasound of the right groin for suspected right inguinal hernia due to her right groin pain. The ultrasound was interpreted by Paul Johnson, M.D. who opined that it was an unremarkable right groin ultrasound. *See* Exhibit 3.

9. On July 9, 2014 Claimant was evaluated by Thomas Manchester, M.D. Claimant reported to Dr. Manchester that she has had burning pain at the right side of her c-section incision for the past two years. She also reported lifting a heavy pipe at work and starting to sweat and have pain at the right groin. Dr. Manchester assessed musculoskeletal pain at the inner thigh. *See* Exhibit 3.

10. On July 21, 2014 Claimant reported the July 5, 2014 incident as a work related incident. Claimant filled out an Employee Statement. Claimant reported that she knelt down by the wet mixer to unhook the fines line and was holding up the line with her right knee and pushed up. Claimant reported that while kneeling she felt a tight pull and instant burning in her right groin area and that when she stood up she felt hot and dizzy. Claimant reported that she told a supervisor what had happened, tried to continue working, but went home approximately an hour later. Claimant reported that she did not desire or need medical treatment. *See* Exhibit S.

11. On July 21, 2014 Barry Anspach sent an email to Warren Walker regarding Claimant's alleged injury. Mr. Anspach indicated that Claimant reported that she had a hernia that she got outside of work and had a doctor's note that she could train as long as she didn't lift anything. Mr. Anspach reported that on July 5, 2014 at 6:15 a.m. Claimant reported to a supervisor that she had bent down and when she stood back up she had pain in her side and that she reported she had strained her hernia. On July 5, 2014, her supervisor advised Mr. Anspach what had happened in Claimant's presence and advised Mr. Anspach that Claimant might need to go home if she felt more discomfort. Mr. Anspach reported that an hour later, Claimant came to him and asked to go home because the pain was getting too bad. See Exhibit R.

12. On October 5, 2014 Claimant was cleaning the inside of the wet mixer and was either standing or dangling her legs on or over a pipe while leaning forward to reach the base of the mixer. Claimant's hips and lower abdomen were against the mixer's outer rim. Claimant alleges that this caused extreme popping in her left hip and groin area and a burning sensation to shoot across her abdomen and that it also caused pain in her right groin.

13. On that date, Claimant reported the pain to her supervisor. Claimant reported that she did not desire any medical treatment for her pelvic are pain and that she did not want to make a formal report of injury, but just wanted her supervisor to be aware of the incident. *See* Exhibit T.

14 Her supervisor filled out a written statement indicating that on October 5, 2014 Claimant reported that she may have reinjured her groin area. His statement indicated that Claimant reported that the injury was not work related. Claimant reported while removing the steam injectors from the wet mixer she was bent over and felt pain in her lower left side and thought she may have reinjured herself. Her supervisor reported that Claimant was training another operator that night so he told her to take it easy for the rest of the night and let the trainee do most of the physical work. *See* Exhibit T.

15. On October 20, 2014 Claimant was at work and attempting to tilt a wheelbarrow like cart to drain water for cheese add-back. Claimant alleges she felt a burning, ripping sensation between her hips and across her lower pelvic area.

16. On October 20, 2014 Claimant stopped a supervisor in the hallway. Claimant was in tears and stated that she was in a lot of pain in her abdominal area from adding re-work back on line 2 and that it was causing her pain to bend down and pull cheese from the barrels. *See* Exhibit T.

17. On October 23, 2014 Claimant was evaluated by Marshal Unrein, PA-C. Claimant reported intermittent pain in her right inguinal area and lower abdominal area with lifting at work since July. Claimant reported that she has worsening symptoms on October 2014. Claimant reported that on October 20, 2014 she was lifting a heavy item when she felt sharp pain in her right inguinal area and lower abdomen and that she has

had pain since. PA Unrein assessed abdominal muscle strain and questioned whether it was abdominal muscle strain versus inguinal hernia or incisional hernia. PA Unrein opined that Claimant's symptoms were aggravated by work and recommended work restrictions. Claimant did not report to PA Unrein that she had any popping or ripping sensations in either hip with any of the work incidents. *See* Exhibit 3.

18. On October 30, 2014 Claimant was again evaluated by PA Unrein. Claimant continued to complain of intermittent discomfort, worsening with abdominal pressure. Physical examination revealed tenderness in the right lower quadrant near the inguinal canal and in the area of Claimant's abdominal incision. PA Unrein continued the assessment of abdominal muscle strain. *See* Exhibit K.

19. On November 3, 2014 Claimant underwent a CT scan of her abdomen and pelvis interpreted by Michael Geraghty, M.D. as unremarkable. *See* Exhibit 3.

20. On November 7, 2014 Claimant was evaluated by PA Unrein. He assessed continued abdominal pain, noted that the claim had been denied by workers' compensation, and noted that Claimant was at maximum medical improvement with no impairment and no restrictions. He recommended that Claimant follow up with her primary care provider. *See* Exhibit 3.

21. On November 7, 2014 Claimant was also evaluated by Lauren Melancon, NP. Claimant reported having a bulge and pain in her right groin after lifting a pipe with her knee at work. Claimant reported her pain had worsened over the past 2-4 weeks and that she had pain in both groins and into the lower pelvis. NP Melancon noted on examination that Claimant was tender over her bilateral lower quadrants and just above her pubic bone over area of scar and tender into the bilateral groin. NP Melancon took Claimant off work for a few days. *See* Exhibit K.

22. On November 21, 2014 Claimant returned to Dr. Cieslik. Dr. Cieslik noted that she had seen Claimant on July 3, 2014 for pelvic pain and hot flashes and that at the prior visit Claimant had complained of pelvic pain for several weeks on the right side. Claimant reported at this appointment that other physicians told her that her pain could be gynecologic in origin. Dr. Cieslik opined that Claimant's pain was not gynecologic in origin. *See* Exhibit 3.

23. On December 29, 2014 Claimant was evaluated by Dave Keller, PA. Claimant reported that after starting a new position in June she started having diffuse discomfort in her lower abdomen and groin area. Claimant reported an incident in early July supporting a heavy pipe with her legs when she felt immediate pain and a tearing sensation in her right groin region. She also reported a second injury in early October when she reached in an awkward position and had pain shooting across her left groin through her abdomen and pelvic area. Claimant reported about a week later she had another injury resulting again in worsening pain and a tearing sensation at the left hip area. Claimant reported her current symptoms were primarily left sided with mechanical popping and catching and that her right hip had gotten better was but that she still had

discomfort and it was achy. Claimant reported that her physical therapist suspected a labrum tear. Claimant denied any previous groin or hip pain. PA Keller ordered a left hip MRI arthrogram. *See* Exhibit 3.

24. On December 30, 2014 Claimant underwent an MRI arthrogram of her left hip that was interpreted by Gregory Beyer, M.D. Dr. Beyer noted findings felt to represent a small labral tear in the lateral superior labrum. *See* Exhibit 3.

25. On January 13, 2015 Claimant was evaluated by PA Keller. PA Keller noted the MRI was read as a labral tear and opined that the MRI correlated with Claimant's mechanism and symptoms. He recommended consultation with a hip specialist for consideration of a hip arthroscopic debridement of a hip labral tear. *See* Exhibit 3.

26. On January 22, 2015 Claimant was evaluated by PA Keller. Claimant reported that she had a few instances at work where she had pain and discomfort in the left hip. PA Keller noted that Claimant an MRI that revealed a labral tear in the left hip. Claimant wanted to discuss the possibility of obtaining a right hip MRI and wanted to know if this particular type of injury could correlate with her reported mechanism of injury. PA Keller opined that it was difficult to say exactly when the labral tear occurred but that it seemed to correlate well with Claimant's description of the work related incident. PA Keller opined that with regards to Claimant's right hip, a future MRI would be needed if Claimant's symptoms persisted or if the mechanical component increased. PA Keller recommended waiting on the right hip until the left hip surgical consultation was obtained. *See* Exhibit 3.

27. On February 9, 2015 Claimant was evaluated by Shawn Karns, PA-C. Claimant reported that on July 5, 2014 she was lifting something heavy at work with her right leg when she felt a pop deep in the groin on the right side with immediate pain. Claimant reported that in October she was leaning over and felt a similar pain develop on the left hip deep in the groin as well. PA Karns noted that X-rays performed that day showed underlying coxa profunda morphology to the acetabuli predisposing Claimant to pincer-type femoral acetabular impingement (FAI) and that Claimant had reactive CAM morphology over the femoral necks bilaterally. He recommended bilateral hip diagnostic injections coupled with an MRI of the right side. He opined that if Claimant received relief with the diagnostic injections then she would be a candidate for hip arthroscopy in the future. *See* Exhibit 6.

28. On February 17, 2015 Claimant underwent a MRI of the right hip that was interpreted by Jeffry P. Weingardt, M.D. Dr. Weingardt found a vertical labrum tear at the base of the mid and posterior portions of the superior labrum with mild superior labral hypertrophy. He also found a prominent cyst arising in the right adnexal area. *See* Exhibit P.

29. On February 19, 2015 PA Karns issued a report indicating he had reviewed bilateral hip MRIs with Dr. White who confirmed that Claimant had labral tears

on both sides. He also noted that Claimant had a right adnexal cyst on her right hip MRI. He noted Claimant's diagnostic hip injections provided over 60% relief on the left side but that the right hip injection did not provide much of a change. He opined that Claimant was a candidate for left hip arthroscopy and noted he called Claimant and discussed surgery with her. *See* Exhibit 6.

30. On February 25, 2015 Claimant was evaluated by Brian White, M.D. Dr. White assessed bilateral labral tears with coxa profunda type or pincer type impingement with reactive CAM Morphology, left greater than right. He noted Claimant had failed non-operative measures and opined that it was reasonable to move forward with hip arthroscopy with extensive acetabular rim trimming and femoral osteoplasty, likely labral reconstruction. *See* Exhibit 6.

31. On May 8, 2015 Claimant underwent an Independent Medical Evaluation performed by Edwin Healey, M.D. Claimant reported that while working in cheese production she developed acute episodes of right and left hip pain while performing her duties. Dr. Healey provided diagnoses related to Claimant's injury while employed by Employer as including: left hip and groin pain with MRI demonstrating left superior small labral tear; right hip and groin pain with MRI demonstrating vertical tear at the base and mid-portions of the superior labrum; prominent cyst in the right adnexal area; recurrent and intermittent low back and left sacroiliac joint dysfunction; and bilateral hip coxa profunda femoral acetabular impingement preexisting and asymptomatic that was permanently aggravated by work related injuries. *See* Exhibit 8.

32. Claimant reported to Dr. Healey that she had no prior history of bilateral groin pain of a similar nature until the injuries at work. Dr. Healey opined that even though Claimant had preexisting congenital and developmental hip pathology that predisposed her to the development of labral tears, it was the activities performed while working that resulted in permanent aggravation of her preexisting and asymptomatic hip conditions. Dr. Healey opined that Claimant's right adnexal prominent cyst should be investigated further by her gynecologist to determine if it is a pain generator for her right groin pain and if not, then Claimant should have a second right hip injection to ensure the right groin pain is caused by the labral tear. He opined that Claimant should undergo the procedure for her bilateral hips recommended by Dr. White. Dr. Healey further opined that Claimant's altered gait resulted in aggravation of her left sacroiliac joint dysfunction. He opined ultimately that Claimant required bilateral hip arthroscopy. *See* Exhibit 8.

33. Dr. Healey opined that Claimant was asymptomatic and that she sustained separate injury episodes which resulted in hip labral tears and permanent aggravation of her pre-existing bilateral hip congenital and developmental condition. *See* Exhibit 8.

34. On June 10, 2015 Claimant underwent an Independent Medical Evaluation performed by Carlos Cebrian, M.D. Claimant reported: deep pain and throbbing in her bilateral groin and hips; buttock and leg cramping with numbness and

tingling; difficulty walking; difficulty sleeping; and extremely tight muscles all over her body. Claimant reported that after her transfer to the cheese department on June 15, 2014 she noticed some soreness in her right groin and saw her OB/GYN on July 3, 2014 to make sure she did not have a tear from a previous surgery. She reported that her doctor thought she had an inguinal hernia and referred her for ultrasound and to a general surgeon, Dr. Manchester. *See* Exhibit A.

35. Claimant reported to Dr. Cebrian that on July 5, 2014 she was in training and unhooking and switching pipes when she squatted down on the front side of the wet mixer against a wall to disconnect a pipe. Claimant reported that the pipes rarely aligned properly and that she knelt on her left knee and hoisted the pipe up with her right knee. Claimant reported that her right knee was bent at a 90 degree angle with her right foot on the ground and that as she pushed, she felt a deep stabbing and excruciating pain with burning in her right groin. Claimant reported that she went home and had swelling in her right groin in the front. *See* Exhibit A.

36. Claimant reported that she returned to work and continued to have pain which was constant and deep in the right groin. Claimant reported that on October 5, 2014 and October 20, 2014 her symptoms worsened. *See* Exhibit A.

37. Claimant reported that on October 5, 2014 when she reached the steam injectors by leaning on top of the wet mixer against her lower abdomen, she had a stabbing and burning sensation across her lower abdomen and felt a lot of symptoms in her left hip. Claimant reported she was in a lot of pain that day and kept getting nauseated and was sweating. Claimant reported that over the next few weeks it was uncomfortable to climb and get on equipment and that the left side of her groin started bothering her more than the right side. *See* Exhibit A.

38. Claimant reported that on October 20, 2014 she lifted a cart to drain water for cheese add back when she experienced a ripping, burning , stabling sensation along her lower abdominal area and felt a click in her left groin. Claimant reported feeling flushed, nauseated, and hot. *See* Exhibit A.

39. Dr. Cebrian opined that Claimant's bilateral femoral acetabular impingement (FAI) secondary to pincer type morphology with reactive CAM morphology over the femoral necks and labral tears and the need for treatment was independent, unrelated, and incidental to work activities performed on July 5, 2014, October 5, 2014 and October 20, 2014. Dr. Cebrian opined that the mechanisms of injury as described by Claimant were minimal and not associated with bilateral hip events nor were they mechanisms of significant force to the hips to aggravate any underlying pathology or to cause labral tears. Dr. Cebrian opined that Claimant's bilateral FAI of her hips is associated with labral tears and pathology and no exogenous event is necessary. Dr. Cebrian opined that the spontaneous onset and symptoms that Claimant was experiencing is ordinary as most pain from FAI and labral pathology presents spontaneously. *See* Exhibit A.

40. Dr. Cebrian opined that FAI progresses gradually and can injure the labrum and the articular cartilage of the hip and that FAI is a common cause of labral injury. Dr. Cebrian opined that FAI can be congenital or developmental. He opined that patients with FAI typically have anterolateral hip pain and pain that can worsen with prolonged sitting, rising from a seat, getting into or out of a car, or leaning forward and that the pain is gradual and progressive. He opined that patients can be misdiagnosed and managed as having such conditions as groin strain, osteoarthritis, low back disorder, or inguinal hernia. He opined that Claimant's impingement disorder and labral tears were caused by her pre-existing anatomy and were not the result of trauma. *See* Exhibit A.

**Medical treatment prior to July, 2014**

41. Claimant suffered a prior alleged work injury on October 10, 2011. Claimant was treated by Gregory Reichhardt, M.D. Claimant underwent treatment for that alleged injury that included a lumbar MRI, lumbosacral spine X-rays, bilateral lower extremity electro diagnostic evaluation and left SI injection and right-sided trigger point injection. The testing and injections did not show any acute abnormalities or provide any lasting improvement in her reported symptoms. Dr. Reichhardt noted that Claimant had chronic low back pain with an unclear etiology, possible SI dysfunction, and possible facet involvement. *See* Exhibit D.

42. On April 23, 2012 after approximately 6 months of treatment, Claimant was evaluated by Dr. Reichhardt. Claimant reported continued pain in her low back and reported her pain as 7-8/10 with stiffness and inflammation. Claimant requested additional chiropractic visits and wanted an additional muscle relaxer. Claimant demonstrated tenderness to palpation in the lumbar spine on physical examination. *See* Exhibit D.

43. On May 7, 2012 Claimant was evaluated by Dr. Reichhardt with reported low back pain of 6-7/10. Claimant requested additional chiropractic care. Dr. Reichhardt placed Claimant at maximum medical improvement, and discussed work restrictions with Claimant. Dr. Reichhardt noted that he and Claimant agreed on work restrictions of: limiting lifting, pushing, pulling, or carrying to 20 pounds and to limit bending and twisting at the waist to an occasional basis. He provided Claimant with a 12% whole person impairment rating. *See* Exhibit D.

44. On July 27, 2012 Claimant presented to physical therapy. Claimant reported pain on her left sacroiliac joint and reported that the pain was greatest after sitting or standing too long and that she was unable to sit or stand for prolonged periods. Claimant reported that occasionally the pain/numbness would shoot down her left lower extremity and that the pain was deep, dull, and stiff. Ceri Middlemist, PT noted Claimant had left posteriorly rotated innominate which altered her range of motion in the lumbar spine and left hip creating a deep pressure pain at end range. PT Middlemist noted that Claimant had decreased strength in her hips and abdominals. *See* Exhibit E.

45. On October 10, 2012 Claimant presented to the emergency department of Colorado Plains Medical Center complaining of pain in her lower abdomen that began 3-4 weeks prior. Claimant reported that she was unable to sleep due to the pain and believed it felt like previous cysts, but that she no longer had ovaries. It was noted on examination that Claimant had tenderness in palpation to the bilateral lower quadrants/pelvic region. *See* Exhibit G.

46. On April 30, 2013 Claimant was evaluated by Dr. Reichhardt. Claimant reported pain of 0/10 and that recently she raked all day long, bent and lifted up stones while seeding a new lawn. Claimant reported she had been lifting feed bags weighing 120 to 125 pounds without any difficulty or pain and was not taking any medications. Dr. Reichhardt noted that Claimant appeared to be doing very well and that Claimant wanted to be released to full duty to apply for a job with the Weld County Sheriff's Department. Dr. Reichhardt released Claimant to full duty work with no restrictions. *See* Exhibit D.

**Testimony**

47. Dr. Healey testified at hearing consistent with his report. He acknowledged that congenital abnormalities like FAI can manifest at any time even without a specific injury. Dr. Healey opined that Claimant was pre-disposed to labral tears and was a "fragile eggshell" type of employee because most workers wouldn't have these types of injuries. He again concluded that her work activity caused an aggravation of her pre-existing condition.

48. Dr. Healey opined that the July 5, 2014 incident could have caused the labral tear or could have increased the size of an existing tear. Dr. Healey acknowledged that he could not specifically state when the labral tears occurred, but opined that most occur acutely and people feel immediate sensation. He opined that he takes patients at their word when they report when their symptoms began. He acknowledged that labrum tears are often misdiagnosed and that Claimant had pain in her groin area prior to July 5, 2014.

49. Dr. Healey's testimony, overall, is not found credible and persuasive and is based mostly on Claimant's subjective reports and on his belief that Claimant was asymptomatic prior to July 5, 2014. However, this is inconsistent with medical reports showing Claimant was not asymptomatic and had several complaints consistent with labral tears prior to July 5, 2014.

50. The testimony and reports of Dr. Cebrian are found more credible and persuasive in this matter. Dr. Cebrian testified at hearing consistent with his report. He opined that Claimant's bilateral labral tears and any need for surgery resulted from Claimant's preexisting developmental and congenital hip condition and was not aggravated by or caused by any of the three work incidents.

51. Dr. Cebrian credibly pointed out various parts of the medical records, including an appointment just days prior to Claimant's first alleged work injury, where she had symptoms consistent with labral tears. He pointed out that Claimant suffers from two types of FAI that are not work related and that can cause labral tears. Dr. Cebrian pointed out that labral tears are often misdiagnosed as groin pain, thigh pain, back pain, and pelvic pain. He opined and the medical records support that Claimant had symptoms prior to July 5, 2014 that were consistent with bilateral labral tears.

52. Dr. Cebrian further opined that the Medical Treatment Guidelines do not support the claim in this case unless there is a repetitive rotational force or some type of high energy trauma. Dr. Cebrian opined there was neither in any of the alleged dates of injuries in this case. He opined the act of lifting up a pipe with a leg wouldn't have caused or aggravated a labrum tear as there is minimal force to the hip in that movement. He opined that bending over the side of the wet mixer similarly would not cause injury to the hip or cause or aggravate a labrum tear. He further opined that performing the cheese add back and lifting a cart would not impact the hips or qualify as trauma to the hips and that most of the pressure is in the back and the arms.

53. Dr. Cebrian also opined that the fact that Claimant's labrum tears are bilateral supports the conclusion that they are congenital and not caused by work and that it would be very unusual to have two incidents sufficient enough to cause trauma of the degree that would cause a labral tear within a couple of weeks of one another. He also opined that the two alleged mechanisms of injury to the left hip were very minor mechanisms of injury and would not have caused a labral tear on the left.

54. Dr. Cebrian is found credible and persuasive. His opinions take into account Claimant's past medical history and he clearly explained the prior medical records, prior pain that was consistent with labral tears, and the developmental and congenital condition of Claimant's bilateral hips. His opinions are also consistent with the Medical Treatment Guidelines.

55. Claimant's testimony, overall, lacks credibility. Claimant reported to her Employer on multiple occasions that her injury was pre-existing and that she did not want medical treatment. At hearing, she alleges new injuries and conditions and that she was denied medical treatment. This is inconsistent with her contemporaneous reports to supervisors, which are found more credible. Here, the medical records document pain consistent with bilateral labral tears prior to July 5, 2014 and Claimant's reports of pain on the three alleged dates of injury as new, acute, and different from any pain she experienced previously is not persuasive.

## CONCLUSIONS OF LAW

### *Generally*

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

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

### ***Compensability***

The Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a

pre-existing condition that is unrelated to the employment. *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). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Division's Medical Treatment Guidelines are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when providing care. *See* §8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003). Although the ALJ is not required to grant or deny medical benefits based on the Guidelines, the ALJ may appropriately consider the Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. No. 4-665-873 (Jan. 25, 2011); *Thomas v. Four Corners Health Care,* W.C. No. 4-484-220 (Apr. 27, 2009).

Claimant has failed to meet her burden to prove by a preponderance of the evidence that she suffered bilateral labral tears proximately caused by her employment on July 5, 2014, October 5, 2014, or October 20, 2014. She has failed to show, more likely than not, that any symptoms she experienced at work on the above dates were causally related to her employment. Rather, it is more likely that any symptoms she experienced while at work were the result of the natural progression of her pre-existing condition unrelated to her employment. Here, all providers agree that Claimant has underlying bilateral congenital developmental hip conditions, and FAI. Claimant also had symptoms in her bilateral hips consistent with labral tears for several years prior to the first alleged work incident on July 5, 2014. Dr. Cebrian is credible that the symptoms associated with labral tears can often be misdiagnosed and that labrum tears can be expressed as groin pain, pelvic pain, leg pain, or low back pain. Claimant had symptoms of pain in all these areas prior to July 5, 2014.

Claimant's testimony is also not found credible or persuasive. Although Claimant may have had the occurrence of symptoms at work, she was not asymptomatic prior to beginning the position in the cheese department. Rather, she had a history of several years of reported pain consistent with labral tears. The mere occurrence of her continued symptoms while at work does not establish that the employment aggravated or accelerated her pre-existing conditions. Rather, it is more likely that any symptoms Claimant experienced at work were the result of the natural progression of her pre-existing condition that is unrelated to her employment. Dr. Cebrian's testimony in this regard is credible and persuasive. Just a few days prior to her first alleged work injury, Claimant complained of right pelvic pain for the past several weeks. In October of 2012 Claimant was in such extreme pain that she reported to the emergency department complaining of pain in her bilateral lower abdomen and pelvic region. Claimant also reported to Dr. Manchester in July of 2014 that she had burning pain at the right side of her c-section incision for the past two years. Dr. Cebrian credibly opined that these consistent symptoms reported by Claimant are consistent with labral tears. Further, Dr. Cebrian credibly opined that none of the incidents reported by Claimant were sufficient to cause trauma to her hips to indicate labral tears occurred at work. His opinions are

consistent with the Medical Treatment Guidelines and are persuasive. The ALJ finds the persuasive evidence and testimony supports the conclusion that Claimant suffered no acute injury or aggravation to her pre-existing conditions on July 5, 2014, October 5, 2014, or October 20, 2014 and that she simply continues to suffer from symptoms that she has had for several years. Further, the mechanisms of injury as described by Claimant would not be sufficient enough to cause labral tears. Although Claimant reports subjectively that her symptoms of groin and pelvic pain have increased since July of 2014, the pain she is experiencing is located in the same areas and is similar to pain she has had for several years. Even if the pain has increased, it is more likely due to the natural progression of her pre-existing condition than due to a work injury. Claimant has failed to meet her burden to show that her employment aggravated or caused her bilateral labral tears.

## ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she suffered compensable injuries to her bilateral hips arising out of or in the course of her employment on July 5, 2014, October 5, 2014 or October 20, 2014. Her claims in WC cases 4-966-229-01, 4-980-046-01, and 4-980-045-01 are denied and dismissed.

2. Claimant is not entitled to medical benefits or treatment for her bilateral hips as the claim is not compensable.

3. Determination of average weekly wage is moot.

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: November 4, 2015 /s/ Michelle E. Jones

#JUHA24700D1C7Nv 2

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

## ISSUES

1. Whether Claimant proved, by a preponderance of the evidence, that he suffered a compensable injury in the course and scope of his employment on April 24, 2015.

2. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits and that treatment he received was authorized, and reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

## FINDINGS OF FACT

1. The Claimant worked for Employer as an operator and rig hand. In this position, his duties included labor work, picking up heavy pipes, going up and down the snubbing unit ladder and going up and down rig derricks. The Claimant testified that he first started working for Employer as a rig hand for 15 months and had no problems with his knees during that time. After 15 months, the Claimant's job changed to operator where he would stand in one place on the rig for his normal shift of approximately 10 hours. As of April 24, 2015, the Claimant testified that he was again working as a rig hand. The Claimant's testimony regarding this employment and duties with Employer was credible and is found as fact.

2. The Claimant worked the night shift on April 24, 2015, and was performing the duties of a rig hand by repeatedly climbing up and down the snubbing unit ladder. Between 7:00 p.m. and 8:00 p.m. on April 24, 2015, approximately 1-2 hours into his shift, the Claimant testified that he was going up the snubbing unit ladder and grabbing the rail with his right hand with a wrench in his left hand when he felt an immediate sensation of pain with a pop of his knee. The pain then increased over the next ½ hour and the Claimant stated that he never felt anything like that before. The Claimant's testimony regarding his mechanism of injury was credible and consistent with the medical records, and is found as fact.

3. The Claimant testified that he was able to work for approximately half an hour after he felt the pop and experienced the initial pain on the ladder, but that his pain increased and he was unable to bear any weight on his left knee. The Claimant testified that he first notified his operator, Alfonzo "Cowboy" Lopez, that he hurt his left leg on the snubbing unit ladder and asked him to notify Rusty Loya, the tool pusher, that he was injured. The Claimant testified that he was not present during the time that Mr. Lopez and Mr. Loya spoke over the phone regarding his injury; however, the Claimant later

also personally spoke to Mr. Loya over the phone and informed him that he hurt his left knee on the snubbing unit ladder. The Claimant further testified that after he reported his injury to Mr. Lopez and Mr. Loya, that Mr. Loya asked him to write a report stating that the injury was not work-related. The Claimant also testified that he was not directed to any medical care or able to return to his normal work duties thereafter.

4. The Claimant testified that after refusing to write a report stating that his injury was not work-related, Mr. Loya asked him to run the pipe wrangler on Rig 31. The Claimant testified that he went to Rig 31, but upon arrival at Rig 31, he was unable to get out of the truck and had to grab onto the side of the truck with his left hand since he could not put any pressure on his left knee. Upon realization that he was completely unable to work due to his inability to bear any weight on his left knee, Claimant waited for the Rig 31 operator, Mr. Mesa, and told him that he had an incident on Rig 34 and that he was sent to him to run pipe wrangler but that he was unable to do so because he could not stand up at all. The Claimant further testified that he asked Mr. Mesa to contact Mr. Loya to let him know and that he went home thereafter. The Claimant's testimony with respect to the events that occurred at Rig 31 was credible and is found as fact.

5. The Claimant tried to sleep when he got home. The Claimant testified that the next day he woke up and his knee was swollen and in pain he sought treatment at Platte Valley Medical Center. On April 25, 2015, the Claimant's wife transported him to Platte Valley Medical Center and the Claimant was advised that he was unable to return to work until he was cleared by "Ortho/Work Comp." On April 25, 2015, the Claimant was diagnosed with internal derangement of his left knee. On that day, the Claimant reported to Lane Looka, N.P. at Platte Valley Medical Center that he was 'on ladders yesterday' and that while he walked up stairs he felt and heard pop to his left knee with swelling and was unable to bear weight. The Claimant was referred to a work comp provider and told that he needed an outpatient MRI (Claimant's Exhibit 7, pp. 22-23).

6. The Claimant testified that he brought a yellow piece of paper (of which Exhibit 7, p. 22 is a copy) to Skip the Safety Manager on the Monday after April 24, 2015. The Claimant testified that he did not tell Skip or anyone else at his Employer that he injured himself at home. Rather, he testified that he consistently told them that his knee injury happened at work. The Claimant completed a written statement describing the events of April 24, 2015 and provided it to his Employer on April 27, 2015. In his statement, the Claimant provides the following:

> Went to work on Friday 4/24/15 night shift. Went to work on Friday 4/24/15 night shift. Went up snubbing unit ladder to rig up tongs + bells + elevators. Was constantly going up and down the snubbers ladder to the floor to get some tools. I got to the point were [sic] my knee started to aggrivate [sic] me. Kept on working. It got to the point where I couldn't put any weight on my leg. Told the operator. Operator got a hold of pusher, Rusty. By that time my knee was swalled [sic]. Was ask [sic] by the pusher

what had happened. Told pusher aggrivated [sic] my knee walking up and down ladder….. (Claimant's Exhibit 4; Respondents' Exhibit E).

7. On April 30, 2015, the Claimant sought treatment with Dr. Aaron Baxter at Mountain View Orthopedics. The Claimant advised Dr. Baxter that he was going up and down a ladder when he felt a sharp pop on the medial aspect of the knee and that his knee continues to be very painful. Dr. Baxter noted the Claimant was treated in the emergency department and was placed in a knee immobilizer and used crutches to avoid putting weight on his leg. Dr. Baxter diagnosed the Claimant with a left medial meniscus tear and referred him for a left knee MRI (Claimant's Exhibit 5, pp. 18-19).

8. On May 7, 2015, the Claimant underwent an MRI of his left knee. The MRI findings included (1) moderate radial tear medial meniscal body. Moderate to severe medial compartment osteoarthritis. (2) Mild contusion anterior lateral tibial plateau. (3) Large knee effusion with synovitis. (4) Prepatellar and infrapatellar subcutaneous edema with adventitial bursitis. (5) Possible grade 1 sprain of the ACL without tear (Claimant's Exhibit 6, pp. 20-21; Respondents' Exhibit H, pp. 17-18).

9. Respondents filed a Notice of Contest on May 12, 2015 (Claimant's Exhibit 1) and the Claimant has continued receiving medical treatment through his personal health insurance.

10. On May 28, 2015, Dr. Baxter performed a left knee arthroscopy and partial medial meniscectomy to repair the Claimant's left knee medial meniscal tear (Claimant's Exhibit 5, pp. 10-11; Respondents' Exhibit H, pp. 20-21).

11. The Claimant testified that he has not been asked to return to work since his date of injury of April 24, 2015 nor has any physician or medical provider told him that he could return to work full duty. The Claimant's testimony regarding his inability to return to work in any capacity is credible, not contested and is found as fact. The Claimant continues to experience left knee pain.

12. The Claimant saw Robert Botnick, PA-C at Mountain View Orthopedics for a post-operative follow up visit. Mr. Botnick noted the Claimant's surgical sutures and staples were removed and the Claimant was provided with arthroscopic photos from his surgery and they were explained to him. The Claimant was referred for physical therapy (Claimant's Exhibit 5, p. 9).

13. With respect to knee pain prior to April 24, 2015, the Claimant testified that he previously sought medical treatment on March 25, 2015, for left knee pain. The Claimant testified that he told Brian Drake, PA-C at Greeley Med Care that he had left knee pain as a result of the motion of how he runs the rig with his right hand and right side which requires him to twist and rotate his body on a constant basis (Claimant's Exhibit 8, pp. 34-35). The Claimant testified that he was able to continue bearing weight on his left knee, that he did not have work restrictions and that he was working at full duty after March 25, 2015, and immediately before his date of injury on April 24, 2015, which is supported by the Claimant's payroll records for that time period (Claimant's

Exhibits 2, pp. 2-3). The Claimant's testimony regarding his prior left knee pain and his ability to work without restrictions at full duty was credible and is found as fact as it is supported by the paystubs which document that he worked his full hours and is also supported by the medical records.

14. Rusty Loya, was a rig supervisor for Employer, testified by telephone on the second day of hearing in this matter. He testified that he was familiar with the Claimant and had been the Claimant's rig supervisor for 1-2 months. The Claimant was assigned to his rig on April 24, 2015. Mr. Loya testified that on the night of April 24, 2015, the Claimant informed him that his knees were bothering him and that he wanted to go home. Mr. Loya subsequently called his supervisor, Jason Anderson, and reported that the Claimant was stating that his knees were hurting and then asked the Claimant if he wanted to do some light duty work and if he would be willing to write a statement about not being hurt on the job site. Mr. Loya testified that Claimant told him he would not make a statement saying he did not get hurt at on the job site because he experienced a similar situation with Employer years before regarding his broken finger and he never got appropriate medical treatment for that because he "took one for the team." Mr. Loya testified that that the Claimant refused to make a statement alleging that he was not hurt on the job but that he accepted his offer of light duty and so Mr. Loya sent the Claimant to perform different work for the night. Mr. Loya testified that he told the Claimant he could not go to the doctors if he injured himself at work because if it happened at work, he needed to inform his bosses right away. Mr. Loya testified that he did not believe the Claimant sustained a work-related injury because, from what he saw, the Claimant was walking just fine.

15. On cross-examination, Mr. Loya testified he was the nighttime supervisor for the rig where Claimant's crew Alfonzo "Cowboy" Lopez; Florentino Ibarra and Leonardo Solis were stationed. Mr. Loya testified that as the nighttime supervisor for that rig, he arrived at about 5:30 p.m. and that Claimant reported his knee injury at approximately 11:00 p.m. on April 24, 2015. Mr. Loya testified that Claimant worked from approximately 6:00 p.m. to 11:00 p.m. Mr. Loya testified that he believes Claimant returned to work on the rig floor; however, he did not personally observe Claimant immediately after the work incident since Mr. Loya was not present on the jobsite for the hours between Claimant's initial reporting of his injury to Mr. Lopez and his arrival at the jobsite some time later. Mr. Loya testified that in 2015, approximately twelve people (two crews and two people) were laid off from Employer. Mr. Loya testified that he prepared the incident report for his records because he was incident-free and he did not want there to be an incident on his rig if one had not actually occurred. Mr. Loya further testified that a serious incident on his rig could shut it down and result in an OSHA investigation.

16. On redirect examination at the hearing, Mr. Loya testified again that he believed that the Claimant was able to bear weight on his leg because he went to get his gear. Mr. Loya testified that the Claimant did not finish out his shift and that he had no further contact with Claimant after April 24, 2015.

17. Mr. Loya's testimony regarding the unrelatedness of the Claimant's work injury is not persuasive. Mr. Loya testified that the Claimant reported his knee injury, that he asked the Claimant to make a statement saying he was not hurt on the job site and that there was an incentive to avoid reporting incidents on his rig. Although Mr. Loya testified that he witnessed the Claimant able to bear weight on his leg, credible evidence presented at the hearing established that Mr. Loya did not come into contact with the Claimant for several hours after the Claimant initially reported an injury to his supervisor Mr. Lopez. Further, the testimony of Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the reporting and mechanism of his injury, and the Claimant's inability to bear weight on his leg.

18. Jason Anderson, Field Supervisor at Employer, testified at the hearing that he was made aware of the Claimant's knee injury when Mr. Loya called and notified him that Claimant was complaining of knee pain from going up and down the ladder and that he wanted to go to the hospital. Mr. Anderson testified that at no point in time did he personally see or meet with Claimant on the evening of April 24, 2015, or the morning of April 25, 2015. Mr. Anderson stated it was approximately 1:00 a.m. on April 25, 2015, and he did not go to the Claimant's jobsite. Mr. Anderson also testified that he asked Mr. Loya to ask the Claimant to write a statement saying nothing happened at work and that the Claimant was leaving on his own will to go to the hospital to get his knees checked since, if Claimant left the jobsite, he would be required to notify the Safety Department. Mr. Anderson testified that after he was made aware of Claimant's refusal to give a written statement saying he was not hurt at work, he transferred Claimant to another rig where he would be on ground level and more stationary. Mr. Anderson testified that he did not notify the Safety Department regarding this particular matter because, according to his personal knowledge, no incident happened at work since other employees were telling him that they didn't see any incident involving the Claimant on location.

19. Mr. Anderson testified that employees get training to report work injuries to rig supervisors and Mr. Anderson acknowledged that the Claimant did notify his operator, Alfonzo "Cowboy" Lopez and tool pusher Rusty Loya about a problem. Mr. Anderson testified that after Claimant properly reported his knee condition to Mr. Lopez and Mr. Loya, Mr. Loya contacted Mr. Anderson regarding the incident. Mr. Anderson testified that he did not personally meet with or see the Claimant until Monday, April 27, 2015, when the Claimant showed up at the shop in a leg splint and crutches. Mr. Anderson testified that his encounter with the Claimant on April 27, 2015, was the only personal encounter he had with the Claimant regarding the injury that is the subject of this case. Mr. Anderson testified that on April 27, 2015, he spoke with Claimant's crew Alfonzo "Cowboy" Lopez; Florentino Ibarra and Leonardo Solis and tried to get them to do a written statement regarding Claimant's incident.

20. Mr. Anderson's testimony regarding the unrelatedness of the Claimant's work injury is not persuasive. Mr. Anderson testified that the Claimant properly reported his knee injury (although Mr. Anderson concurrently testified that it was not a work

injury, but something that happened outside of work). He further admitted that he asked the Claimant to make a statement saying he was not hurt on the jobsite through Rusty Loya and that he did not notify the Safety Department regarding this particular matter because, according to his personal knowledge, no incident happened at work. However, at no point in time during the evening of April 24, 2015, or the morning of April 25, 2015, did Mr. Anderson personally meet or speak with the Claimant regarding the work incident. The testimony of Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the relatedness and mechanism of his injury.

21. Ronald Scott Laird, HSE Coordinator at Employer, testified at the hearing as to his belief that the Claimant did not report a work injury. Mr. Laird testified that on the morning of April 25, 2015, the Claimant contacted him by phone stating that his knees hurt and had been hurting for 8-10 weeks and he did not recall an instant at work that he hurt his knee. Mr. Laird testified that up to that point, he had not spoken to anyone regarding Claimant's work injury and that this was the first notification he received regarding the same. Neither Rusty Loya nor Jason Anderson had reported an incident for Claimant as of that time. Mr. Laird testified that the Claimant told him he was going to a personal physician since he had an appointment on the Wednesday after April 24, 2015. Mr. Laird further testified that he advised the Claimant to receive treatment through his personal health insurance if he persisted to have knee problems over the weekend. Mr. Laird testified that Employer's protocol regarding an injured worker is that the injured worker is to advise the tool pusher of their injury and, if they are not present, to contact field supervisor Jason Anderson wherein either the tool pusher or Jason Anderson will contact HSE so they can go to the location immediately. Mr. Laird testified that the Claimant returned to work on Monday, April 27, 2015 on crutches with a knee immobilizer brace and provided paperwork from the emergency department visit.

22. On cross-examination, Mr. Laird agreed that if the Claimant had been unable to bear weight on his leg prior to April 24, 2015, he would not have been able to do his job. Mr. Laird also testified that Employer has laid off about 200 workers between January 2015 and September 2, 2015 (the date of his testimony). Mr. Laird testified that he does not know the Claimant's work status and the last time he saw the Claimant was on Monday, April 27, 2015.

23. Mr. Laird's testimony as it relates the Claimant's reporting of his injury is not found persuasive. Mr. Laird testified that he did not speak to the Claimant regarding his work incident until the day after, on April 25, 2015, and that the Claimant had not reported a work injury that occurred on April 24, 2015. However, the testimony of the Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the reporting and mechanism of his injury.

24. Skip Bolding, HSE Coordinator at Employer, testified as to his belief that the Claimant did not sustain a work-related injury. Mr. Bolding testified that he learned

of the Claimant's incident on April 27, 2015, when the Claimant presented at Employer's facility in Littleton in a leg immobilizer and crutches with his son at approximately 8:30 a.m. or 9:00 a.m. Mr. Bolding testified that the Claimant searched specifically for him and that the Claimant handed him paperwork stating that he had been taken off work due to a work-related injury. Mr. Bolding testified that upon receipt of the Claimant's work restrictions, he questioned the Claimant regarding the specifics of his work incident. Mr. Bolding testified that the Claimant advised him he worked the night of Friday, April 24, 2015, and hurt his knee. Mr. Bolding testified that the Claimant advised him he already had a doctor appointment scheduled and that he asked the Claimant why he did not properly report the injury by circumventing company policy by going to the doctor without advising someone. Mr. Bolding testified that the Claimant told him he already had an appointment to get his other knee checked out. Mr. Bolding testified that, based on his knowledge, there were no complaints or reported incidents prior to April 24, 2015, and that he first learned of the Claimant's left knee medial meniscal tear on Monday, April 27, 2015. Mr. Bolding reiterated prior testimony, and testimony of other witnesses, that Employer's incident notification protocol requires injured workers to immediately notify their supervisor of an injury and that the supervisor in turn notifies the agency or personnel on call or on staff supervising that particular area. When asked whether the Claimant's supervisor Rusty Loya should have notified Mr. Bolding, Mr. Bolding testified that Mr. Loya only had to notify him if Mr. Loya had been notified and the immediate supervisor had been notified. Mr. Bolding stated that he could not answer whether or not he ever filed a First Report of Injury in this case. Although Respondents contend through Mr. Bolding and others that the Claimant did not follow proper protocol in reporting his injury, the weight of the evidence clearly establishes that the Claimant notified his operator, Mr. Lopez and his tool pusher, Mr. Loya and that Mr. Loya should have advised field supervisor, Jason Anderson and the Safety Department of the Claimant's knee injury.

25. Mr. Bolding testified to having knowledge that, per Colorado Workers' Compensation law, injured workers are only required to report injuries to their supervisors and that it would have been up to him to notify the Division of Workers' Compensation by filing an Employer's First Report of Injury after being notified of a work injury. Mr. Bolding also testified that either himself or his fellow HSE Coordinator, Scott Laird, are the people to whom work restrictions are generally provided.

26. Mr. Bolding's testimony regarding the unrelatedness of the Claimant's work injury is not persuasive. Mr. Bolding testified and confirmed that Claimant properly reported his knee injury and that he was prompted to question the validity and relatedness of Claimant's knee injury due to not having specific information that field supervisor Jason Anderson and tool pusher Rusty Loya should have provided him on the date of the injury. The testimony of Claimant, supported in the medical records, and by the later testimony of Mr. Solis, is found more credible and persuasive surrounding the reporting and mechanism of his injury.

27. Leonardo Solis, Derrick Hand at Employer and the Claimant's co-worker, testified as to his belief that the Claimant sustained a work-related injury. Mr. Solis

credibly testified that prior to April 24, 2015, he never saw Claimant ambulate with a limp. The Claimant drove a crew truck and picked Mr. Solis up for work every day, including April 24, 2015. Mr. Solis credibly testified that on April 24, 2015, around 7:00-8:00 p.m. the Claimant informed him he got hurt and that he had a lot of knee pain. Mr. Solis testified that he advised the Claimant to follow Employer's policies by reporting the injury to their supervisor and operator immediately. Mr. Solis credibly testified that he personally witnessed the Claimant report his injury to their operator, Alfonzo "Cowboy" Lopez. Mr. Solis further testified that he personally provided the Claimant with HSE Coordinator Scott Laird's phone number and witnessed the Claimant attempt to contact him to report his injury but that Mr. Laird did not answer his phone. Mr. Solis also testified that Mr. Loya was not on the jobsite at the time Claimant reported his injury to Mr. Lopez. Mr. Solis testified that prior to tool pusher, Rusty Loya, arriving at the scene of the incident, the Claimant could not bear any weight on his leg and that he had to assist the Claimant by essentially carrying the weight of his body by allowing the Claimant to lean on him. Mr. Solis credibly testified that Mr. Loya arrived at the scene of the incident hours after the initial reporting and that he was the only co-worker who personally witnessed the Claimant's inability to bear weight on his leg for the hours between the Claimant's initial reporting of his injury to Mr. Lopez and the time Mr. Loya arrived at the scene of the incident. Mr. Solis further testified that by the time Mr. Loya showed up, the Claimant was getting worse and he had to help the Claimant to the truck because the Claimant couldn't put weight on the leg and Mr. Loya was trying to send him to another location.

28. During the hearing testimony of Mr. Solis, Claimant's Exhibit 10 was offered and entered into evidence as proof of Mr. Solis being asked to sign a document that he did not understand, author or agree with the contents. Mr. Solis testified that the document was written in English and although he speaks English, he cannot read and write in English sufficient to understand the contents of Exhibit 10. When portions of the document were read out loud to Mr. Solis at the hearing, Mr. Solis was asked if it was true that the Claimant did not state he was hurt on the jobsite and Mr. Solis testified that it was not true because he saw the Claimant telling Mr. Lopez and saw the Claimant trying not to walk because he was hurt. Mr. Solis credibly testified that he signed Exhibit 10 only after Mr. Loya informed him, Alfonzo "Cowboy" Lopez and Florentino Ibarra that the Claimant and all of them would be fired unless they signed a statement saying that Claimant did not suffer a work-related injury. Mr. Solis testified that he merely signed the document because he felt intimidated stating that if he did not sign it, he was afraid that he would be fired.

29. Mr. Solis' testimony regarding the relatedness of the Claimant's left knee injury is persuasive as Mr. Solis is the only witness who testified against his own personal interest as a present employee of Employer. The testimony of Mr. Solis and the Claimant is found more credible and persuasive surrounding the reporting and mechanism of Claimant's injury.

30. The Claimant's testimony overall is credible and persuasive and supported by the medical records. Based on his testimony, the testimony of Mr. Solis and the

medical records, it is more likely than not that the Claimant hurt his knee going up and down the snubbing ladder at Employer's worksite while performing his normal work duties.

## 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). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the right of the Claimant nor in favor of the rights of the Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 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).

In this case, the ALJ finds that the Claimant's testimony was generally credible and persuasive and supported by the medical records in evidence. His testimony was also supported by Mr. Solis and, when taken together and viewed in context with the medical records, their testimony represents the most likely version presented of the facts surrounding the mechanism of Claimant's injury and his reporting of the injury to supervisors with the Employer. The Employer witnesses Rusty Loya, Jason Anderson, Scott Laird and Skip Bolding were not as persuasive or credible and there were motives present for these witnesses to insist the Claimant did not suffer a work injury, even if he had. Further, none of these witnesses were actually present at the time of the Claimant's injury or shortly thereafter, although Mr. Loya apparently arrived on the scene a couple of hours later. Rather than following the company procedures that these witnesses testified were policy when an employee reports an injury, some of the

Employer witnesses apparently intimidated Mr. Solis and other employees to sign a written statement to the effect that the Claimant was not injured at work and instead had told them that he was injured at home. Overall, in reviewing the evidence as a whole, the ALJ finds that the Employer witnesses were not credible with respect to the location, timing and nature of the Claimant's injury or his reporting of that injury to supervisors.

### ***Compensability***

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo.App. Div. 5 2009). The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

The mechanism of injury described by the Claimant during testimony at hearing, which is consistent with his description to medical providers, is a mechanism of injury that is consistent with the physical findings on examination and the meniscal tear on his MRI. The Claimant's left knee injury was significant enough to require work restrictions which would prevent him from working for Employer due to the need to avoid putting any weight on the leg prior to surgery and in post-operative recovery. The injury

occurred during Claimant's work shift while he was performing activities that are a specific part of his job duties. Based upon the Claimant's supported testimony and the medical records confirming Claimant's physical condition, it is found that the Claimant suffered a left knee medial meniscal tear while in the course and scope of his employment with Employer. This is supported by Mr. Solis' testimony that he never saw Claimant ambulate with a limp prior to April 24, 2015, and that it was only immediately after Claimant's knee injury on April 24, 2015, that he witnessed Claimant's inability to bear any weight on his left knee. Although it is likely that the Claimant suffered from a preexisting arthritic knee condition, the work activities on April 24, 2015 permanently aggravated, accelerated and combined with his condition to produce the need for immediate and ongoing treatment.

Based upon the Claimant's supported testimony and the medical records confirming the Claimant's physical condition, it is found that the Claimant suffered a compensable injury on April 24, 2015.

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

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Under C.R.S. §8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat

the injury. Where an employer fails to offer to provide a Claimant with medical treatment in the first instance, the right of selection passes to the Claimant. C.R.S. § 8-43-404 (5)(a)(I)(A); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988).

Authorized providers also include those medical providers to whom an authorized treading physician ("ATP") refers a claimant in the normal progression of authorized treatment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

***Emergency Medical Care***

Under C.R.S. § 8-43-404(5)(a), the Employer or Insurer is afforded the right in the first instance to select a physician to treat the injury. Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

However, in an emergency situation, an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical attention. A medical emergency allows an injured party the right to obtain treatment without undergoing the delay inherent in notifying the employer and obtaining his referral or approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing medical service and the employer then has the right to select a physician. *Sims v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 777 (Colo. App. 1990).

Awards of emergency medical treatment have been upheld where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment. See *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992). However, compensable emergency treatment is not restricted to such circumstances. *Lutz v. Western Pacific Airlines, Inc.*, W.C. No. 3-333-031 (ICAO, December 27, 1999). There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether the claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. The question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case. An ALJ's determination whether there was a bona fide emergency or not will be upheld if supported by substantial evidence. *Hoffman v. Wal-mart Stores, Inc.*, W.C. No. 4-774-720 (ICAO, January 12, 2010); *Timko v. Cub Foods*, W. C. No. 3-969-031 (ICAO, June 29, 2005).

### *Application of the Law to the Fact of this Case*

After reporting an injury to his supervisors onsite on the night of April 24, 2015 when he suffered his compensable injury, the Claimant was ultimately sent home and was not provided any referrals for medical treatment with workers' compensation physicians. In fact, per the testimony of Employer witness, Mr. Laird, the Claimant contacted him by phone on the morning of April 25, 2015 and Mr. Laird told him that this was not a workers' compensation matter since no specific incident was reported to his supervisors and that the Claimant should seek treatment through private health insurance if his knee continued to bother him over the weekend.

The Claimant testified that on April 25, 2015, his knee was swollen and in pain and so he sought treatment at Platte Valley Medical Center. On April 25, 2015, the Claimant's wife transported him to Platte Valley Medical Center and the Claimant was advised that he was unable to return to work until he was cleared by "Ortho/Work Comp." On April 25, 2015, the Claimant was diagnosed with internal derangement of his left knee. On that day, the Claimant reported to Lane Looka, N.P. at Platte Valley Medical Center that he was 'on ladders yesterday' and that while he walked up stairs he felt and heard pop to his left knee with swelling and was unable to bear weight. The Claimant was referred to a work comp provider and told that he needed an outpatient MRI.

The Claimant testified that he brought a yellow piece of paper (of which Exhibit 7, p. 22 is a copy) to Skip the Safety Manager on the Monday after April 24, 2015. The Claimant testified that he did not tell Skip or anyone else at his Employer that he injured himself at home. Rather, he testified that he consistently told them that his knee injury happened at work, including his written statement provided on April 27, 2015. However, the Employer did not provide the Claimant with a designated provider list at this time.

On April 30, 2015, the Claimant sought treatment with Dr. Aaron Baxter at Mountain View Orthopedics. The Claimant advised Dr. Baxter that he was going up and down a ladder when he felt a sharp pop on the medial aspect of the knee and that his knee continues to be very painful. Dr. Baxter noted the Claimant was treated in the emergency department and was placed in a knee immobilizer and used crutches to avoid putting weight on his leg. Dr. Baxter diagnosed the Claimant with a left medial meniscus tear and referred him for a left knee MRI. On May 7, 2015, the Claimant underwent an MRI of his left knee. The MRI findings included (1) moderate radial tear medial meniscal body. Moderate to severe medial compartment osteoarthritis. (2) Mild contusion anterior lateral tibial plateau. (3) Large knee effusion with synovitis. (4) Prepatellar and infrapatellar subcutaneous edema with adventitial bursitis. (5) Possible grade 1 sprain of the ACL without tear.

After this, the Respondents filed a Notice of Contest on May 12, 2015 and the Claimant continued receiving medical treatment through his personal health insurance.

On May 28, 2015, Dr. Baxter performed a left knee arthroscopy and partial medial meniscectomy to repair the Claimant's left knee medial meniscal tear. The Claimant was not returned to work since his date of injury of April 24, 2015 nor has any physician or medical provider told him that he could return to work full duty. The Claimant continues to experience left knee pain. The Claimant saw Robert Botnick, PA-C at Mountain View Orthopedics on June 5, 2015 for a post-operative follow up visit. Mr. Botnick noted the Claimant's surgical sutures and staples were removed and the Claimant was provided with arthroscopic photos from his surgery and they were explained to him. The Claimant was referred for physical therapy.

With respect to whether the emergency department treatment was a "bona fide emergency" on April 25, 2015, the ALJ finds that the visit to Platte Valley Medical Center did constitute a bona fide emergency. A Claimant should not fear repercussions for obtaining emergency medical care when there is a reasonable and authentic belief that a medical condition is worsening due to an escalation of symptoms. Here, the Claimant credibly testified that his knee was continuing to swell and he was not able to place weight on his leg without pain. He received no alternative referral of medical care from his Employer. In looking at the whole picture over the course of the Claimant's treatment, seeking emergency treatment at Platte Valley Medical Center is found to be reasonable and necessary. This was the one and only emergency care visit over the course of the Claimant's treatment for this work injury and the evidence does not support an inference that the Claimant was attempting to circumvent the workers' compensation scheme to obtain inappropriate treatment.

In fact, the information gleaned as a result of the emergency room visit was ultimately incorporated by Dr. Baxter, who participated in the diagnosis and continued care of the Claimant. Because he was not provided with medical treatment for his left knee injury, the Claimant treated with Dr. Baxter who diagnosed a medial meniscus tear and performed surgery. The Claimant then followed up with the Mountain View Orthopedics clinic and was referred for physical therapy. At the hearing the Claimant testified that he continues to have knee pain. There was no testimony from medical professionals in this case, so the medical opinions are only those expressed in the admitted medical records and the Claimant's own testimony regarding his condition.

The conservative medical care and the surgical care that the Claimant received to date from the physicians and medical personnel at Mountain View Orthopedics, and any referrals, is also reasonably necessary to treat the Claimant's work-related condition. The medical records do not indicate that the Claimant's authorized treating physicians have placed the Claimant at MMI or released him to return to work without restrictions. The Claimant has established that he is entitled to further evaluation of his left knee condition to determine if he requires any additional medical treatment to cure and relieve the Claimant from the effects of the injury in accordance with the Act.

## ORDER

It is therefore ordered that:

1. The Claimant proved that he suffered a compensable work injury on

2. Medical treatment provided by Platte Valley Medical Center and Mountain View Orthopedics (and any referrals from the providers there) was reasonably necessary to cure and relieve Claimant from the effects of his injury and Respondents shall be liable for payment for this medical treatment.

3. The Claimant is entitled to further medical benefits to treat his symptoms of his left knee condition which are causally related to the April 24, 2015 work injury, if any, as determined by his authorized treating physicians, and the Respondents is responsible for payment for such treatment in accordance with the Medical Fee Schedule and the Act.

4. All matters not determined herein are reserved for future

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: November 9, 2015

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

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## ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the request for additional lumbar fusion surgery by Jeffrey B. Kleiner, M.D. is reasonable, necessary and causally related to his September 8, 1989 industrial injury.

## FINDINGS OF FACT

1. On September 8, 1989 Claimant suffered a compensable industrial injury to his lower back. On March 2, 1993 he underwent fusion surgery at L2-L3 and L3-L4 with Orderia Mitchell, M.D.

2. On May 17, 1996 Claimant reached Maximum Medical Improvement (MMI) and received a 34% whole person impairment rating. On April 11, 1997 Respondents filed a Final Admission of Liability (FAL). Claimant has continued to receive medical maintenance benefits.

3. Claimant subsequently sought an anterior/posterior interbody fusion at L5-S1. The parties proceeded to a hearing on April 19, 2000. On May 17, 2000 Claimant's request for surgical intervention was denied because it was not reasonable or necessary. Numerous physicians noted that Claimant was only a marginal surgical candidate from a psychological perspective.

4. Approximately five years later Claimant sought authorization for disc replacement surgery recommended by Jeffrey B. Kleiner, M.D. An August 23, 2005 order denied Claimant's request for surgery. The ALJ concluded that Claimant was not an appropriate surgical candidate for both physical and psychological reasons.

5. In the 10 years since Claimant's request for disc replacement surgery was denied, he has continued to receive treatment from Richard Stieg, M.D. and psychiatrist Bert Furmansky, M.D. During the period Claimant suffered a psychotic breakdown and was diagnosed with a psychotic disorder that has been treated with psychotropic medications.

6. Dr. Steig referred Claimant back to Dr. Kleiner in 2015. On April 8, 2015 Dr. Kleiner remarked that Claimant's CT scan revealed a pseudarthrosis at the L2-L3 level, a solid fusion at the L3-L4 level, disc space collapse at the L5-S1 level and degenerative changes at the L4-L5 level. Dr. Kleiner recommended a surgical procedure that included an anterior spinal fusion at the L4-L5 and L5-S1 levels as well as a repair of the L2-L3 level with segmental fixation.

7. Brian Reiss, M.D. evaluated Claimant in 2005 and 2015. In 2005 Dr. Reiss reviewed a CAT scan and determined that Claimant had a solid fusion at both the L4-L5 and L5-S1 levels. He also remarked that Claimant did not have a pseudoarthrosis. The CAT scan showed bone formation in the anterior column at both the L2-L3 and L3-L4 levels. Dr. Reiss concluded that Claimant was a poor surgical candidate.

8. Claimant also visited Thomas Puschak, M.D. at Panorama Orthopedics. Dr. Puschak determined that Claimant had a solid fusion from L2-L4 and did not recommend any additional surgery.

9. When Dr. Reiss evaluated Claimant in 2015 he reviewed an updated MRI and CAT scan. He determined that there was no pseudoarthrosis and the radiology report reflected a solid fusion. Dr. Reiss noted that it would be extremely unreasonable to consider a fusion between L4 and the sacrum because the procedure would convert the prior two level failed fusion into a four level fusion. Dr. Reiss explained that, considering Claimant's widespread degeneration and lack of response to a prior fusion surgery, additional surgery would be extremely unlikely to decrease Claimant's pain or increase his function. Accordingly, the surgery proposed by Dr. Kleiner does not constitute reasonable and necessary medical care relating to Claimant's industrial injury.

10. Dr. Reiss commented that the proposed fusion would also not be reasonable and necessary under the Colorado Medical Treatment Guidelines (Guidelines). He remarked that the Guidelines require the completion of all appropriate conservative care but Claimant has never completed a conservative care program and has refused to participate in a conservative treatment program. The Guidelines also require a psychological evaluation. However, Claimant's psychological treatment reveals "major psychological concerns that are a distinct roadblock to consideration of any surgical intervention at all." Dr. Reiss explained that Claimant's continued complaints of lower back pain are unrealistic, out of proportion to his objective findings and represent a deconditioned state over a long period of time. He noted that Claimant also has unrealistic expectations about his surgical outcome.

11. Claimant has not worked since 1990. Other than visiting Drs. Furmansky and Stieg on a regular basis and receiving psychotropic medication, Claimant has not undergone any other medical treatment in the previous 10 years. Dr. Furmansky noted that Claimant is "focusing on the desire for surgery" and although his pain remains at the same level, he "still want[s] to go through surgery."

12. On July 15, 2015 Claimant was evaluated by psychiatrist Gary S. Gutterman, M.D. Dr. Gutterman confirmed that as early as 2005 numerous physicians noted that Claimant was exhibiting an odd and bizarre presentation characteristic of a psychiatric process. In 2009 Dr. Stieg had determined that Claimant suffered from a psychotic disorder that was unrelated to his Workers' Compensation claim. Dr. Gutterman summarized that Claimant has a Schizotypal personality disorder that includes passive dependent character traits. He also has a chronic pain disorder

resulting in pain complaints that are considerably out of proportion to physical findings. Claimant has been highly attached to his symptoms of pain and maintained a passive dependent "professional injured patient" stance in the Workers' Compensation system. Dr. Gutterman concluded that Claimant's Schizotypal personality disorder, prior psychotic expressions, need for antipsychotic medication and marked somatization are unrelated to his September 8, 1989 industrial injury.

13. Claimant has failed to demonstrate that it is more probably true than not that the request for additional lumbar fusion surgery by Dr. Kleiner is reasonable, necessary and causally related to his September 8, 1989 industrial injury. Dr. Reiss persuasively explained that Claimant does not suffer from a pseudoarthrosis and the radiology report reflected a solid fusion. He noted that it would be extremely unreasonable to consider a fusion between L4 and the sacrum because it would convert the prior two level failed fusion into a four level fusion. Dr. Reiss explained that, considering Claimant's widespread degeneration and lack of response to a prior fusion surgery, additional surgery would be extremely unlikely to decrease Claimant's pain or increase his function. He maintained that the proposed fusion would also not be reasonable and necessary under the Guidelines because they require the completion of all appropriate conservative care but Claimant has never completed a conservative care program. Moreover, Claimant's psychological treatment reveals "major psychological concerns that are a distinct roadblock to consideration of any surgical intervention at all." Dr. Reiss explained that Claimant's continued complaints of lower back pain are unrealistic, out of proportion to his objective findings and represent a deconditioned state over a long period of time.

14. Dr. Gutterman determined that Claimant is not a surgical candidate from a psychological perspective. Claimant suffers from a Schizotypal personality disorder that includes passive dependent character traits. He also has a chronic pain disorder resulting in pain complaints that are considerably out of proportion to physical findings. Claimant has been highly attached to his symptoms of pain and has maintained a passive dependent "professional injured patient" stance in the Workers' Compensation system. Dr. Gutterman concluded that Claimant's Schizotypal personality disorder, prior psychotic expressions, need for antipsychotic medication and marked somatization are unrelated to his September 8, 1989 industrial injury. Based on the persuasive opinions of Drs. Reiss and Gutterman, Claimant's request for additional lumbar fusion surgery as proposed by Dr. Kleiner is denied and dismissed.

## CONCLUSIONS OF LAW

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

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the request for additional lumbar fusion surgery by Dr. Kleiner is reasonable, necessary and causally related to his September 8, 1989 industrial injury. Dr. Reiss persuasively explained that Claimant does not suffer from a pseudoarthrosis and the radiology report reflected a solid fusion. He noted that it would be extremely unreasonable to consider a fusion between L4 and the sacrum because it would convert the prior two level failed fusion into a four level fusion. Dr. Reiss explained that, considering Claimant's widespread degeneration and lack of response to a prior fusion surgery, additional surgery would be extremely unlikely to decrease Claimant's pain or increase his function. He maintained that the proposed fusion would also not be reasonable and necessary under the Guidelines because they require the completion of all appropriate conservative care but Claimant has never completed a conservative care program. Moreover, Claimant's psychological treatment reveals "major psychological concerns that are a distinct roadblock to consideration of any surgical intervention at all." Dr. Reiss explained that Claimant's continued complaints of lower back pain are unrealistic, out of proportion to his objective findings and represent a deconditioned state over a long period of time.

6. As found, Dr. Gutterman determined that Claimant is not a surgical candidate from a psychological perspective. Claimant suffers from a Schizotypal personality disorder that includes passive dependent character traits. He also has a chronic pain disorder resulting in pain complaints that are considerably out of proportion to physical findings. Claimant has been highly attached to his symptoms of pain and has maintained a passive dependent "professional injured patient" stance in the Workers' Compensation system. Dr. Gutterman concluded that Claimant's Schizotypal personality disorder, prior psychotic expressions, need for antipsychotic medication and marked somatization are unrelated to his September 8, 1989 industrial injury. Based on the persuasive opinions of Drs. Reiss and Gutterman, Claimant's request for additional lumbar fusion surgery as proposed by Dr. Kleiner is denied and dismissed.

## ORDER

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

Claimant's request for additional fusion surgery is denied and dismissed.

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

DATED: November 6, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

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

**FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

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

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection. A transcript of the evidentiary deposition of Guadalupe Ledezma, Ph.D., clinical psychologist, was received in lieu of Dr. Ledezma's testimony at hearing.

At the commencement of the hearing, the Claimant withdrew the issue of medical maintenance benefits and penalties against the Respondents. Also, the parties agreed to strike the Final Admission of Liability (FAL), dated November 4, 2011. The parties further stipulated to reasonably necessary and causally related medical maintenance care by ATPs, with the exception of ongoing care by Dr. Ledezma, and the ongoing prescription of Zoloft, an anti-depressant.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, giving the Respondents 2 working days within which to object as to form. The proposed decision was filed on

November 30, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

## ISSUE

The sole issue to be determined by this decision concerns whether the Claimant's ongoing psychological care and medication recommended by her authorized treating physician (ATP), Lon Noel, M.D., and her authorized treating psychologist, Dr. Ledezma, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of August 31, 2000; and, is it causally related thereto.

The Claimant bears 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. On August 31, 2000, the Claimant sustained admitted injuries to her right wrist and hand during the course and scope of her employment. As a result of her right upper extremity (RUE) injury, in 2001, the Claimant developed an injury in her left upper extremity (LUE) (Claimant's Exhibit 1).

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

3. On May 15, 2001, Dr. Johnsrud diagnosed the Claimant as having an adjustment disorder with somatic reactivity and characteristics of a dependent personality (Claimant's Exhibit 3).

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

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

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

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

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

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

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

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

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

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

14. On October 13, 2004, the undersigned ALJ issued Specific Findings of Fact, Conclusions of Law and Order stating, "Respondents shall pay the costs of continuing maintenance medical benefits, under the *Grover* case, to maintain medical stability as recommended by Dr. Gray and prescribed by Dr. Noel including maintenance psychological treatment under Dr. Ledezma" (Claimant's Exhibit 8).

**The Present Situation**

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

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

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

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

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

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

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

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

**Independent Medical Examination by Stephen Moe, M.D.**

23. The Respondents contested the referral to and treatment from Dr. Ledezma. The Respondents requested an IME, which was performed by Dr. Moe, a psychiatrist. Dr. Moe is of the opinion that the Claimant's current psychological status is not causally related to her work injuries of 2000 and 2001.

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

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

**Dr. Ledezma's Evidentiary Deposition**

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

27. Dr. Ledezma testified that the treatment she provided in May and June of 2015 was strictly limited to issues related to the Claimant's work-related injuries and

chronic pain (Ledezma Depo. p. 8, lines 9-13; p. 10, lines 17-22; p. 11, lines 19-22; p. 51, lines 23-25; p. 66, lines 13-4).

28. According to Dr. Ledezma, the Claimant's situation is chronic by nature. She stated that the depression and anxiety that the Claimant is having is primarily related to issues around being physically limited and having to depend on other people for assistance with a lot of activities of daily living, and feeling basically that there is no sense of improvement forthcoming. Dr. Ledezma stated that this has been really emotionally devastating for the Claimant (Ledezma Depo. pp. 8-9, lines 25 & 1-9; pp. 56-57, lines 19-25 & 1; p. 57, lines 7-8).

29. According to Dr. Ledezma, it's not necessarily one specific thing that will cause the Claimant to have more depression or problems sleeping. It is a cumulative effect of basically realizing that as time goes on, she's noticing more and more problems here and there that are impacting her self-esteem, her quality of life, etc. (Ledezma Depo. p. 51, lines 13-18).

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

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

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

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

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

**The Claimant's Testimony at Hearing**

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

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

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

38. Dr. Moe was of the opinion that the Claimant has suffered from chronic disorder involving a blend of depression and anxiety since the mid-1990s, where she presented with symptoms associated with stress. It was recommended at that time that the Claimant get treatment and she declined.

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

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

41. Dr. Ledezma further stated that there was no indication of any ongoing prior psychological issues or problems that were treated or identified prior to her 2000 injury, other than a medical report from 1995 that noted that the Claimant was taking care of her diabetic and blind mother and the death of Claimant's brother (Ledezma Depo. p. 16, lines 16-18; p. 17, lines 11-13).

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

43. During his testimony, Dr. Moe agreed that the death of the Claimant's brother and the disabling condition of her mother could cause a situational depression and that it is not unusual for patients who suffer from chronic pain to experience depression and anxiety.

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

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

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

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

**Ultimate Findings**

48. Comparing Dr. Moe's assessment of the situation in the 90s with Dr. Ledezma's and Dr. Noel's assessment, the ALJ infers and finds that Dr. Moe gave inadequate consideration of the situation in the 90s, and Dr. Ledezma rendered a

thorough analysis of the situation. Consequently, Dr. Ledezma's assessment of the situation pre-existing the admitted injury of 2000 is substantially more credible than Dr. Moe's assessment thereof. For this reason, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

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

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

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## CONCLUSIONS OF LAW

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

### Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Moe's opinion concerning lack of causal relatedness is neither adequately supported nor persuasive or credible. On the other hand, Dr. Ledezma's analysis of the 90s situation is credible and persuasive. Indeed, Dr. Moe agreed that the 90s situation was situational. For this reason, the continuing need for Zoloft and psychological treatment is causally related to the admitted injury of August 31, 2000 and its sequelae.

**Substantial Evidence**

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

**Pre-Existing Condition**

c. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990). Despite

the Respondents' argument that the Claimant could easily have benefited from psychotherapy treatment and medication, and been on Zoloft for the past 20 years, she did not seek psychotherapy and did not begin taking antidepressant medication until after her 2000 injury. The admitted compensable injury was an acceleration and aggravation of the Claimant's underlying and mostly dormant conditions, including psychological stress conditions.

**Maintenance Medical Care (*Grover Medicals)*/Psycholgical/Zoloft Prescription**

d. A claimant has suffered a compensable injury if the industrial accident is the proximate cause of the claimant's need for medical treatment or disability. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law*, § 13.00 (1997). As found, the increase in the Claimant's rent and her health issues did not cause a need for psychological treatment. The call from the adjuster in 2014 and ongoing uncertainly about the possible loss of her benefits increased the Claimant's anxiety. As found, The ALJ drew a plausible inference and found that fear and anxiety about the Claimant losing her source of income triggered the renewed visits to Dr. Ledezma in 2015. There is no persuasive evidence that the Claimant's need for psychological treatment is based on a subsequent intervening event. The totality of the evidence, including the Claimant's testimony, demonstrated that the need for psychotherapy treatment and medication recommended by Dr. Ledezma and ATP Dr. Noel are reasonably necessary and causally related to the admitted injury of 2000 and the sequelae thereof

**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 the ongoing need for psychological treatment and the Zoloft prescription.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

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

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

DATED this_____day of December 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 December 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

## PROCEDURAL HISTORY

This matter proceeded to hearing on December 3, 2014, with the record remaining open until January 12, 2015 for the submission of position statements and the deposition transcript of Dr. Jorge Klajnbart. The ALJ issued a Summary Order on February 20, 2015. The ALJ considered the Summary Order final as of March 6, 2015 because the Office of Administrative Courts (OAC) received no timely request for a full order from either party.

On September 15, 2015, Claimant's counsel advised the ALJ that he was still awaiting a full order based upon a request Respondents had apparently filed on February 23, 2015. Because the OAC never received such a request, the OAC had purged the file and considered it closed. Ultimately, both parties agreed that Respondents timely filed a request for a full order, and that they anticipated issuance of a full order despite the passage of seven months without any notification to the OAC concerning the status of the full order.

On September 21, 2015, the ALJ held a telephonic conference with counsel for both parties. Respondents' counsel agreed to re-create the record and submit it to the OAC. The ALJ received the complete record as of October 23, 2015.

## ISSUES

The issue presented for determination is whether the Claimant's request for a right total shoulder replacement is reasonable, necessary and related to his work injury.

At the commencement of hearing, the Respondents stated that they had the burden of proof because they had filed an admission of liability admitting for maintenance medical treatment. In Respondents' brief, the Respondents averred that Claimant had the burden of proof. In this decision, the burden of proof was assigned to the Claimant.

## FINDINGS OF FACT

1. The Claimant sustained a compensable injury to his right shoulder in 2001 when a U-Haul truck rolled over him. He sustained injuries to various parts of his body including his right shoulder.

2. The Claimant has received medical treatment for his shoulder over the past 13 years including two surgeries performed by Dr. Phillip Stull. Claimant was eventually placed at maximum medical improvement on June 4, 2008.

3. A December 19, 2001 MRI of Claimant's right shoulder showed an intact infraspinatus with some fatty infiltration but no significant atrophy of the infraspinatus. The MRI also showed a superior subluxation of the humeral head and apparent non-union of an acromion fracture and changes in the AC joint region which the radiologist presumed to be post-traumatic. The radiologist also noted disruption of the supraspinatus with extensive retraction.

4. When Dr. Stull performed surgery to repair the Claimant's right shoulder on April 11, 2002, his post-operative diagnosis was "chronic massive retracted right rotator cuff tear with impingement and AC joint arthritis as well as acromion nonunion plus complex SLAP lesion."

5. Dr. Stull also noted and repaired a non-union fracture in the acromion, a type III slap lesion, a bucket handle tear of the labrum with detachment and an unstable bicep complex, all of which were caused by the August 2001 accident.

6. Dr. Stull initially considered the rotator cuff irreparable because it was "quite retracted due to chronicity of the tear." Dr. Stull ultimately repaired the tears in the infraspinatus and supraspinatus tendons.

7. Claimant testified that his shoulder felt much better after surgery than he had been following the August 23, 2001 accident.

8. Over the subsequent years, Dr. Stull has continued to treat Claimant's right shoulder, excising a cyst in 2008 and administering intermittent injections.

9. Despite the various forms of medical treatment Claimant has received, he remains symptomatic in his right shoulder.

10. On March 16, 2011, Claimant reported to Stull that he was experiencing increasing right shoulder pain over the prior six to eight weeks. Claimant elected to proceed with conservative treatment at that time which included an injection. Dr. Stull noted that he would refer Claimant for an MRI if he didn't get any improvement in six weeks.

11. By August 24, 2011, Claimant had the MRI and visited with Dr. Stull to review the results. Dr. Stull noted that the MRI shows early cuff tear arthritis and with and irreparable massive joint cuff [tear] and fatty atrophy. Dr. Stull opined that Claimant may need reverse arthroplasty but that Claimant continued to prefer conservative treatment. Dr. Stull injected Claimant's shoulder and referred him to physical therapy.

12. On November 16, 2012, Dr. Stull noted that Claimant continued to suffer from right shoulder pain but that he had reasonable function. Dr. Stull's impression was: osteoarthritis, right shoulder and cuff tear arthritis. Dr. Stull performed another injection into Claimant's right shoulder.

13. Claimant returned to see Dr. Stull on September 13, 2013. Claimant reported increasing right shoulder pain over the prior month or two, and loss of motion. He reported good relief from the last injection performed in November 2012 and requested that Dr. Stull perform another injection, and Dr. Stull did.

14. On December 20, 2013, Claimant saw Dr. Stull again and complained of increasing pain in his right shoulder as well as increasing popping, reduced motion and pain that interrupted his sleep. Dr. Stull referred Claimant for a new MRI.

15. The January 15, 2014 MRI showed a large full thickness tear of the supraspinatus with marked fatty atrophy and mild fatty atrophy on the infraspinatus and, for the first time, evidence of mild fatty atrophy of the teres minor muscles, which had not even been mentioned in either the MRI report or in any medical records around the time of the August 23, 2001 accident.

16. Other new findings on the January 15, 2014 MRI include partial tearing of the subscapulus tendon with subluxation of the long head of the biceps tendon out of the bicipital groove, a widening of the AC joint and superior subluxation of the humeral head with marginal osteophytes slightly progressed from a 2011 MRI.

17. Based on the MRI finds and Claimant's clinical presentation, Dr. Stull recommended a right reverse total shoulder replacement. Claimant's pain had become more severe and his function progressively compromised.

18. Dr. Stull pursued a request for authorization with the Insurer, and no further evidence concerning the outcome of this request was offered into evidence. The ALJ infers that the Insurer denied the request which resulted in Claimant pursuing a hearing.

19. Claimant has been living with significant shoulder pain for the past two years. He is still able to work as a mechanic but it has been more difficult.

20. Dr. Stull has opined that not only does Claimant need a reverse shoulder replacement, but that such need is directly related to his 2001 work injury. Dr. Stull stated the need for surgery is due to advanced cuff tear arthritis which is related to the injury-related surgery he performed on the Claimant in 2002.

21. The Respondents referred the Claimant to Dr. Jorge Klajnbart for an independent medical examination. Dr. Klajnbart performed an examination of the Claimant and reviewed Claimant's medical records. Dr. Klajnbart opined that a reverse shoulder replacement surgery is not necessary in Claimant's case and that even if he needed the surgery, it is due to a chronic rotator cuff tear that pre-existed the Claimant's work injury. Dr. Klajnbart opined that there is no objective medical evidence that the work injury caused the rotator cuff tears. Dr. Klajnbart agreed that the shoulder surgery is reasonable.

22. According to Dr. Klajnbart, the findings on the MRI done in December 2001 reflect chronic changes. Dr. Klajnbart also noted two medical records that referenced rotator cuff problems that pre-existed Claimant's work injury. He provided little detail concerning the content of these records and neither of these records were offered into evidence.

23. Claimant did not remember having any problem with his right shoulder prior to the August 23, 2001 accident and the record lacks any meaningful information concerning any pre-existing rotator cuff problems other than the December 2001 MRI findings.

24. There is no persuasive evidence in the record that Claimant had any medical treatment for any rotator cuff problems. There are no medical records prior to August 23, 2001 which indicate that Claimant had a recommendation for surgical repair of his right rotator cuff.

25. Claimant's right shoulder symptoms have increased since 2010 and Claimant has reduced range of motion and strength and increased, constant pain.

26. Dr. Stull is of the opinion that this worsening is the result of the normal history of a failed repair of a massive chronic rotator cuff tear.

27. Dr. Stull is also of the opinion that the need for the original rotator cuff repair and the other things caused solely by the accident which he repaired in 2002 was related to and caused by the industrial accident.

28. Finally, Dr. Stull believes that the reverse shoulder replacement needed to treat the cuff tear arthritis now is more likely due to the industrial accident than to any other factor.

29. The Claimant has proven that he is entitled to the reverse shoulder replacement surgery recommended by Dr. Stull. Although the December 2001 MRI showed some pre-existing problems with his right shoulder, the ALJ finds that such problems were exacerbated by the work injury. The ALJ is not persuaded by Dr. Klajnbart's opinions that all of Claimant's right rotator cuff problems flow from a pre-existing condition completely unrelated to his work injury. The medical record does not support such a finding or conclusion given at the lack of meaningful information concerning any pre-existing clinical findings.

30. The ALJ credits the opinions of Dr. Stull who has been treating the Claimant for the past 13 plus years. Dr. Stull performed a rotator cuff repair, considered work-related at that time, which has now failed. The medical records document a gradual deterioration of Claimant's right shoulder condition over the past few years and the reverse total arthroplasty will prevent further deterioration.

## CONCLUSIONS OF LAW

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

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

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

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

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

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

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

6. 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.

7. 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. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). Resolution of that issue is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

8. As found above, the Claimant has proven that he is entitled to the reverse shoulder replacement surgery recommended by Dr. Stull. Although the December 2001 MRI showed some pre-existing problems with his right shoulder, the ALJ finds that such problems were exacerbated by the work injury. The ALJ is not persuaded by Dr. Klajnbart's opinions that all of Claimant's right rotator cuff problems flow from a pre-existing condition completely unrelated to his work injury. The medical record does not support such a finding or conclusion. There is no persuasive evidence in the record to support that Claimant had any significant clinical symptoms related to a right rotator cuff tear or that he had received any medical treatment. The ALJ credits the opinions of Dr. Stull who has been treating the Claimant for the past 13 plus years. He has opined that the need for the right shoulder replacement is due to cuff tear arthritis, a condition he relates to the work injury particularly in light of the work-related rotator cuff repair surgery performed in 2002.

## ORDER

It is therefore ordered that:

1. Respondents are liable for the right total reverse arthroplasty recommended by Dr. Stull because it is a reasonable and necessary treatment related to and designed to prevent further deterioration of Claimant's work-related right shoulder condition.

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: November 6, 2015

DIGITAL SIGNATURE:

L. Broniak

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

## ISSUES

The issue raised for consideration at hearing is whether Claimant proved by a preponderance of the evidence that he is entitled to an order awarding medical benefits. Specifically, whether Claimant proved by a preponderance of the evidence that Dr. Huser's recommendation for referral to an ear, nose and throat (ENT) specialist for evaluation is a reasonably necessary and related medical benefit.

## FINDINGS OF FACT

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

1. Claimant is a 57 year old man who suffered an admitted injury to his left ankle in the course and scope of his employment with Employer on July 22, 2003.

2. As a result of the admitted injury, Claimant underwent multiple surgeries including multiple attempts at ankle fusion. Claimant developed complications with infections and eventually had a below the knee amputation of his left leg on May 2, 2012.

3. Claimant has treated with many different providers from the date of his injury in 2003 until now and is currently being treated by David J. Schneider, M.D. at Panorama Orthopedics and Spine Center, and Chris Huser, M.D., at MD Pain, Comprehensive Pain Management.

4. Claimant is currently using a prosthetic device below the knee on his left leg. Claimant is currently experiencing significant pain and has trouble bearing weight on his prosthesis, with an average pain rating of 7-8/10 when weight bearing. Claimant is unable to walk without significant pain and often uses crutches or a wheelchair.

5. Claimant had osteoarthritis of the left knee prior to his below the knee amputation. This osteoarthritis was asymptomatic prior to his injury and his use of the prosthesis.

6. Following his below the knee amputation, Claimant suffered a fall that required surgery to repair his right quadriceps tendon. This surgery was performed on October 23, 2012, by Jared Foran, M.D. of Panorama Orthopedics & Spine Center. Following surgery, Claimant developed a complication with infection that required further treatment.

7. On January 6, 2014, Claimant had surgery for neurectomy of the left saphenous nerve neuroma to relieve sharp burning nerve pain on the bottom of his stump that was performed by Mark Conklin, M.D. of Panorama Orthopedics & Spine Center.

8. Claimant had several follow up appointments with Dr. Conklin after the left saphenous nerve neuroma surgery. Dr. Conklin noted on April 23, 2014, that Claimant presented to the clinic in a wheelchair. Dr. Conklin also noted Claimant was seeing Dr. Schneider for his knee.

9. Claimant has had multiple different prosthetic devices and numerous different sockets. He also has had multiple injections to his knee as well as a neurectomy of the left saphenous nerve neuroma all in attempts to relieve his pain. These more conservative treatments have failed to relieve Claimant of severe pain when ambulating.

10. Claimant's physician, ATP Chris Huser, has been providing Claimant with narcotic and non-narcotic medications for a prolonged period of time to address the pain from his injury and following his multiple surgeries. Those medications have included and include among others, codeine, Gabapentin, and Mexalon.

11. On May 28, 2015, ATP Huser made a referral to Jeff Chain, M.D., "to consult on [Claimant's] tinnitus." That request was denied by Respondents, even though ATP Huser noted that Claimant had a "one year history of increasing bilateral tinnitus." *See* Claimant's Submission Tab 1, BS 16.

12. Dr. Olsen opined that, although tinnitus could be caused by Gabapentin and/or possibly a combination of the medications Claimant has been taking for his admitted workplace injury, because Claimant had been on medications for such a long period of time it was Dr. Olsen's opinion that the tinnitus was unrelated to the medications and was rather an age related event.

14. Claimant testified that he was not seeking treatment, rather at the present he was seeking the consultation requested by ATP Huser so a determination could be made regarding what causes the tinnitus.

## CONCLUSIONS OF LAW

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

### *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. (2003). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

### *Medical Benefits*

ATP Huser's referral was clearly in the nature of a diagnostic evaluation, to establish Claimant's future medical needs as it relates to his tinnitus condition. *Moon Far Restaurant v.* ICAO, 862 P. 2d 1026 (Colo. App. 1993). Diagnostic evaluations are compensable medical benefits under the Act. See *Public Service Co., v. ICAO*, 979 P. 2d 584 (Colo. App. 1999). Respondents' expert, Dr. Olsen, opined in testimony that tinnitus can be caused by the medication Claimant is currently using for his admitted workplace injury.

Claimant proved by a preponderance of the evidence that he is entitled to the medical benefit of an evaluation with Jeff Chain, M.D. Claimant established that it was more probably true than not that ATP Huser's request for evaluation is authorized, reasonable and necessary. Claimant established that it is more probably true than not that ATP Huser's referral for an ENT evaluation is reasonable, necessary and should be authorized by Respondents. Insurer shall pay pursuant to the fee schedule for an evaluation with Jeff Chain, M.D., for an evaluation that is reasonable, necessary and related to Claimant's admitted industrial injury.

**ORDER**

It is therefore ordered that:

1. Accordingly, it is ordered that Respondents shall authorize Dr. Huser's recommendation for Claimant's referral to an ENT for evaluation.

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

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

DATED: __November 18, 2015_____

DIGITAL SIGNATURE:

Margot W. Jones

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

## ISSUES

- Whether claimant has proven by a preponderance of the evidence that Dr. James is authorized to provide claimant with medical treatment?

- Whether claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. James, including the SI joint injections at the L5-S1 level, are reasonable and necessary medical treatment related to claimant's industrial injury?

## FINDINGS OF FACT

1. Claimant sustained an admitted injury while employed with employer on September 26, 2004 when he fell from the cab of his truck and landed on the left side of his body. Claimant was initially diagnosed with a left hip fracture, a T12 compression fracture, a bruised coccyx. Claimant also complained of pain initially in his low back, upper back, left shoulder and neck.

2. Claimant's medical records document that he received treatment for low back pain prior to his injury dating back to June 2002. Claimant had a magnetic resonance image ("MRI") performed on March 20, 2003 that revealed lower disc and facet degeneration.

3. Following claimant's September 26, 2004 injury, claimant underwent an x-ray of his lumbar spine on September 27, 2004 (along with x-rays of his pelvis, cervical spine, and left hand). The x-rays showed anterolateral osteophytes at the L4 level (and to a lesser degree at the L3 and L5 levels). No acute injuries were noted on the x-rays.

4. Claimant was eventually placed at maximum medical improvement ("MMI") for his injuries on March 15, 2006 by Dr. Ryan. Claimant was provided with a PPD rating by Dr. Ryan of 35% whole person, including a rating of 17% for the cervical spine, 18% for the lumbar spine and 5% for a brain injury. Respondents filed a final admission of liability ("FAL") on June 16, 2006 admitting for the 35% whole person impairment rating.

5. Claimant treated with Dr. Told following MMI for maintenance treatment. Dr. Told was also claimant's family physician. Dr. Told referred to Dr. Kinder for continuing maintenance medical treatment related to his work related injury in an undated "To Whom it May Concern" letter that appears to have been drafted on or about August 2009. In the same letter, Dr. Told refers claimant for ongoing care to Dr. Ryan. Dr. Told specifically references claimant's treatment of his low back in the letter, along with treatment involving claimant's head, neck and shoulder.

6. Claimant subsequently went to hearing on the issue of the compensable nature of his right hip condition. A Summary Order was issued on January 9, 2009 that found claimant's right hip condition was not related to his September 26, 2004 injury. Claimant underwent a right total hip arthroplasty in December 2008 regarding this condition.

7. Claimant testified at hearing that after he was placed at MMI, he continued to have symptoms in his low back. Claimant testified at hearing that prior to his work injury, he had received medical treatment to his low back, including one injection to treat his low back pain.

8. Claimant sought treatment on October 28, 2008 from Dr. Copeland. Dr. Copeland's initial report mentions Dr. Told on the first page and is addressed "Dear Tom". Claimant testified at hearing that Dr. Told had recommended Dr. Copeland to treat claimant for his low back pain. Other records from Dr. Copeland refer to Dr. Told as the "referring physician". The ALJ finds Dr. Copeland is within the chain of referrals from Dr. Told.

9. Dr. Copeland subsequently treated claimant for his right hip and low back pain. The right hip condition, as mentioned above, was found to be not related to claimant's work injury. Dr. Copeland also was treating claimant for his cervical spine through 2010. The ALJ notes that Dr. Copeland's treatment for claimant's hip was not related to the work injury, however, the treatment for claimant's cervical spine would be related to the work injury and would be within the chain of referrals, as this was a referral from Dr. Told.

10. Claimant was evaluated by Dr. Mistry on June 27, 2013. Dr. Mistry noted claimant was complaining of lumbar spine pain that was described as sharp and stabbing. Dr. Mistry recommended an MRI of the lumbar spine. The MRI again showed mild degenerative disc disease. Dr. Mistry recommended physical therapy and referred claimant to Dr. Langston for pain management.

11. Claimant was evaluated by Dr. Langston on July 15, 2013 for pain in his low back and around his right hip down his right leg to his knee. Dr. Langston noted that claimant was seen as a referral from Dr. Copeland. Dr. Langston noted that claimant could consider an epidural steroid injection ("ESI").

12. Claimant testified that the injections into his back were effective in relieving claimant's pain in his low back. Claimant testified that Dr. James eventually purchased Dr. Langston's practice and claimant continued to treat with Dr. James. The ALJ credits the testimony of claimant at hearing and finds that Dr. James is authorized to treat claimant as the physician who took over Dr. Langston's practice.

13. Claimant was initially evaluated by Dr. James on March 19, 2015. Dr. James noted claimant was seen by Dr. Langston several years ago and did have some relief from injection therapy. Dr. James noted claimant had lower lumbar pain on the right side. Claimant also reported pain radiating into the buttocks and occasionally

down the left leg. Dr. James reviewed claimant's medical records and recommended a left ESI and SI joint injection. Dr. James noted claimant's right SI joint was the most symptomatic and recommended a right SI joint injection (times 2).

14. Respondents obtained a records review independent medical evaluation ("IME") with Dr. Lesnak on October 7, 2015. Dr. Lesnak had previously performed an IME of claimant in 2008 in connection with his right hip condition. Dr. Lesnak noted in his October 7, 2015 report that claimant had low back complaints that predated his work injury. Dr. Lesnak also noted that he had previously opined that claimant's right buttock, hip, and groin symptoms were not related to the September 26, 2004 work injury. Dr. Lesnak opined that no medical evidence was made available that would suggest that claimant's more recent diagnosis of sacroiliitis or lumbosacral radiculitis was in any way related to the September 26, 2004 work injury. Dr. Lesnak noted that when he evaluated claimant on April 10, 2008, more than 3 ½ years after his occupational injury, claimant had no clinical evidence of symptomatic SI joint dysfunction or sacroiliitis or lumbar or sacral radiculitis.

15. Dr. Lesnak testified consistent with his IME report at hearing. Dr. Lesnak testified on cross examination he did not believe claimant injured his low back during the work injury. Dr. Lesnak testified that Dr. James did not perform a causation analysis regarding claimant's current back complaints and that he was not certain if Dr. James had reviewed claimant's prior medical records. Dr. Lesnak testified it appeared that claimant's treatment recommendations were based off of claimant's clinical presentation.

16. The ALJ credits the medical records from Dr. James, Dr. Told and claimant's treating physicians over the contrary medical opinions expressed by Dr. Lesnak and finds that claimant has proven that it is more likely than not that the treatment recommended for his low back condition by Dr. James, including the injections, is related to the September 26, 2004 work injury. The ALJ notes that claimant had a low back injury as rated by Dr. Ryan and that the current medical treatment recommended by Dr. James can reasonably be traced back to claimant's September 26, 2004 work injury by a close review of the medical records.

17. The ALJ further finds that Dr. James is authorized to treat claimant as a physician within the chain of referrals as he came to treat claimant through a referral from Dr. Copeland who was an authorized physician by referral from Dr. Told.

## CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page*

*v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

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 treatment recommended by Dr. James, including the ESI and SI joint injection are reasonable medical treatment necessary to prevent further deterioration of claimant's physical medication condition.

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). "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).

6. When the authorized treating physician refers the claimant to another health care provider, the treatment rendered by the referred provider is compensable as part of the legal chain of authorization. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026, 1029 (Colo. App. 1993) (*citing Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985)).

7. As found, Dr. James is determined to be authorized in this case as a physician in the chain of referrals from Dr. Told (through Dr. Copeland).

## ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to prevent further deterioration of claimant's condition related to the September 26, 2004 work injury, including the ESI and SI joint injections recommended by Dr. James.

2. Dr. James is hereby determined to be an authorized provider for medical treatment related to claimant's September 26, 2004 compensable 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: November 27, 2015

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

## ISSUES

Whether the respondent proved by a preponderance of the evidence that the claimant no longer needs medical maintenance treatment for his December 6, 2005 industrial injury.

## FINDINGS OF FACT

1. The claimant was employed as a Correctional Officer with the respondent-employer on December 6, 2005 when he sustained an admitted injury to his back while running up some stairs to a backup call.

2. The claimant had a prior work related injury to his back with the respondent-employer on April 21, 2003 when he was involved in a takedown of an inmate.

3. The claimant described his injury on December 6, 2005 to a physician's assistant at CCOM as feeling a twinge in his lower back. In that report, PA Schultz notes that the claimant has had ongoing back pain since his 2003 injury for which he was undergoing chiropractic treatment 1-2 times per week. Physical examination on December 6, 2005 revealed full range of motion of the claimant's back including forward flexion to his fingertips touching his toes. "He relates that he has pain in his back with range of motion and that was present prior to the incident yesterday." The claimant was diagnosed with low back pain with a history of chronic low back pain. PA Schultz did not anticipate any permanent impairment as a result of the claimant's 2005 injury. The claimant was released to return to work with no restrictions.

4. The claimant was placed at maximum medical improvement (MMI) for his 2005 injury on August 3, 2007. Dr. Olson recommended medical maintenance treatment in the form of medications for the next 6-12 months, periodic medical evaluation, and continued chiropractic adjustment over the next 6 months. A Final Admission of Liability was filed on August 28, 2007 admitting for medical maintenance benefits.

5. The claimant underwent an Independent Medical Evaluation with Dr. Bernton on December 2, 2005. Dr. Bernton compared MRI reports from 2006, 2010, 2012, and 2014 and noted increased degenerative changes on each. Dr. Bernton opined that the claimant's persistent lumbar and thoracic pain was associated with his progressive degenerative disk disease in his lumbar and thoracic spine. Dr. Bernton further opined, within a reasonable degree of medical probability, that the claimant's condition would be the same with or without the occupational injury on December 6, 2005. With regard to ongoing medical maintenance treatment, Dr. Bernton noted that Dr. Olson's recommendations for 6-12 months of maintenance treatment was sufficient to address any exacerbation of the claimant's underlying and preexisting degenerative disk disease which occurred as a result of the claimant's December 6, 2005 industrial injury. Dr. Bernton opined that any ongoing maintenance treatment needed for the claimant's preexisting degenerative disk disease was not the result of the claimant's December 6, 2005 injury.

6. On February 9, 2015, Dr. Sandell, an authorized treating physician, agreed with Dr. Bernton's assessment that "issues related to the December 6, 2005 workers' compensation claim likely stabilized." Dr. Sandell went on to discuss the more serious injury the claimant sustained to his back in 2003 which the claimant was treating for and "continues to treat for."

7. Dr. Sandell testified for the claimant.

8. The respondents argue that Dr. Sandell testified as a lay witness.

9. Dr. Sandell was identified as a medical doctor with expertise in Physical Medicine and Rehabilitation. While the pro se claimant did not specifically ask that Dr. Sandell be offered as an expert the ALJ so recognizes Dr. Sandell's testimony as it meets the criteria of Rule 702, CRE.

10. Dr. Sandell has been treating the claimant since 2007. When he first began to treat the claimant the diagnosis was chronic lumbar pain.

11. The claimant has had two injuries to his lumbar spine with overlay, occurring in 2003 and 2005 respectively.

12. As a result of the claimant's 2005 injury he experienced severe pain in the buttocks and numbness in his feet. This indicates that there is possibly an injury.

13. Even if the 2005 injury is part of the 2003 injury and aggravated that injury it is difficult to tell how much is as a result of the older injury and how much is a result of the newer injury.

14. There is a possibility that exercise can exacerbate or irritate the back.

15. Dr. Sandell has stated that, in part, he agrees with Dr. Bernton's assessment that the December 6, 2005 workers' compensation injury likely stabilized. Dr. Sandell's emphasizes, however, that Dr. Bernton fails to mention there was a more serious workers' compensation injury in 2003 that the claimant was treated for and continues to treat for.

16. Dr. Sandell opines that it is hard to objectively establish causality.

17. He further opines that the claimant's back is getting worse.

18. Dr. Sandell agrees that the claimant had prior degenerative disk disease.

19. Dr. Sandell is unaware of the mechanism of injury for the claimant's 2003 injury but is aware that the 2005 injury occurred when the claimant was running up stairs on an emergency call when he felt a pull in his back and felt leg symptoms. Dr. Sandell opines that this was a traumatic event since there was an acute onset of back pain with associated leg symptoms.

20. Dr. Sandell states that the claimant was receiving treatment for the 2003 injury at the time of the occurrence of the 2005 injury. Dr. Sandell states that the claimant has a disk protrusion and he doesn't know if the disk protrusion was present prior to the 2005 event.

21. Dr. Sandell opines that it is possible, although he cannot say probable, that there was permanent damage caused by the 2005 injury.

22. He agrees that the initial diagnosis was musculoskeletal strain but that he was not the claimant's doctor at the time. The condition stabilized to the point of no further work-up but still requiring medical treatment. Dr. Sandell opines that it is probable that the claimant's treatment needs are for the 2005 injury. He goes on to say that differentiation is not possible to tell if the treatment required is for the 2003 versus the 2005 injury. He does agree that the medical records in the case can help to differentiate.

23. Dr. Sandell agrees that degenerative disk disease is potentially an issue.

24. Dr. Bernton credibly and persuasively opined that the claimant's MRIs, which were taken serially over time, are consistent with the progression of degenerative disk disease and that there is no evidence that either the claimant's 2003 injury or his 2005 injury produced a structural change that would alter the progression of the degenerative disk process. Dr. Bernton credibly and persuasively opined that the probability that the claimant would be any different in terms of his medical needs or the care that he requires at this point in time had he not had the December 5, 2006 industrial injury is extraordinarily high.

25. The ALJ finds that the respondent has established that it is more likely than not that the claimant no longer requires medical maintenance treatment for his December 6, 2005 industrial injury.

## CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App.

1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). However, after an injured worker reaches maximum medical improvement, the injured worker may obtain future medical benefits only to maintain maximum medical improvement or to prevent deterioration of his condition. *See Grover v. Industrial Commission*, 759 P.2d 705, 711 (Colo. 1988). The injured worker is therefore entitled to *Grover*-type medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve a claimant from the effects of an [industrial] injury" or prevent further deterioration of the injured worker's condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992); *Jones v. Estes Express Lines*, W.C. No. 4-651-658 (April 25, 2008).

5. In cases where the respondent has filed a Final Admission of Liability admitting for medical maintenance benefits, they retain the right to challenge the relatedness, reasonableness, and necessity of ongoing medical benefits. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). When the respondent seeks an order terminating all medical maintenance benefits, the respondent bears the burden to prove by a preponderance of the evidence that no treatment is or will be reasonably needed to relieve the effects of the injury or prevent deterioration of the claimant's injury-related condition(s). Section 8-43-201(1), C.R.S.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013); *Salisbury v. Prowers County School District RE2,* W.C. No. 4-702-144 (June 5, 2013). Whether a party has sustained their burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997). Questions of causation and relatedness and whether ongoing treatment is reasonably necessary present issues of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *See Kroupa v. Industrial Claim Appels Office*, 53 P.3d 1192 (Colo. App. 2002). 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).

6. As found, the respondent has proved by a preponderance of the evidence that additional medical maintenance treatment is not causally related to the claimant's December 6, 2005 industrial injury. Dr. Bernton's opinion that the claimant requires ongoing medical treatment for his progressive degenerative disk disease and not because of his December 6, 2005 industrial injury is credible and persuasive. Accordingly, the claimant is not entitled to additional medical maintenance benefits under this claim.

## ORDER

It is therefore ordered that:

1. The respondent's request to terminate medical maintenance benefits is granted. The claimant is not entitled to receive additional medical maintenance benefits under this claim.

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: November 23, 2015

/s/ original signed by:

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

## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his August 6, 2009 and September 29, 2010 Workers' Compensation claims based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the requests for fusion surgery by Douglas W. Beard, M.D. are reasonable, necessary and causally related to his August 6, 2009 and September 29, 2010 industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 14, 2014 until terminated by statute.

## STIPULATIONS

The parties agreed to the following:

1. Douglas Beard, M.D. is Claimant's Authorized Treating Physician (ATP).

2. Claimant was not responsible for his April 14, 2014 separation from employment.

3. Claimant earned $884.98 each week and received $357.55 in COBRA benefits. He thus earned a total Average Weekly Wage (AWW) of $1,242.53.

## FINDINGS OF FACT

1. Claimant is a 56 year old male. He worked for Employer as a Material Handler.

2. On August 6, 2009 Claimant sustained an admitted lower back injury in case number 4-800-916 during the course and scope of his employment with Employer. On August 14, 2009 Timothy Wirt, M.D. performed a semihemilaminectomy and discectomy to Claimant's lumbar spine at the L4-L5 level. On November 19, 2009 Claimant underwent a dynamic stabilization at the same level.

3. Although Claimant continued to report lower back pain, he reached Maximum Medical Improvement (MMI) on March 12, 2010. He was assigned a 20% whole person impairment rating for his lower back condition. Insurer filed a Final

Admission of Liability (FAL) on April 8, 2010. Claimant's claim subsequently closed by operation of law.

4. On September 29, 2010 Claimant sustained a second admitted lower back injury in case number 4-837-106 during the course and scope of his employment with Employer. He reached MMI with no permanent impairment on May 18, 2011. Claimant received work restrictions of no lifting in excess of 30 pounds. He also received sitting, standing, stooping and bending limitations. Respondents filed a FAL and acknowledged reasonable, necessary and related medical maintenance benefits. Claimant's claim subsequently closed by operation of law.

5. Claimant continued to receive medical maintenance treatment for his lower back condition from various medical providers. On October 24, 2012 Claimant visited orthopedic surgeon Bryan Castro, M.D. for an examination. After reviewing Claimant's MRI and EMG, he determined that Claimant was not a surgical candidate. Dr. Castro recommended epidural injections for symptom relief.

6. On December 18, 2012 Claimant visited Rosalinda Pineiro, M.D. for an evaluation. Because Claimant was not a surgical candidate, Dr. Pineiro concluded that Claimant remained at MMI with no change in his permanent impairment rating. She continued Claimant's medical maintenance medications.

7. On May 9, 2013 Claimant reported to the Poudre Valley Hospital Emergency Room for treatment. He noted a significant increase in lower back pain after experiencing a "pop" while lifting at work on May 6, 2013. Dr. Pineiro subsequently commented that the Emergency Room lumbar spine MRI did not reflect any acute findings.

8. On September 18, 2013 Claimant returned to Dr. Pineiro for an examination. Dr. Pineiro noted that Claimant had suffered an exacerbation of lower back symptoms but had returned to his baseline condition. She commented that Claimant continued to remain at MMI with no new impairment or restrictions.

9. On February 7, 2014 Claimant visited Hope Edmonds, M.D. at Workwell and reported increasing lower back pain over the prior two weeks. She assigned Claimant a 10 pound lifting restriction and referred him to the Poudre Valley Emergency Room for an evaluation. The Emergency Room physician noted that Claimant's symptoms were similar to his lower back pain on May 9, 2013 and referred him back to Dr. Wirt for an examination.

10. On February 18, 2014 Claimant underwent a lumbar MRI. On February 20, 2014 Dr. Edmonds reviewed the MRI and remarked that there were no changes compared to Claimant's October 10, 2012 MRI. Dr. Edmonds maintained that Claimant was not a surgical candidate. She noted that Claimant remained at MMI and recommended pain management care.

11. On April 14, 2014 Claimant ceased working for Employer. Claimant was not responsible for his separation from employment.

12. Claimant subsequently underwent pain management care from Alicia Feldman, M.D. On August 20, 2014 Dr. Feldman remarked that Claimant suffered from chronic lower back pain. Because injections had not provided Claimant with any pain relief, he sought a surgical consultation. On September 22, 2014 Dr. Feldman noted that Claimant would likely continue to suffer chronic lower back pain regardless of any surgical procedure.

13. On September 15, 2014 Claimant underwent a surgical consultation with Douglas W. Beard, M.D. Claimant reported that his symptoms had waxed and waned since his November 2009 lower back surgery but his symptoms had recently become more severe. Dr. Beard recommended a CT scan to determine whether Claimant's dynamic stabilization hardware was stable and a discography to identify his pain generator.

14. On November 6, 2014 Dr. Beard recorded that he had reviewed Claimant's CT scan and could not identify Claimant's pain generator. He commented that the CT scan revealed degenerative disc disease. Claimant sought to move forward with hardware removal and extend his fusion up and down one level.

15. On December 3, 2014 Claimant filed a Petition to Reopen his August 6, 2009 {W.C. No. 4-800-916) and September 29, 2010 (W.C. No. 4-837-106) Workers' Compensation claims. The Petition to Reopen was predicated on Dr. Beard's September 15, 2014 medical report.

16. On February 28, 2015 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. After conducting an extensive review of Claimant's medical records, Dr. Rauzzino performed a physical examination. In evaluating Dr. Beard's surgical request, Dr. Rauzzino referred to the *Medical Treatment Guidelines* (*Guidelines*). He explained that the *Guidelines* require a clearly identifiable pain generator prior to proceeding with surgery. Dr. Rauzzino determined that Claimant lacked a clearly identifiable pain generator and has experienced lower back pain since his original 2009 injury. He summarized that Claimant more likely suffered from failed back syndrome rather than new progressive complaints at the L5-S1 and L3-L4 levels.

17. Dr. Edmonds reviewed Dr. Rauzzino's report. She determined that Claimant remained at MMI until his source of pain could be connected to his original industrial injury.

18. Claimant subsequently underwent a discogram to identify his pain generator. He was symptomatic at all levels of his back.

19. On June 25, 2015 Claimant returned to Dr. Beard for an examination. Dr. Beard noted that Claimant's discogram was "equivocal" and revealed symptoms at all levels. After discussing various surgical options, Dr. Beard proposed a "hybrid"

procedure in which Claimant would undergo an exploration at L4-L5, a fusion from L4-S1 and an arthroplasty at L3-L4.

20. On July 9, 2015 Dr. Rauzzino issued a Supplemental Report. After reviewing additional medical records and Dr. Beard's June 25, 2015 request for surgical authorization, Dr. Rauzzino noted that the request was inconsistent with the *Guidelines.* He explained that Dr. Beard's proposed procedure constituted a three level fusion on top of an already-fused segment to produce a four level fusion. The *Guidelines* limit fusions to two levels because studies have shown that the rates of success for fusing additional levels are much lower and do not improve functional outcomes. Moreover, Dr. Rauzzino maintained that the proposed surgery would address pre=existing degenerative disc disease independent of adjacent level disease. Finally, based on the discogram Dr. Rauzzino determined that Claimant suffered from pain at all levels of his back and thus an additional lumbar fusion would not be medically reasonable or necessary.

21. On July 22, 2015 Dr. Beard responded to Dr. Rauzzino's July 9, 2015 letter and provided additional details regarding the hybrid surgical option. Dr. Beard noted that the requested procedure involved extending Claimant's arthrodesis to L5-S1 distally, exploration of the L4-L5 level and an arthroplasty at the L3-L4 motion segment.

22. On August 5, 2015 Claimant visited Roberta P. Anderson-Oeser, M.D. at Workwell. He reported severe lower back pain three weeks earlier and sought emergency room treatment. Claimant received medications and was discharged to return home. Dr. Anderson-Oeser continued Claimant on restricted duty and did not retract his MMI status.

23. Claimant testified at the hearing in this matter. He explained that he has suffered from chronic lower back pain since his initial industrial injury on August 6, 2009. In fact, when asked whether his lower back condition worsened in February 2014, he responded that it had "basically been pretty much the same." Claimant recognized that his lower back symptoms have waxed and waned since his initial industrial injury. He attributed his flare-ups to his work activities.

24. On September 14, 2015 Dr. Beard testified through an evidentiary deposition in this matter. He detailed that the best treatment for Claimant involved a "hybrid" surgical procedure. The procedure would involve the insertion of an artificial disc at the L3-L4 level, removing hardware, possibly fusing the L4-L5 level and fusing the L5-S1 level. Dr. Beard maintained that Claimant has suffered a substantial deterioration of his lower back condition because of his work activities.

25. Dr. Beard explained that Claimant has suffered from lower back pain since the early 2000s. He noted that patients with lower back pain will always struggle with the waxing and waning of symptoms. Despite Dr. Beard's surgical recommendation he acknowledged that the discogram revealed pain reproduction at all levels and all of the levels reflected degenerative changes. Moreover, Claimant's February 18, 2014 lumbar MRI did not demonstrate any changes relative to his previous MRI's. Finally, Dr. Beard

recognized that none of his proposed surgical procedures satisfy the criteria delineated in the *Guidelines*.

26. On September 28, 2015 Dr. Rauzzino testified through an evidentiary deposition in this matter. Dr. Rauzzino maintained that Claimant's work-related condition has not worsened but instead his symptoms are related to multilevel disc degeneration. He detailed that Claimant not only has degeneration of the discs adjacent to the level of his fusion, but also at the non-adjacent level above the fusion. The degeneration at the adjacent levels was thus more likely caused by the natural aging process than his previous fusion surgery at the L4-L5 level.

27. Dr. Rauzzino also explained that Dr, Beard's proposed surgical procedure was not reasonable, necessary or related to Claimant's industrial lower back injuries. Initially, Claimant's discogram revealed pain at all levels of his back and did not identify a distinct pain generator. After reviewing additional medical records and Dr. Beard's June 25, 2015 request for surgical intervention, Dr. Rauzzino explained that the request was inconsistent with the *Guidelines.* Finally, Dr. Rauzzino explained that the proposed "hybrid" procedure constituted an experimental technique and there is not much data available about the performance of an artificial disc above a two level fusion.

27. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his August 6, 2009 and September 29, 2010 Workers' Compensation claims based on a change in condition. He has not demonstrated that his condition has worsened or that he is entitled to benefits.

28. On August 6, 2009 Claimant sustained an admitted lower back injury in case number 4-800-916, underwent lumbar surgery at the L4-L5 level and reached MMI with a 20% whole person impairment rating on March 12, 2010. On September 29, 2010 Claimant sustained a second admitted lower back injury in case number 4-837-106 and reached MMI with no permanent impairment on May 18, 2011. After Respondents filed FAL's in both cases, they closed by operation of law. On December 3, 2014 Claimant filed a Petition to Reopen both of his claims. The Petition to Reopen was predicated on Dr. Beard's September 15, 2014 medical report. On September 15, 2014 Claimant underwent a surgical consultation with Dr. Beard and reported that his symptoms had waxed and waned since his November 2009 lower back surgery but his symptoms had recently become more severe. Dr. Beard ultimately recommended a "hybrid" surgical procedure for Claimant. The procedure would involve the insertion of an artificial disc at the L3-L4 level, removing hardware and possibly fusing both the L4-L5 and L5-S1 levels. Dr. Beard maintained that Claimant has suffered a substantial deterioration of his lower back condition because of his work activities.

29. In contrast to Dr. Beard's surgical request, the medical records are replete with evidence that Claimant has suffered from chronic waxing and waning lower back pain since his initial industrial injury on August 6, 2009. In fact, Claimant recognized that his lower back symptoms have waxed and waned since his initial industrial injury. Claimant's symptoms flared both while he was working for Employer and after he ceased employment on April 14, 2014. Multiple treating physicians have

maintained that Claimant reached MMI and have not retracted the MMI determination. Although Claimant's lifting restrictions were increased from 30 pounds to 10 pounds on February 7, 2014 by Dr. Edmonds at Workwell because he had reported increasing lower back pain over the prior two weeks, he remained at MMI. Furthermore, Dr. Edmonds reviewed a February 18, 2014 MRI and remarked that there were no changes compared to Claimant's October 10, 2012 MRI. Multiple doctors have also noted that there have been no objective changes in Claimant's lumbar MRI's since he reached MMI.

30. Dr. Rauzzino maintained that Claimant's work-related condition has not worsened but instead his symptoms are related to multilevel disc degeneration. He detailed that Claimant has degeneration of the discs adjacent to the level of his fusion, but also at the non-adjacent level above the fusion. The degeneration at the adjacent levels was thus more likely caused by the natural aging process than his previous fusion surgery at the L4-L5 level. Finally, Claimant's Petition to Reopen was predicated on a September 14, 2014 date of worsening of condition. However, Claimant ceased working for Employer on April 14, 2014. The temporal proximity of Claimant's date of worsening several months after he ceased working for Employer suggests that any onset of acute symptoms was not related to his work activities for Employer. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

31. Claimant has failed to demonstrate that it is more probably true than not that Dr. Beard's requested fusion surgery is reasonable, necessary and causally related to his August 6, 2009 and September 29, 2010 industrial injuries. Initially, Claimant's discogram revealed pain at all levels of his back and thus an additional lumbar fusion would not be medically reasonable or necessary. Furthermore, Dr. Rauzzino explained that the proposed surgical procedure is inconsistent with the *Guidelines*. Finally, Dr. Rauzzino remarked that the proposed "hybrid" procedure constituted an experimental technique and there is not much data available about the performance of an artificial disc above a two level fusion.

## CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-203(2)(b)(II) C.R.S. provides that issues admitted in an FAL are automatically closed unless the claimant contests the FAL in writing and requests a hearing on any disputed issues that are ripe for hearing within 30 days. C.R.S. 8-43-203(2)(b)(II); *Quintana v. Earle M. Jorgensen Co.*, W.C. No 4-543-106 (ICAP, Sept. 16, 2004). The purpose of the requirement is to encourage prompt adjudication of issues involving a legitimate controversy and close issues over which there is no dispute. *Id*; see also *Dyrkopp v. ICAO*, 30 P.3d 821 (Colo. App. 2001); *Drinkhouse v. Mountain Board Cooperative Education Services*, W.C. No. 4-368-354 (ICAP, Feb. 7, 2003). The timely filing of an objection and application for hearing on a disputed issue are jurisdictional prerequisites to a hearing on that issue. See *Peregoy v. ICAO*, 87 P.3d 261 (Colo. App. 2004); *Dalco Industries, Inc. v. Garcia*, 867 P.2d 156 (Colo. App. 1993)

5. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

6. 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).

7. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his August 6, 2009 and September 29, 2010 Workers' Compensation claims based on a change in condition. He has not demonstrated that his condition has worsened or that he is entitled to benefits.

8. As found, on August 6, 2009 Claimant sustained an admitted lower back injury in case number 4-800-916, underwent lumbar surgery at the L4-L5 level and reached MMI with a 20% whole person impairment rating on March 12, 2010. On September 29, 2010 Claimant sustained a second admitted lower back injury in case number 4-837-106 and reached MMI with no permanent impairment on May 18, 2011. After Respondents filed FAL's in both cases, they closed by operation of law. On December 3, 2014 Claimant filed a Petition to Reopen both of his claims. The Petition to Reopen was predicated on Dr. Beard's September 15, 2014 medical report. On September 15, 2014 Claimant underwent a surgical consultation with Dr. Beard and reported that his symptoms had waxed and waned since his November 2009 lower back surgery but his symptoms had recently become more severe. Dr. Beard ultimately recommended a "hybrid" surgical procedure for Claimant. The procedure would involve the insertion of an artificial disc at the L3-L4 level, removing hardware and possibly fusing both the L4-L5 and L5-S1 levels. Dr. Beard maintained that Claimant has suffered a substantial deterioration of his lower back condition because of his work activities.

9. As found, in contrast to Dr. Beard's surgical request, the medical records are replete with evidence that Claimant has suffered from chronic waxing and waning lower back pain since his initial industrial injury on August 6, 2009. In fact, Claimant recognized that his lower back symptoms have waxed and waned since his initial industrial injury. Claimant's symptoms flared both while he was working for Employer and after he ceased employment on April 14, 2014. Multiple treating physicians have maintained that Claimant reached MMI and have not retracted the MMI determination. Although Claimant's lifting restrictions were increased from 30 pounds to 10 pounds on February 7, 2014 by Dr. Edmonds at Workwell because he had reported increasing lower back pain over the prior two weeks, he remained at MMI. Furthermore, Dr. Edmonds reviewed a February 18, 2014 MRI and remarked that there were no changes compared to Claimant's October 10, 2012 MRI. Multiple doctors have also noted that there have been no objective changes in Claimant's lumbar MRI's since he reached MMI.

10. As found, Dr. Rauzzino maintained that Claimant's work-related condition has not worsened but instead his symptoms are related to multilevel disc degeneration. He detailed that Claimant has degeneration of the discs adjacent to the level of his fusion, but also at the non-adjacent level above the fusion. The degeneration at the adjacent levels was thus more likely caused by the natural aging process than his previous fusion surgery at the L4-L5 level. Finally, Claimant's Petition to Reopen was predicated on a September 14, 2014 date of worsening of condition. However,

Claimant ceased working for Employer on April 14, 2014. The temporal proximity of Claimant's date of worsening several months after he ceased working for Employer suggests that any onset of acute symptoms was not related to his work activities for Employer. Accordingly, Claimant has failed to demonstrate that he has suffered a change in the condition of the original compensable injury or a change in his physical or mental condition that is causally connected to the original injury.

11. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Dr. Beard's requested fusion surgery is reasonable, necessary and causally related to his August 6, 2009 and September 29, 2010 industrial injuries. Initially, Claimant's discogram revealed pain at all levels of his back and thus an additional lumbar fusion would not be medically reasonable or necessary. Furthermore, Dr. Rauzzino explained that the proposed surgical procedure is inconsistent with the *Guidelines*. Finally, Dr. Rauzzino remarked that the proposed "hybrid" procedure constituted an experimental technique and there is not much data available about the performance of an artificial disc above a two level fusion.

## ORDER

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

1. Claimant's request to reopen his April 24, 2010 Workers' Compensation claim is denied and dismissed.

2. Claimant's request for additional fusion surgery as proposed by Dr. Beard is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

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

DATED: November 19, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

#JUEB3SG80D1MNFv 2

## ISSUES

The issues presented for determination are as follows:

- Whether Claimant suffered a change in her medical condition or there was an error which would allow Claimant to reopen her claim;

- Whether the Claimant is entitled to additional permanent partial disability benefits beyond those originally admitted and paid by Respondents;

- Whether Claimant is entitled to an award of permanent total disability, which claim was previously denied by Order of Judge Jones on January 25, 2013;

- Whether the Claimant is entitled to payment of or an award of specific medical benefits;

- Whether the medical benefits requested by Claimant are through authorized treating physicians.

- Although the Claimant listed issues of compensability and death benefits in the Application for Hearing, those issues were not heard, by agreement, as the Claimant is not deceased; therefore, death benefits are not a ripe issue for hearing and the claim is an admitted case and, therefore, compensability is not an issue that needs to be resolved. Additionally, these issues were stricken by Prehearing Order of PALJ Barbo dated June 3, 2015.

- The Claimant elected to proceed *pro se*. She was advised by the undersigned Judge that she had the right to obtain an attorney and that if she chose to proceed without an attorney, she would be held to the same standards as if represented. After this was explained to Claimant, she chose to proceed without an attorney but requested that her husband, Eliazar Aguirre, be allowed to assist her. This request was granted, without objection by Respondents, based on the OAC Hearing Notice that allows the parties to be represented by an attorney or other person of their choice at the hearing. Case law would also support the Claimant's husband representing her in an administrative proceeding.

- Jesse Torrez, a professional interpreter, was given the interpreter's oath and acted as the Claimant's interpreter throughout the hearing process.

## PROCEDURAL MATTERS

During the hearing, the ALJ gave both parties the opportunity to offer exhibits into evidence. The Claimant offered Exhibit 1, consisting of five pages. Respondents offered only Exhibit F, consisting of the Summary Order from Judge Margot W. Jones dated January 25, 2013. The ALJ admitted both exhibits into evidence. Respondents declined to offer Claimant's medical records into evidence. Claimant also failed to offer any of her medical records into evidence other than the documents found in Exhibit 1. Based on the evidence admitted and the testimony of the Claimant and her husband, the ALJ found and concluded that Claimant failed to meet her burden of proof regarding all issues endorsed. The ALJ entered a ruling from the bench and requested that Respondents' counsel prepare a proposed order.

After the hearing, on October 9, 2015, the Claimant submitted to the ALJ a large packet of medical records accompanied by a note requesting that the ALJ consider those records. The note also accused Respondents' counsel of refusing to provide Claimant's medical records to the ALJ, and basically asks that the ALJ consider these records now. While the ALJ appreciates the efforts made by Claimant to provide additional medical records, the hearing record was closed as of October 6, 2015. Further, the Respondents were under no obligation to submit records to the ALJ on behalf of the Claimant. It was up to Claimant to present her case at the time of the hearing. Finally, it does not appear that the Claimant sent copies of these specific medical to the Respondents' counsel. The ALJ may not consider the additional records without providing the Respondents a chance to object to the records or to question witnesses about the records. To the extent, Claimant's note and the additional medical records could be construed as a request to reopen the hearing record, the request is denied and the bench ruling of the ALJ entered on October 6, 2015 stands. This Findings of Fact, Conclusions of Law, and Order is entered pursuant to the bench ruling.

## FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds as facts:

1. The Respondents admitted liability Claimant's August 25, 2009 workers' compensation claim. She received medical treatment and the matter closed in 2012.

2. On January 14, 2013, the Claimant proceeded to a hearing on several issues, including permanent total disability benefits, and medical benefits.

3. ALJ Margot Jones presided at the January 14, 2013, and entered a Summary Order on January 25, 2013. ALJ Jones found that the Respondents filed a final admission of liability on July 16, 2012, that admitted for maintenance medical benefits.

4. ALJ Jones ordered that the Claimant failed to present evidence that she is unable to earn any wages. The testimony of Sara Nowotny, an expert in vocational rehabilitation, and Dr. Brian Lambden, a Level II accredited physician specializing in physical medicine and rehabilitation, was found to be more credible and persuasive than the testimony of Claimant and her witness, her spouse.

5. ALJ Jones also found that the Claimant failed to establish that she was entitled to an order awarding specific medical benefits.

6. The Claimant currently feels pain from the elbow and wrist in her right arm. She has cramps in her arm.

7. Claimant needs medications for the pain and cramps in her arm. She does not feel that she can be without medications.

8. Medicaid is no longer paying for the Claimant's medications and treatment. The Claimant is now required to pay for some portion of her medical treatment and/or medications.

9. The Claimant is requesting that the Respondents pay for her pain medicine and her psychologist.

10. The Respondents have admitted liability for maintenance medical benefits. The Respondents have refused to pay for medical treatment provided by physicians who are not authorized treating physicians under the workers' compensation system.

11. The Claimant complained that the workers' compensation doctors never found anything on her and that Social Security did find something. The ALJ is unclear what the Claimant meant by this testimony.

12. The Claimant is receiving some sort of Social Security benefits, and is now being covered by Medicare rather than Medicaid. Apparently, Medicare does not cover all of Claimant's prescription medications, including Cymbalta.

13. The Claimant's husband, Eliazar Aguirre, in addition to acting as her representative, also provided testimony in the claim. Mr. Aguirre testified that the Claimant had attempted suicide on two occasions. However, he admitted that those events took place prior to the previous hearing and Order by Judge Jones. He feels that the Claimant still needs to see psychiatrists and that she still has problems with her arm.

14. Claimant's evidence includes a three-page copy of the drug warnings associated with the prescription Cymbalta. This was issued through Denver Health on October 5, 2015, at a cost of $463.13. There is no evidence presented that Denver Health is an authorized treating facility.

15. There was no evidence that the prescription drug Cymbalta was prescribed for symptoms related to Claimant's work injury.

16. Claimant also presented evidence that she has future appointments throughout the months of October and early November with providers through the Denver Health system. There has been no evidence presented that any referral was made to these providers by authorized treating physicians, that these physicians are authorized treating physicians, or that Claimant has ever received an Order changing physicians. There was no evidence that the treatment Claimant continues to seek through Denver Health is related to her work injury.

17. It is also found that the Claimant was seen by Herbert Fried, M.D. Based on his report, the Claimant has received evaluations through the orthopedics and neurology physicians at Denver Health Medical Center. She has received steroids and obtained a cervical spine MRI, which was reviewed as completely normal. She had occupational therapy and an EMG in 2013 by Dr. Ladley-O'Brien, with no evidence of carpal tunnel syndrom, no evidence of ulnar neuropathy and no evidence of radiculopathy. Dr. Fried did not think that he had anything to offer the patient and felt that she should be seen by the hand service.

18. There is no evidence that Dr. Fried is an authorized treating physician or received authorization for the evaluation he performed.

19. Claimant chose to treat outside the authorized treating physicians and obtain treatment through Denver Health, including physical and psychological evaluations, therapy, tests, and medications. Said treatment was originally paid for by Medicaid. When Claimant received Social Security disability, she lost Medicaid. She now has Medicare, which does not pay for all of her treatment and medications.

20. Claimant did not present evidence that an authorized doctor had recommended the treatment she is receiving. There is no evidence from an authorized physician of a need for ongoing psychological treatment and no sufficient showing that the treatment Claimant has received is connected to the claim, authorized, or that it would be denied by workers' compensation. Further, there is no evidence that the workers' compensation physician will no longer see the patient or provide her care and treatment. There is also no evidence that the Claimant has endeavored to pursue additional treatment, since the Order of Judge Jones, through the workers' compensation system.

21. Claimant has failed to provide evidence of a worsening of her medical condition since the Order of Judge Jones. She has testified to treatment which was ongoing at the time of the Order and continues to date. Claimant has failed to provide any evidence of a change or worsening of her condition.

22. The ALJ understands that Claimant feels she needs additional medical treatment related to her 2009 workers' compensation injury, but the Claimant has not provided any proper proof (through records admitted at hearing or through witness testimony) that her requests for treatment have any relationship to her work injury. In addition, Claimant essentially asks that the ALJ disregard the rules and law allow her to receive treatment with any medical provider she chooses without making any attempt to

pursue treatment through the workers' compensation system. The ALJ is without authority to disregard the law and enter such an order.

## CONCLUSIONS OF LAW

### *General*

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.

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).

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).

### *Petition to Reopen*

In this case, Respondents filed a Final Admission of Liability on July 6, 2012. Ultimately, an Order of Administrative Law Judge Jones on January 25, 2013, addressed Claimant's challenges to the Final Admission. Judge Jones determined Claimant's average weekly wage and awarded disfigurement. Judge Jones denied permanent total disability and a claim for specific medical benefits beyond the maintenance medical benefits admitted by Respondents in the Final Admission. There is no evidence of an appeal of that Order or other challenge to the Respondents' Final Admission of Liability. The case would be closed as to all issues other than maintenance medical benefits left open by the Final Admission of Liability. Once a claim is closed, as here, it is not subject to further litigation or receipt of benefits unless it is reopened under § 8-43-303, C.R.S. 2014. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005).

To reopen a claim. a claimant must show error, mistake, or change in condition. § 8-43-303(1); *Berg*, 128 P.3d at 272.

> A "change in condition" . . . means "a change in the claimant's physical or mental condition resulting from the compensable injury." Thus, "change in condition" refers either to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury.

*Chavez v. Indus. Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985) (quoting *Lucero v. Indus. Comm'n*, 710 P.2d 1191, 1192 (Colo. App. 1985)). "Reopening is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted." *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000).

The party attempting to reopen a claim "shall bear the burden of proof as to any issues sought to be reopened." § 8-43-303(4). Thus, claimant bore the burden of demonstrating that she had experienced a worsening of her condition which was attributable to the work-related injury for her petition to reopen to be successful. *See, Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002) (claimant bears the burden of proof on reopening, including burden of demonstrating a causal link to the initial injury.)

The Claimant has failed to provide evidence to sustain her burden of proving a change or worsening of her condition that would entitle her to a reopening of this claim. The testimony of Claimant and her husband indicated that the Claimant continues to pursue the same treatment she has been pursuing since before the filing of the previous Final Admission of Liability and entry of ALJ Jones' Order. There was no medical evidence that the Claimant's condition had worsened since the date of the previous Admission and Order, or that she has experienced any change in her medical condition that is related to her workers' compensation injury. Claimant has failed to prove that her claim should be reopened.

Absent a reopening of the claim, the issues of permanent partial disability and permanent total disability are moot, as those issues were resolved by the previous Final Admission of Liability and Order of ALJ Jones.

***Medical Treatment***

Respondents are liable for medical treatment that is reasonable and necessary to cure or relieve the employee from the effects of the injury. § 8-42-101. C.R.S.; *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Claimant has the burden to prove that an injury directly or proximately caused the condition for which benefits are sought. *Wal-Mar Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The claimant is entitled to maintenance medical benefits where there is substantial

evidence in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of the industrial injury or prevent further deterioration of the claimant's condition. *Stollmeyer v. Indus. Claim Appeals Office*, 969 P.2d 609 (Colo. App. 1995). Respondents retain the right to contest the compensability of a particular treatment on the grounds the treating physician is not authorized to treat the injury, or the treatment is not reasonable or related to the industrial injury. The Admission for maintenance medical treatment does not vitiate the Respondents' right to dispute the relatedness of treatment. The Respondents have raised the issue of whether the medical treatment requested by the Claimant is by and through authorized treating providers.

Although the Respondents have admitted for maintenance medical treatment, Claimant has failed to establish a connection between the treatment to which she claims she needs and the claim itself. Claimant has also failed to present evidence that would establish that an authorized doctor has recommended the ongoing treatment. Claimant has further failed to produce evidence that the ongoing need for treatment is connected to the claim or that a need for ongoing psychiatric treatment is related to the work injury. Claimant has failed to provide evidence that she cannot be seen by the workers' compensation physician or that she has actively pursued treatment through the authorized physicians. Claimant has failed to establish that she is entitled to an Order awarding any specific medical benefits.

## ORDER

It is therefore ordered that:

A. The Claimant has failed to satisfy her burden of proving a mistake, change or worsening of condition that would entitle her to a reopening of her claim.

B. The issues of permanent partial and permanent total disability are denied and dismissed as moot based on the Claimant's failure to prove a right to reopen the claim.

C. The claim for specific medical treatment, including but not limited to medical services and prescriptions through Denver Health Medical Center, is denied and dismissed based on the Claimant's failure to prove that the treatment is necessary, related, or through authorized treating physicians.

D. 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: November 2, 2015

DIGITAL SIGNATURE:

L. Broniak

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

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-837-612-04

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**FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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IN THE MATTER OF THE WORKER'S COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

---

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 4, 2015 and continued to a second day on October 23, 2015 in Denver, Colorado. The hearings were digitally recorded (reference 6/4/2015, beginning at 8:30 a.m. and ending at 1:08 p.m. and reference 10/23/2015, beginning at 8:30 a.m. and ending at 3:30 p.m.).

Claimant's Exhibits 1 through 25 and 27 were admitted without objection. There was no exhibit 26 that was submitted. Claimant's exhibits 28 and 29 were not admitted into evidence because the ALJ sustained the Respondents' objections thereto. Respondents' Exhibits A through G 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 Respondents to be filed, electronically, within five (5) business days and giving the Claimant two (2) working days after receipt thereof within which to file objections, electronically. The proposed decision was filed, electronically, on October 30, 2015. No copy of the proposal was noted to counsel for the Claimant. Consequently, the Office of Administrative Courts (OAC) emailed a copy of the proposed decision to Claimant's counsel on November 9, 2015. No timely objections were filed. .After consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

## ISSUES

The issues to be determined by this decision concern whether a spinal cord stimulator trial is reasonably necessary to treat Claimant's work-related injury. The resolution of "spinal cord stimulator" issue was, potentially, a prerequisite to a determination of maximum medical improvement (MMI) unless the spinal cord stimulator is deemed post-MMI maintenance medical care (*Grover* medicals). The Claimant's burden on the reasonable necessity and whether the stimulator is maintenance medical care is by "a preponderance of the evidence."

The issue concerning the Claimant's request to overcome the Division Independent Medical Evaluation (DIME) of Karen Ksiazek, M.D., which determined Claimant had reached MMI on January 14, 2014, and assigned the Claimant a 17% whole person impairment rating, which Dr. Ksiazek later corrected in her evidentiary deposition to 18% whole person impairment. The Claimant's burden on this issue is by "clear and convincing evidence."

If the DIME opinion concerning MMI is overcome, the Claimant designated the issue of temporary total disability (TTD) benefits from January 14, 2014 and continuing. The Claimant's burden on this issue is 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. This is an admitted low back injury of September 9, 2010.

2. The Claimant was referred to Concentra for treatment. Claimant treated for low back pain and right leg pain with David Yamamoto, M.D. and was also treated or evaluated by Frederic Zimmerman, D.O., Steve Shogan, M.D., Christopher Ryan, M.D., Sanjay Jatana, M.D., Bennett Machanic, M.D., Peter Reusswig, M.D., Giancarlo Barolat, M.D., Ron Carbaugh, Psy.D., and Walter Torres, Ph.D

3. The Claimant underwent a L5-S1 anterior fusion surgery on November 3, 2011, with Dr. Jatana. Claimant underwent a posterior fusion surgery to L5-S1 with Dr. Jatana on January 31, 2013 (Claimant's Exhibit. 2).

4. The Claimant continued treating for his low back and leg pain. He was referred to Dr. Reusswig on November 15, 2013, who recommended a spinal cord stimulator trial (Claimant's Exhibit 6).

5. The Claimant underwent an Independent Medical Examination (IME) with Lawrence Lesnak, D.O., at the Respondents' request on January 14, 2014. Dr. Lesnak stated the opinion that the Claimant was not a candidate for a spinal cord stimulator trial from either a physical or psychological standpoint and he placed the Claimant at maximum medical improvement (MMI) as January 14, 2014 (Respondents' Exhibit C). The Respondents filed an Application for a 24-Month Division Independent Medical Examination (DIME) on February 20, 2014.

6. The Claimant underwent a DIME Karen Ksiazek, M.D., on June 23, 2014. Dr. Ksiazek placed the Claimant at MMI as of January 14, 2014, and ultimately assigned him an18% whole person impairment.

7. The Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Ksiazek's report. The Claimant objected to it and filed an Application for Hearing to overcome the DIME and on the issues of the reasonable necessity of a spinal cord stimulator and permanent total disability. The issue of permanent total disability was stayed pending the outcome of this hearing.

**Reasonable Necessity of a Trial Spinal Cord Stimulator**

8. Dr. Jatana, an orthopedic spine surgeon, performed hardware removal surgery on the Claimant on June 9, 2015. Dr. Jatana saw the Claimant for a follow up on September 14, 2015. During this visit, Dr. Jatana noted improvement in the Claimant's back pain but noted that right lower extremity pain persists. Dr. Jatana recommended a spinal cord stimulator trial to address the residual lower extremity pain.

9. Dr. Jatana's recommendation for a spinal cord stimulator has been consistent before and after the hardware removal surgery (Claimant's Exhibit 2).

10. A spinal cord stimulator trial was recommended by Dr. Yamamoto, Dr. Reusswig, and Dr. Machanic (Claimant's Exhibits 3-4, and 6).

11. Claimant was also referred to Dr. Barolat who recommended a spinal cord stimulator trial (Claimant's Exhibit 1).

12. During his evidentiary deposition, Dr. Barolat indicated that he would not recommend a spinal cord stimulator trial for an individual with the following personality traits and presentation:

a. A psychological Axis II Diagnosis of personality disorder with dependant schizotypal, narcissistic and borderline personality.
b. A mental health professional saying the patients' profile is strongly indicative of someone who's a poor psychological candidate for an invasive procedure.

c. A mental health professional saying that the patient would probably not respond well to invasive procedures or would develop persistent and peculiar complications to these procedures (Barolat Depo. Trans. 19:10 – 20:16).

13. The hypothetical listed above tracks Dr. Torres' psychological conclusions concerning the Claimant (Respondents' Exhibit D), which psychological conclusions, as found herein below, are **not** credible. The hypothetical, based on Dr. Torres' psychological conclusions, does not track the psychological conclusions of Dr. Carbaugh concerning the Claimant because, while noting concerns, Dr. Carbaugh found the Claimant to be a fair candidate for invasive procedures (Claimant's Exhibit 5).

14. Dr. Barolat was presented Dr. Carbaugh's scenario as a hypothetical. On re-direct examination, Dr. Barolat re-affirmed that he thought a spinal cord stimulator was reasonable and necessary for the Claimant (Barolat Depo. Trans. 25:16-21).

**Psychological Evaluations**

15. The Claimant underwent a psychological evaluation with Dr. Torres on January 13, 2013. Dr. Torres assessed the Claimant with depression and a personality disorder and was of the opinion that the Claimant was a poor candidate for a spinal cord stimulator or other invasive procedures (Respondents' Exhibit D).

16. The Claimant underwent a psychological profile with Dr. Carbaugh. Dr. Carbaugh stated that the Claimant's behavioral presentation caused him concerns, including dramatic pain behavior and cognitive difficulties, however, Dr. Carbaugh was of the opinion that the Claimant was a **fair candidate** for a spinal cord stimulator trial or any invasive procedure (Claimant's Exhibit 5).

**Opinions Contra a Trial Spinal Cord Stimulator**

17. Dr. Ryan, DIME Dr. Ksiazek, IME Dr. Goldman, and IME Dr. Lesnak recommended against a trial spinal cord stimulator trial (Respondents' Exhibits. A-C, E).

**Opinions in Favor of a Trial Spinal Cord Stimulator**

18. The Claimant underwent a hardware removal surgery on June 9, 2015. According to the Claimant, his low back pain had almost entirely dissipated after the hardware removal surgery but his right lower extremity pain persisted.

19. The Claimant stated that he had difficulty sitting due to pain in his lower extremities, from his buttocks down his thigh, right worse than left. During the last session of the hearing, the ALJ observed the Claimant sitting, standing

and kneeling at the witness box and at counsel table. The ALJ infers and finds that the Claimant's posturing behavior was genuine, not staged, and it supports his testimony concerning his difficulty sitting.

20. Dr. Machanic and Dr. Barolat testified during their evidentiary depositions that a spinal cord stimulator is used primarily to relieve nerve pain associated with lower extremity radiculopathy (Machanic Depo Trans.15:5-15; Barolat Depo Trans. 9:16-10:6).

21. Dr. Barolat noted that the hardware removal would have no effect on the leg pain experienced by the Claimant (Barolat Depo. 8:7-9:13). He further stated that the spinal cord stimulator would serve to mask the leg pain that Claimant experiences (*Id*. at 14:16-15:2). The spinal cord stimulator does **not cure** the pain. Consequently, it does not improve a claimant's structural/anatomical condition. Therefore, in the present case, the spinal cord stimulator would be to maintain the Claimant at the plateau of MMI and to prevent a deterioration of his condition.

22. Dr. Goldman was of the opinion that a spinal cord stimulator would be unlikely to relieve the pain associated with sitting. The ALJ finds this opinion contrary to the weight of the opinions of experts with considerably more expertise concerning spinal cord stimulators than Dr. Goldman possesses. Therefore, the ALJ does not find Dr. Goldman's opinion credible in this regard. Also, the ALJ makes a rational choice to reject Dr. Goldman's opinion in this regard and accept the contrary opinions favoring a trial spinal cord stimulator.

**Overcoming the Division Independent Medical Examination (DIME) of Karen Ksiazek, M.D.**

23. The Claimant underwent a DIME with Dr. Ksiazek on June 23, 2014. Dr. Ksiazek found that a spinal cord stimulator was not prudently indicated, citing Claimant's mechanical factors, lack of demonstrable fibrosis of nerve roots, and the psychological evaluations of Dr. Carbaugh and Dr. Torres. Dr. Ksiazek was of the opinion that the Claimant had reached MMI on January 14, 2014.

24. Dr. Ksiazek first assigned the Claimant a 17% whole person impairment rating. During her evidentiary deposition testimony on March 23, 2015, Dr. Ksiazek corrected her impairment rating and assigned the Claimant an 18% whole person rating.

25. The Claimant underwent a hardware block, a diagnostic injection to determine the source of the pain generator, on March 9, 2015, with Dr. Jatana (Claimant's Exhibit 2).

26. At a March 12, 2015, follow-up visit with Dr. Jatana, the Claimant reported pain relief from the hardware block. Thereafter, the Claimant underwent hardware removal surgery performed by Dr. Jatana on June 9, 2015 (Claimant's Exhibit 2).

27. Dr. Jatana provided a letter to the ALJ that the results of the Claimant's hardware removal surgery would be known six weeks after the surgery (Claimant's Exhibit 27).

28. According to Dr. Goldman, the Claimant's condition was stable as of January 14, 2014. Dr. Goldman was of the opinion that the Claimant may have been removed from MMI as of the date of the hardware removal surgery of June 9, 2015, but returned in any event to MMI six weeks after the surgery, or as of July 21, 2015.

29. The ALJ rejects the notion that a claimant can be taken off MMI and placed back on MMI. There is but one MMI per injury unless a case is re-opened, based on a changed condition (wherein the case is a brand new "ballgame" after the re-opening). The Claimant's need for the hardware removal surgery to substantially improve his condition supports the proposition that the Claimant had not reached MMI, at any time, before that procedure. The ALJ finds that the Claimant reached the one and solitary date of MMI six weeks after the hardware removal.

30. The ALJ rejects DIME Dr. Ksiazek's initial determination that the Claimant was at MMI as of January 14, 2014 because it is contrary to the weight of the credible evidence. Stability in the Claimant's condition following the hardware removal surgery allows consideration of MMI at a later date. It is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Ksiazek's January 14, 2014 MMI date is erroneous.

31. Indeed, the ALJ has considered the totality of Dr. Ksiazek's report and testimony, as well as the totality all of the evidence in this matter, including all opinions offered by all the medical experts, and finds that the Claimant's date of MMI was six weeks after the Claimant 's hardware removal of June 9, 2015, or **July 21, 2015**, which the ALJ hereby determines is the Claimant's MMI date.

32. Dr. Ksiazek was fully Level II accredited at the time of the Claimant's DIME, but she is no longer Level II accredited.

33. The ALJ has considered all opinions to the contrary, including those of Drs. Yamamoto and Machanic, that claimant is not at MMI. The ALJ rejects the opinions of Drs. Yamamoto and Machanic and finds that the Claimant reached MMI on July 21, 2015. At the session of the hearing on October 23, 2015, the Claimant testified that the hardware removal surgery had dramatically improved his back pain, and his back pain is now minimal. The Claimant also testified that he had substantially greater functional improvement after the hardware removal surgery and he described the improvement in his function in terms of his activities of daily living. The Claimant testified that because his back condition is alleviated, he was looking forward to returning to work after he receives a spinal cord stimulator.

**Temporary Total Disability**

34. The Claimant has not worked or earned wages in the job market since January 14, 2014. As of that date, the Claimant was and is receiving Federal Social Security Disability (SSDI) benefits, which after offset yielded an admitted TTD benefit rate of $576.28 per week, or $82.33 per day. The period from January 14, 2014 through July 21, 2015, the day before MMI, both dates inclusive equals 554 days. At the admitted TTD rate, aggregate past due TTD benefits from January 14, 2014 through July 21, 2015 equal $45, 610.82.

**Ultimate Findings**

35. Regarding the trial spinal cord stimulator, between conflicting medical opinions, the ALJ finds the opinions of Dr. Jatana, Dr. Yamamoto, Dr. Machanic, and Dr. Barolat, recommending a trial spinal cord stimulator (and Dr. Carbaugh's psychological opinion that the Claimant was a **fair** candidate for a spinal cord stimulator) more persuasive and credible than the opinions of Dr. Ryan, Dr. Ksiazek, Dr. Torres, Dr. Goldman, and Dr. Lesnak.

36. Between conflicting medical opinions that ALJ makes a rational choice to accept the opinions of Dr. Jatana, Dr. Yamamoto, Dr. Machanic, and Dr. Barolat, recommending a trial spinal cord stimulator, and to reject the opinions of Dr. Ryan, Dr. Ksiazek, Dr. Torres (psychological), Dr. Goldman, and Dr. Lesnak.

37. As found herein above, the Claimant has met his burden of proof, by preponderant evidence that a trial spinal cord stimulator is reasonably necessary to maintain the Claimant at MMI and to prevent a deterioration of his condition.

38. Through testimony and supporting medical records, the Claimant has shown substantial improvement due to the hardware removal surgery. In fact, he has testified that his back is essentially pain free and he has significantly greater functionality after the removal.

39. The ALJ finds that the totality of the evidence, including the latest opinions of Dr. Ksiazek, Dr. Goldman, and Dr. Jatana support the proposition that the Claimant reached MMI six weeks after the hardware removal surgery. This is corroborated by Claimant's testimony that he experienced substantial improvement a month after the surgery and was essentially pain free in his low back as of the date of hearing. As found herein above, the Claimant reached MMI six weeks after the June 9, 2015, hardware removal surgery, or on July 21, 2015.

40. Because Dr. Ksiazek's erroneous MMI date was January 14, 2014, her prior impairment rating is no longer valid because the Claimant has undergone an additional procedure and his condition has improved. The

Claimant cannot return to Dr. Ksiazek, however, for the purposes of a follow-up impairment rating because Dr. Ksiazek is no longer Level II accredited.

41. As found herein above, the Claimant has proven, by preponderant evidence that he is entitled to TTD benefits (with the SSDI offset) of $576.28 per week, or $82.33 per day, from January 14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days, in the aggregate amount of $45, 610.82.

## 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).

b. The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964**,** 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals* Office, 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Jatana, Dr. Machanic, Dr. Barolat, and Dr. Yamamoto that a trial spinal cord stimulator is recommended

were more persuasive and credible than the opinions to the contrary. As found, concerning MMI, the weight of the evidence, including but not limited to the persuasive opinion of Dr. Goldman that the Claimant reached MMI six weeks post-hardware removal surgery, most persuasive and, as found, the claimant reached MMI as of July 21, 2015. As further found, the ALJ rejected the opinions of Dr. Machanic, Dr. Yamamoto and all other contrary evidence, contrary to a date of MMI as of July 21, 2015.

**Substantial Evidence**

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals* Office, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals* Office, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals* Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals* Office, 224 P.3d 397, 399-400 (Colo. App.2009). As found, between conflicting medical opinions, the ALJ made a rational choice, consistent with substantial evidence, to accept the opinions of Dr. Jatana, Dr. Machanic, Dr. Barolat, Dr. Carbaugh, and Dr. Yamamoto concerning the recommendation for a trial spinal cord stimulator. As further found, the ALJ made a rational choice, consistent with substantial evidence, to accept the opinions supporting the Claimant's date of MMI of six weeks after the hardware removal surgery, or July 21, 2015.

**Medical Benefits – Reasonableness Necessity of a Trial Spinal Cord Stimulator**

d. The Respondents are liable for authorized medical treatment that is reasonably 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). The obligation to provide treatment to "cure" or improve the claimant's condition terminates when the claimant reaches MMI. § 8-40-201(11.5), C.R.S.; *Gonzales v. Indus. Claim Appeals Office*, 905 P.2d 16 (Colo. Ct. App. 1995). Treatment to relieve the effects of an industrial injury or prevent further deterioration of the claimant's condition is generally defined as maintenance treatment. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Respondents, however, are only responsible for medical treatment which is

reasonably necessary to cure or relieve the effects of the industrial injury and a claimant bears the burden to prove the causal connection between a particular treatment and the industrial injury. § 8-42-101(1) (a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); see also *Hanna v. Print Expediters*, Inc., 77 P.3d 863 (Colo. App. 2003) (concerning *Grover* medical benefits). Accordingly, where the Respondents contest liability for a particular medical benefit, the Claimant must prove that it is reasonably necessary to treat the industrial injury. *See Grover v. Indus. Comm'n*, *supra*. The question of whether a proposed treatment is reasonably necessary is generally one of fact for determination by the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999); and *White v. Eastman Kodak*, W.C. No. 4-204-799 (ICAO March 25, 2010). As found, the Claimant proved by preponderant evidence that a trial spinal cord stimulator is reasonably necessary to treat his work-related injury. Dr. Barolat's opinion details the appropriateness of the spinal cord stimulator as maintenance treatment. In that opinion, Dr. Barolat notes that the spinal cord stimulator will not cure the Claimant's condition, rather it will mask the pain (Barolat Depo. 14:14-15:6).

**Overcoming the DIME of Dr. Ksiazek**

e. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage* Co. v. *Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage* Co. v. *Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380560 (ICAO, Nov. 17, 2000). As found, the Claimant has proven by clear and convincing evidence that DIME Dr. Ksiazek's opinion that Claimant reached MMI on January 14, 2014 is erroneous. Subsequent to the

DIME exam, the Claimant underwent hardware removal surgery which was not a consideration at the time of the exam with DIME Dr. Ksiazek. The Claimant's low back pain significantly improved to the point it is essentially resolved due to the subsequent hardware removal surgery and his function also similarly significantly improved. The ALJ weighed the evidence and found that the Claimant met his burden of proof, by clear and convincing evidence that he experienced additional significant improvement after being placed at MMI and, therefore, he overcame the DIME opinion by DIME Dr. Ksiazek that he had reached MMI on January 14, 2014. The totality of the persuasive evidence, including but not limited to Dr. Goldman's testimony established that the Claimant reached MMI six weeks after hardware removal surgery, which was July 21, 2015.

**Post-MMI Medical Maintenance Medical Care**

f. An injured worker is entitled to reasonably necessary and causally related post-MMI medical maintenance care to maintain him at MMI and to prevent a deterioration of his condition. As found, Dr. Barolat, Dr. Jatana, and Dr. Machanic were of the opinion that a spinal cord stimulator would not cure the Claimant's pain but would only reduce or relieve the effects of it be masking the pain. Dr. Goldman also stated that a spinal cord stimulator is not curative treatment. The ALJ credits the opinion of Dr. Goldman, as supported by medical evidence, that the spinal cord stimulator and all related treatment thereto is a post-MMI medical maintenance treatment. The trial spinal cord stimulator may be performed as maintenance medical treatment.

**Temporary Total Disability (TTD) Benefits**

g. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). 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 has neither worked nor earned wages since January 14, 2014, and he did not reach MMI until July 22, 2015. He was temporarily and totally disabled from January 14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days.

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, and there is no actual return to work,

TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant is entitled to TTD benefits (including the SSDI offset) of $576.28 per week, or $82.33 per day, from January 14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days, in the aggregate amount of $45, 610.82.

**Burden of Proof on Issues Requiring Preponderant Evidence**

i. The injured worker has the burden of proof, by a preponderance of the evidence of establishing entitlement to benefits, beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues requiring preponderant evidence.

**ORDER**

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of a trial spinal cord stimulator trial and all other post-maximum medical improvement maintenance medical benefits, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The original date of maximum medical improvement provided by Karen Ksiazek, M.D., of January 14, 2014, is hereby vacated. The Claimant reached maximum medical improvement on July 22, 2015. The trial spinal cord stimulator shall be performed as medical maintenance treatment.

C. the Respondents shall pay the Claimant temporary total disability benefits of $576.38 per week, or $82 33 per day, from January b14, 2014 through July 21, 2015, both dates inclusive, a total of 554 days, in the aggregate amount of $45, 610. 82, to be paid retroactively and forthwith.

D. The Respondents are entitled to a credit for all amounts of permanent partial disability benefits paid pursuant to the Final Admission, dated August8, 2014.

E. 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.

F. A new Division Independent Medical Examination Panel shall be constituted for the sole purpose of determining the degree of the Claimant's permanent medical impairment as of the date of maximum medical improvement, July 22, 2015.

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

DATED this_____day of November 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 true and correct copies of the above **Full Findings of Fact, Conclusions of Law and Order** were **sent electronically, PDF format** on this____day of November 2015 addressed as follows:

Division of Workers' Compensation
cindy.beck@state.co.us

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

_____
Court Clerk

Wc.ord

## ISSUES

The issues for determination in this case are as follows:

1. Whether the claimant has established, by a preponderance of the evidence, a worsening of her work-related knee condition;

2. If so, whether, in the discretion of the ALJ, the claim should be reopened; and,

3. If so, whether the claimant has established, by a preponderance of the evidence, that the left total knee replacement procedure recommended by Dr. Lee McFadden is reasonable and necessary medical treatment which is causally related to the work-injury.

## FINDINGS OF FACT

1. The claimant was employed as a cosmetologist for the respondent-employer from February 2003 to January 2011.

2. The claimant suffered no preexisting bilateral knee or wrist symptoms.

3. On September 25, 2010, the claimant suffered an admitted work injury when she tripped and fell while carrying a chair for the respondent-employer. She landed on her bilateral knees and right arm.

4. On September 29, 2010, Dr. Williams examined the claimant, who reported the work injury to her bilateral knees and right arm. Dr. Williams obtained x-rays of the bilateral knees and right arm, which were negative for fractures or dislocations. He diagnosed right wrist pain, bilateral knee pain, contusions of the knees and forearm, sprain of the right wrist, and knee abrasions. He prescribed naproxen and imposed restrictions against lifting over 20 pounds or 15 pounds repetitively and prohibited any crawling, kneeling, or squatting.

5. The claimant returned to work at her regular job duties for the employer.

6. On December 1, 2010, the claimant proceeded with her next appointment with Dr. Williams. The claimant reported continued pain in her right wrist and knees. She also reported some loss of range of motion of the right wrist and intermittent numbness in the right hand. She reported that physical therapy and climbing stairs increased her symptoms. She reported that she had stopped physical therapy and the naproxen.

7. Dr. Williams determined that claimant was at MMI without impairment or the need for additional medical treatment. He noted full range of motion of the wrist and knees, but took no formal measurements. Dr. Williams reported that he had nothing more to offer claimant, but noted that she may continue to have knee symptoms due to degenerative changes.

8. On December 6, 2010, the insurer filed a final admission of liability (FAL) denying liability for any permanent disability benefits or additional medical benefits.

9. On April 13, 2011, Dr. Watson performed a Division Independent Medical Examination (DIME). Dr. Watson obtained x-rays of the right wrist and bilateral knees. He reported that the x-rays showed normal right wrist structures, but medial and lateral osteoarthritis and bone-on-bone condition of the right patellofemoral joint and degenerative joint disease of the left knee. He diagnosed contusion of the right forearm, dorsiflexion injury of the right wrist, decreased sensation in the right ulnar nerve distribution, degenerative arthritis of the right knee, and chondromalacia of the left knee. Dr. Watson determined the claimant was not at MMI and needed an MRI of the right wrist, an EMG of the right wrist, and a referral to an orthopedic surgeon for evaluation of the bilateral knees.

10. The respondent-insurer challenged the DIME physician's determinations and the case went to hearing before ALJ Stuber, who determined that the respondent-insurer failed to overcome the DIME physician's findings.

11. On January 17, 2012, Dr. Caughfield began authorized treatment of the claimant. He referred the claimant for MRI scans, the EMG of the right wrist, and evaluation by Dr. Weinstein and Dr. Karl Larsen.

12. The February 28, 2012 MRI of the right knee showed patellofemoral osteochondromalacia with subcortical cysts. The MRI of the left knee that same day showed severe chondromalacia of the patella and lateral femoral condyle with moderate

chondromalacia in the medial facet, mild injury of the medial collateral ligament, and a Baker's cyst.

13. On May 25, 2012, Dr. Weinstein began treatment of the claimant's bilateral knees. He administered injections and referred the claimant for physical therapy. He subsequently tried a series of viscosupplementation injections without much success.

14. On March 5, 2013, Dr. Caughfield determined that claimant was at MMI. He referred her for a functional capacity evaluation (FCE).

15. On March 6, 2013, Dr. Weinstein discharged the claimant from his care with directions to continue home exercises, ibuprofen, and to consider knee braces. He continued to diagnose aggravation of patellofemoral osteoarthritis.

16. On April 11, 2013, Dr. Caughfield determined 9% impairment of the right upper extremity based upon right wrist range of motion loss and supination loss. Dr. Caughfield also determined 24% impairment of the right lower extremity based upon 20% loss of right knee flexion combined with 5% for mild chondromalacia. Dr. Caughfield determined 24% impairment of the left lower extremity based upon 20% loss of left knee flexion combined with 5% for mild chondromalacia. Dr. Caughfield reported that claimant's restrictions based upon the FCE as occasional lifting 20 pounds to shoulder height and 25 pounds overhead, repetitive use of upper extremities to tolerance with anticipated unrestricted use, no kneeling or crouching, and frequent standing of four to six hours per day. He noted that frequent lifting limits would be half of the occasional limits.

17. On June 11, 2013 Dr. Watson performed a follow-up DIME. He determined that claimant was at MMI on March 15, 2013. Dr. Watson measured left knee flexion of 100 degrees, resulting in 18% impairment. He determined 7% impairment for moderate to advanced degenerative changes of the patella. He combined the ratings to determine 24% impairment of the left lower extremity. Dr. Watson also measured right knee flexion of 105 degrees, which resulted in 16% impairment. He combined the ratings to determine 24% impairment of the left lower extremity. Dr. Watson also measured the right knee flexion of 105 degrees, which resulted in 16% impairment. He combined that rating with 5% for mild chondromalacia of the patella, resulting in 20% impairment of the lower extremity. Dr. Watson also determined 7% impairment of the upper extremity due to loss of wrist and elbow range

of motion. He agreed with the maintenance care and restrictions recommended by Dr. Caughfield.

18. On October 16, 2013, Dr. Wallace Larson performed an independent medical examination for the respondent-insurer. He disagreed with the DIME determination of permanent impairment to the bilateral knees. He thought the claimant suffered only abrasions and contusions.

19. A second hearing was held before ALJ Stuber in March 2014 wherein he upheld the determination of the DIME physician, finding the claimant suffered work aggravations of her preexisting bilateral knee degenerative conditions. She was asymptomatic before the work injury, but remained symptomatic thereafter.

20. Subsequent to the Order issued by ALJ Stuber on April 10, 2014, the claimant continued to treat for her work-related and ongoing bilateral knee condition.

21. Subsequent to the determination of MMI the claimant's left knee has begun to give out on her causing her to fall. She is now severely limited in her functionality and that she can no longer tolerate the pain.

22. On July 28, 2014, Dr. David Weinstein notes that "Her left knee is particularly painful and has slowly increased to the point where she is extremely limited in activity." Dr. Weinstein recommended that the claimant be referred to his partner, Dr. Lee McFadden, for consideration of a left total knee replacement. The claimant was examined by Dr. McFadden on September 24, 2014. Dr. McFadden notes a "history of increasing bilateral knee pain" with the "most severe pain in her left knee." Based upon this presentation, as well as an updated MRI, Dr. McFadden recommended a left total knee replacement procedure.

23. The respondent-insurer denied the procedure asserting that the need for the left total knee replacement surgery was not causally related to the compensable injury.

24. On May 6, 2015, the respondent-insurer had Dr. Mark Failinger perform an IME. Dr. Failinger opined that the work-injury aggravated the pre-existing arthritis in the claimant's knees. He opined that the viscosupplementation procedures which were performed were intended to calm down the work-related aggravation of the pre-existing arthritis. Dr. Failinger opined that the viscosupplementation was reasonable and necessary medical treatment and that it was claim related. Dr. Failinger noted that this

viscosupplementation had been unsuccessful. Dr. Failinger further opined that the need for the left total knee replacement was not related to the work-injury. Dr. Failinger's opinion is summarized in his report as follows:

> It is extremely common to have an event cause symptomatology from severe preexisting arthritis were there was no or some milder symptoms previously. All attempts to settle this down with physical therapy and injections have been performed, as well as anti-inflammatories and relative rest. Unfortunately, she has ongoing symptomatology subjectively and it would appear with medical probability that the need for treatment of degenerative joint disease is for the preexisting arthritis rather than any new pathology created in the incident of September 25, 2010.

25. On September 15, 2015, the parties took the deposition of Dr. William Watson, the DIME physician in this case. Dr. Watson testified that he had reviewed the treatment notes from the Colorado Center of Orthopedic Excellence which were generated subsequent to his last examination of the claimant. Dr. Watson testified that, at the time of MMI, he opined that the work-injury caused a permanent aggravation of the claimant's pre-existing arthritis. He opined that the claimant's ongoing bilateral knee symptoms were caused by the work-injury which permanently aggravated the pre-existing arthritis. Dr. Watson opined that work-injury caused the symptoms for which the left total knee replacement surgery was being recommended. Dr. Watson opined that the need for the left total knee replacement surgery was caused by the work-injury.

26. The ALJ finds that the analyses and opinions of Dr. Watson are credible and more persuasive than medical analyses and opinions to the contrary.

27. The claimant has established that it is more likely than not that the claimant's condition in her knees has worsened from the time the claimant was placed at MMI and this worsening is as a result of the permanent aggravation of the claimant's pre-existing condition. This permanent aggravation is causally related to the claimant's industrial injury.

28. The ALJ finds that the claimant has established that the claim should be reopened.

29. The ALJ finds that the claimant has established that it is more likely than not that the claimant's need for left total knee replacement is reasonable, necessary, and related to the claimant's industrial injury.

## CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by 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 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 bi-as, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P .2d 1205 (1936); CJI, Civil 3:16 (2007).

4. C.R.S. §8-43-303(1) provides in pertinent part that; "At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award…If an award is reopened on grounds of an error, a mistake, or a change in condition, compensation and medical benefits previously ordered may be ended, diminished, maintained, or increased. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. Any order entered under this subsection (1) shall be subject to review in the same manner as other orders."

5. In this case, the ALJ concludes that the claimant has established, by a preponderance of the evidence, that she suffered a worsening of her work-related medical condition. The evidence which supports this finding is contained in the medical records of The Colorado Center of Orthopedic Excellence. These records document that the claimant continued to purse treatment for her work-related knee condition after she was found to be at MMI in April of 2013. On July 28, 2014, Dr. David Weinstein notes that "Her left knee is particularly painful and has slowly increased to the point where she is extremely limited in activity." Dr. Weinstein recommended that the claimant be referred to his partner, Dr. Lee McFadden, for consideration of a left total knee replacement. The claimant was examined by Dr. McFadden on September 24, 2014. Dr. McFadden notes a "history of increasing bilateral knee pain" with the "most severe pain in her left knee." Based upon the clinical presentation, as well as an updated MRI, Dr. McFadden recommended a left total knee replacement procedure.

6. Support for the ALJ's finding that the claimant has suffered a worsening of her work-related knee condition is also found in the claimant's testimony at hearing. The claimant had no pain or functional limitations in either knee prior to the work-related injury occurring on September 25, 2010. The claimant had pain and functional limitations in both knee from the date of injury up until she was placed at MMI in April of 2013. The claimant observed that since being placed at MMI, her work-related knee condition has gotten worse. Her left knee has begun to give out on her causing her to fall and she is now severely limited in her functionality and can no longer tolerate the pain.

7. Given that the claimant has established a worsening of her work-related medical condition, it is within the discretion of the ALJ to reopen that case. The ALJ finds good cause to reopen the claim.

8. The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required.

*Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

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

10. In this case, the ALJ concludes that the claimant has established by a preponderance of the evidence, that the left total knee replacement is reasonable and necessary medical treatment for her work-related left knee condition. Support for this finding can be found in the treatment notes of the Colorado Center for Orthopedic Excellence as well as the opinions of Dr. Watson who served as the DIME doctor in this matter.

11. This ALJ concludes that the opinions and analyses of Dr. Watson are more credible than the opinions of Dr. Failinger in regards to whether the need for the total knee replacement procedure was caused by the work-injury. Both physicians agree that the claimant's pre-injury baseline, relative to her bilateral knees, was asymptomatic pre-existing arthritis. Both physicians believe that the work-injury aggravated the previously asymptomatic arthritis causing it to become symptomatic. Both physicians agree that the viscosupplementation, which was undertaken was an attempt to calm down the permanently aggravated arthritis, was properly claim related. Both physicians opined that the claimant has not, since suffering the work-injury, returned to her pre-injury baseline. All of these facts lead to the conclusion that the need for the total knee replacement procedure is causally related to the work-injury.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The claimant's workers' compensation claim is reopened.

2. The claimant has established, by a preponderance of the evidence, that the left total knee replacement procedure recommended by Dr. Lee McFadden is reasonable and necessary medical treatment which is causally related to the work-injury.

3. The parties stipulated that Dr. Lee McFadden is an authorized treating provider for this claim and it is so ordered.

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

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

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

DATE: November 6, 2015

/s/ original signed by:

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

## ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of Temporary Total Disability (TTD) benefits from Claimant in the amount of $13,721.35.

2. The rate at which Respondents may recover any overpayment.

## FINDINGS OF FACT

1. On October 18, 2011 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. While Claimant was loading pallets into his truck they fell and struck him in the head and cervical spine. Claimant reported his injuries to Employer and received medical treatment from authorized treating physicians.

2. Claimant underwent an extensive course of treatment that included C5-C6 fusion surgery and cervical spine surgery. During his rehabilitation he received Temporary Total Disability (TTD) benefits for the periods from October 19, 2011 through January 26, 2014 and November 26, 2014 through March 11, 2015.

3. On April 15, 2013 Claimant's treating physicians placed him at Maximum Medical Improvement (MMI). Respondents subsequently filed a Final Admission of Liability (FAL).

4. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). Clarence Henke, M.D. was selected to perform the DIME. He initially evaluated Claimant on September 18, 2013 and concluded that Claimant had not reached MMI. Dr. Henke recommended additional medical treatment for Claimant's cervical spine.

5. In May 2014 Claimant's treating physicians determined that he had again reached MMI. However, on July 17, 2014 Claimant returned to Dr. Henke for a follow-up DIME. Dr. Henke again concluded that Claimant had not reached MMI and recommended additional medical treatment.

6. Respondents filed an Amended General Admission of Liability (GAL) and restarted TTD benefits with additional medical treatment based on Dr. Henke's recommendations. Dr. Henke had instructed Claimant to follow-up with his treating dentist for evaluation of his jaw and his treating physician for additional cervical spine treatment.

7. On September 24, 2014 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian determined that Claimant was progressing very well and had regained range of motion throughout his cervical spine. Dr. Cebrian remarked that Claimant's condition had stabilized after his cervical spine surgeries. He assigned Claimant a 20% whole person impairment rating.

8. Claimant's treating physicians again placed him at MMI and referred him back to Dr. Henke for a third DIME. On February 4, 2015 Dr. Henke examined Claimant and determined that he had reached MMI on November 26, 2014. Dr. Henke agreed with Dr. Cebrian and assigned Claimant a 20% whole person impairment rating.

9. On March 19, 2015 Respondents filed a new FAL based on Dr. Henke's February 4, 2015 DIME determination. Respondents noted that Claimant had received an overpayment of TTD benefits in the amount of $13,721.35. The excess TTD benefits were based on payments after the November 26, 2014 date of MMI. Claimant received total TTD benefits in the amount of $113,438.37. The FAL also recognized an Average Weekly Wage (AWW) of $1,822.88. Finally, the FAL left open medical maintenance benefits that are reasonable, necessary and related to Claimant's October 18, 2011 industrial injury.

10. At the hearing in this matter the parties agreed that the only remaining issue to be determined was Respondents' request to recover the $13,721.35 overpayment of TTD benefits noted in the March 19, 2015 FAL. The parties noted that Claimant is still working for Employer.

11. Claimant's 20% whole person impairment rating had a value of $70,216.94. However, because the impairment rating was less than 25% Claimant reached the $75,000 statutory cap. Claimant thus could not recover based on the 20% whole person impairment rating and have the $13,721.35 credited against a Permanent Partial Disability (PPD) award.

12. Respondents have proven that it is more probably true than not that they are entitled to recover an overpayment of TTD benefits from Claimant in the amount of $13,721.35. At Claimant's third DIME on February 4, 2015 Dr. Henke determined that he had reached MMI on November 26, 2014. However, because of the retroactive MMI determination, Claimant had received TTD benefits from November 26, 2014 through March 11, 2015. Because Claimant should not have received TTD benefits after he reached MMI, the $13,721.35 that Respondents paid after November 26, 2014 constituted an overpayment. Claimant shall thus repay Respondents a total of $13,721.35.

13. Claimant requested at hearing that a total of $50/month be paid to Respondents in the event repayment is ordered. Respondents replied that the repayment of $13,721.35 at $50/month would take almost 23 years. Respondents instead proposed that Claimant should be ordered to repay $250/month. At that rate Claimant would repay the $13,721.35 in overpaid benefits in approximately 4 ½ years. A payment of $250/month is reasonable based on Claimant's admitted AWW of

$1,822.88. Claimant's AWW equals a monthly income of $7,899.15. Accordingly, Claimant shall repay Respondents $250/month in overpaid TTD benefits until recovered in full.

## 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 contend that the amount of $13,721.35 paid in TTD benefits since MMI constitutes an overpayment that should be repaid. In support of their argument, Respondents cite to the recent cases of *Haney v. Shaw, Stone & Webster*, W.C. No. 4-790-763 (ICAP, July 28, 2011) and *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013). In contrast, Claimant claims that there is no "overpayment." He contends that because the payment of TTD benefits by Respondents was made at a point where they were required by law, instead of by mistake, they cannot be characterized as an "overpayment" as described by §8-40-201(15.5), C.R.S.

5. In 1997 the General Assembly amended §§8-43-303(1), C.R.S. and 8-43-303(2)(a), C.R.S. to permit the reopening of a claim on the grounds of "fraud" or "overpayment" in addition to the traditional grounds of error, mistake or change in condition. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011). The 1997 legislation is designated as an act "concerning the recovery from claimants of Workers' Compensation benefits to which such claimants are not entitled." *Id.* The statutes

provide that reopening may not "affect moneys already" paid except in cases of fraud or overpayment. *In Re Stroman,* W.C. No. 4-366-989 (ICAP, Aug. 31, 1999). The statute contemplates that in the case of an overpayment the ALJ has the authority to remedy the situation. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011)

6. Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." There are thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandestaff,* No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

7. Sections 8-42-107.2(4), C.R.S. and 8-43-203(b)(II)(A), C.R.S. provide that when a report from a DIME is received, the respondents shall file a FAL based on that report or else request a hearing. *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013). Absent a request to challenge the DIME's findings, the FAL controls. *Id.*

8. In *In Re Haney*, W.C. No. 4-790-763 (ICAP, July 28, 2011) excess temporary benefits were subject to recovery from the claimant as an overpayment. The claimant was terminated from work by the employer based on his failure to pass a drug test. The respondents had previously filed an admission for ongoing temporary benefits. At a hearing conducted several months after the claimant had been terminated, the ALJ found that the claimant was responsible for the loss of his job pursuant to §8-42-105(4)(a), C.R.S. The ALJ required the claimant to repay to the respondents the temporary benefits paid between the date of the termination and the date of his order. The ICAP affirmed. The ICAP opinion was premised on the Court of Appeals' analysis in *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev 'd in part on unrelated grounds*, 232 P.3d 777 (Colo. 2010). In *Simpson*, the Court pointed to the 1997 statutory amendments to §8-43-303(1) & (2)(a), C.R.S. and to the definition of 'overpayment' in §8-40-201(15.5), C.R.S. The amendment to §8-43-303(1) & (2)(a), C.R.S. stated that, upon a showing that the claimant received overpayments, an award could be reopened "and repayment shall be ordered."

9. In *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAP, July 25, 2013) the DIME physician assigned the claimant a permanent impairment rating lower than that determined by her treating physician. The Authorized Treating Physician (ATP) assigned the claimant a 16% lower extremity impairment rating. The respondents filed an FAL and paid the claimant $8,490.73 in PPD benefits. However, the DIME physician subsequently assigned the claimant a 12% lower extremity impairment rating. The respondents filed an amended FAL and awarded the claimant PPD benefits in the amount of $6,368.05. The respondents filed an application for

hearing and sought to recover an overpayment in PPD benefits of $2,122.60. The ALJ agreed with the respondents and ordered the claimant to repay an overpayment of $2,122.60. The ICAP affirmed because an overpayment may result even though it did not "exist at the time the claimant received disability or death benefits."

10. The reasoning and analysis in *Haney* and *Mattorano* are controlling in the present matter. As found, Respondents have proven that it is more probably true than not that they are entitled to recover an overpayment of TTD benefits from Claimant in the amount of $13,721.35. At Claimant's third DIME on February 4, 2015 Dr. Henke determined that he had reached MMI on November 26, 2014. However, because of the retroactive MMI determination, Claimant had received TTD benefits from November 26, 2014 through March 11, 2015. Because Claimant should not have received TTD benefits after he reached MMI, the $13,721.35 that Respondents paid after November 26, 2014 constituted an overpayment. Claimant shall thus repay Respondents a total of $13,721.35.

11. As found, Claimant requested at hearing that a total of $50/month be paid to Respondents in the event repayment is ordered. Respondents replied that the repayment of $13,721.35 at $50/month would take almost 23 years. Respondents instead proposed that Claimant should be ordered to re-pay $250/month. At that rate Claimant would repay the $13,721.35 in overpaid benefits in approximately 4 ½ years. A payment of $250/month is reasonable based on Claimant's admitted AWW of $1,822.88. Claimant's AWW equals a monthly income of $7,899.15. Accordingly, Claimant shall repay Respondents $250/month in overpaid TTD benefits until recovered in full.

## ORDER

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

1. Claimant shall repay Respondents an overpayment in the amount of $13,721.35.

2. Claimant shall repay Respondents $250/month in overpaid TTD benefits until recovered in full.

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: November 13, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

## ISSUES

The issues addressed by this decision involve Claimant's entitlement to ongoing medical benefits. The questions to be answered are:

I. Whether Claimant's need for ongoing lumbar epidural steroid injections and opioid medications are reasonable, necessary and causally related to Claimant's December 5, 2011 admitted work injury.

## FINDINGS OF FACT

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

1. On December 5, 2011, Claimant sustained a complex left subtrochanteric hip fracture as a consequence of a work related slip and fall. Claimant required open reduction and internal fixation (ORIF) with intermedullary rod placement to treat his hip fracture. Claimant was able to advance to a weightbearing as tolerated status after which he was referred to post surgical physical therapy (PT).

2. Claimant's recovery was complicated by the development of left knee pain and his report of "episodes of feeling as though his leg was giving out". MRI of the left knee completed May 14, 2012 demonstrated a medial meniscal tear and grade 2 chrondromalacia of the medial femoral condyle which were attended to surgically by Dr. Wallace Larson on July 12, 2012. According to Dr. Larson, Claimant's 12/5/11 slip and fall probably injured his left knee in addition to causing his femur fracture. Consequently, Dr. Larson opined that Claimant's left knee "arthroscopic evaluation and treatment" performed July 12, 2012 "would be considered work-related".

3. Claimant was returned to PT to address rehabilitation of his hip and knee. On December 19, 2012 Dr. Larson opined that Claimant had reached MMI for his hip and released him from care.

4. On January 14, 2013, Claimant returned to Dr. Larson complaining of "significant left-sided lower back pain". X-rays were obtained and an MRI ordered. X-rays demonstrated "degenerative changes at T-10, T-11 and T-12". The MRI obtained January 22, 2013 revealed "mild central spinal canal stenosis with mild bilateral recess stenosis at L-4-5" along with bilateral moderate foraminal stenosis at L2-3, L3-4 and L4-

5. The MRI also demonstrated contact with disk osteophyte complexes by "several exiting nerve roots".[1]

5. On March 14, 2013 Claimant was evaluated by Dr. Albert Hattem of Concentra Medical Centers. During this visit Claimant reported "persistent low back pain that he [rated] at 2 to 3 out of 10 associated with constant leg numbness". Dr. Hattem informed Claimant that his MRI demonstrated "diffuse age-related degenerative changes; however, because of Claimant's complaint of left leg numbness, Dr. Hattem ordered an EMG/nerve conduction study.

6. Claimant's left hip, knee, back and leg pain has been addressed by issuance of prescriptions for opioid medication, including oxycotin, oxycodone, hydrocodone and Butrans patches.

7. On April 1, 2013, Claimant was seen for a physiatric consultation to "address [his] low back pain. Claimant was evaluated by Dr. Jeffery Wunder. Dr. Wunder addressed the cause of Claimant's low back pain opining that it was "unlikely within reasonable medical probability" that Claimant's low back pain was related to his December 5, 2011 industrial injury and his antalgic gait related to both his hip and knee injuries. As support for his opinion, Dr. Wunder noted that multiple studies regarding the relationship between gait dysfunction and low back pain failed to produce any clear relationship between the two. Nonetheless, Dr. Wunder recommended proceeding with the EMG given his concern that referred anterior thigh pain is common with chronic hip pain, noting that Claimant's femur fracture was at the femoral neck. The ALJ infers from this note, that Dr. Wunder was concerned that Claimant's anterior thigh pain may be emanating from his hip and that Claimant's femur fracture may the cause.

8. On May 14, 2013, Claimant was evaluated by Dr. Mitchell. Dr. Mitchell noted that the MRI obtained January 22, 2013 demonstrated "findings consistent with multiple level DDD (degenerative disc disease), foraminal stenosis at L3-4 and L4-5, instability and stenosis at L4-5 and facet arthropathy at multiple levels". Dr. Mitchell did not address the cause of Claimant's lumbar spine conditions; however, he referred Claimant to PT for "core strengthening and flexibility" and recommended a trial of ESI's (epidural steroid injections) at the L4-5 level as well as NSAID's (non-steroidal anti-inflammatory drugs).

9. On May 23, 2013, Claimant returned for a follow-up examination with Dr. Hattem. At that time, Dr. Hattem noted that the EMG study completed on April 9, 2013 by Dr. Wunder was devoid of evidence for radiculopathy. He also noted that following Dr. Wunder's examination, Insurer "denied additional treatment directed at the patient's low back". Dr. Hattem placed Claimant at maximum medical improvement (MMI) with

[1] During Claimant's follow-up visit with Dr. Larson on March 19, 2013, Dr. Larson documented similar findings and referred Claimant to Dr. Orderia Mitchell for consultation regarding treatment recommendations, although Dr. Larson felt that the likelihood that Claimant may require lumbar epidural steroid injections or selective nerve root blocks was "relatively high".

impairment of the left hip and knee associated with Claimant's December 5, 2011 work injury. Dr. Hattem did not recommend maintenance medical care.

10. Claimant requested a Division sponsored Independent Medical Examination (DIME). While the process to identify a DIME physician to complete the requested evaluation was underway, Respondents set an appointment for Claimant with Dr. Allison Fall.

11. Dr. Fall completed a Respondent Independent Medical Examination (RIME) on September 5, 2013. Following a records review and physical examination, Dr. Fall concluded that Claimant's low back complaints were unrelated to his December 5, 2011 industrial injury. She was unable to discern any correlating objective findings to complaints of low back pain during her physical exanimation. Based upon her review of the medical records, Dr. Fall questioned whether there was any symptomatic pathology in the lumbar spine.

12. On October 16, 2013, Dr. Stephen Lindenbaum completed Claimant's requested DIME. Concerning the relationship of Claimant's low back pain to his December 5, 2011 industrial injury, Dr. Lindenbaum opined as follows: "At this point, I am really not able to substantiate any relationship between his low back symptoms and his prior injury". This is similar to the finds (sic) of Dr. Fall's. Regardless, Dr. Lindenbaum felt Claimant required involvement in a chronic pain program because of his difficulties with activities secondary to chronic pain.

13. Respondents filed a Final Admission of Liability (FAL) consistent with the opinions expressed by Dr. Lindenbaum concerning impairment on November 8, 2013. The FAL also admitted for "Reasonable and necessary medical care related to this claim per authorization from authorized treating physicians".

14. Claimant returned to Concentra Medical Centers on November 21, 2013 for a recheck. He was evaluated by Dr. Daniel Peterson on this date. During this visit, Claimant reported worsening low back symptoms. Dr. Peterson prescribed Percocet 5/325, instructing Claimant to take one tab qid (four times a day) PRN to last him until he came under the care of a pain management specialist. Claimant was referred to Dr. Jeffrey Jenks for pain management.

15. Dr. Jenks evaluated Claimant on November 26, 2013. Following a physical examination, Dr. Jenks opined that Claimant's low back and left leg pain was "likely secondary to lumbar spinal stenosis. He did not address the relationship of Claimant's stenosis to his December 5, 2011 industrial injury. Dr. Jenks recommended a left L4-5 epidural injection and started Claimant on a Butrans 5 mg patch for pain; instructing Claimant to discontinue his use of oxycodone. Dr. Jenks also wrote a prescription for Neurontin.

16. On December 4, 2013, Respondents' requested that Dr. Fall review Claimant's records and respond to Dr. Jenks request for authorization for the L4-5 epidural injection per WCRP Rule 16. Following her records review, Dr. Fall recommended that

Dr. Jenks' request be denied as there is "no documentation that [Claimant's] lumbar condition is causally related to the work-related injury from two years ago". Consequently, the ESI was, in Dr. Fall's opinion, "not medical reasonable and necessary and related to the work-related injury".

17. On December 30, 2013, Dr. Jenks renewed his recommendation for an L4-5 ESI. He changed Claimant's Butrans patch from 5 mcg to 10 mcg and increased Claimant's Neurontin adding one tablet in the AM to Claimant's overall use. Dr. Jenks also recommended continued use of a Flector patch which had been previously prescribed.

18. On January 27, 2014 Claimant returned for follow-up with Dr. Jenks. In addition to the above mentioned medication regime, Dr. Jenks noted that Claimant was using oxycodone when he experienced left trochanter pain. Claimant received left lateral piriformis and gluteus medius injections on this visit and was prescribed a "compounded analgesic ointment" for continued pain to apply to the lateral piriformis and gluteus medius.

19. On March 18, 2014, Claimant's Butrans pain patch was increased to 20 mcg q.7 days in anticipation of his becoming more active as the weather warmed with the onset of spring. Despite Claimant's use of Butrans for pain management at this level, he reported increased episodes of breakthrough pain requiring him to use 10 mg of oxycodone up to three times a day.

20. On May 9, 2015, Respondents requested a records review of Claimant's medication usage by Dr. Fall. Dr. Fall had previously opined that Claimant's initial use of Butrans appeared reasonably necessary and related to Claimant's industrial injury. After reviewing the subsequent records, Dr. Fall noted an escalation in Claimant's use of pain medication in the face of increasing pain. Dr. Fall opined that there was no indication for continued prescription medication as a result of the work-related injury to the left hip and left knee for the following reasons: First, Dr. Fall noted that "[p]ain from the femur fracture would not be expected to increase over time". She concluded that Claimant's increasing pain/symptoms were more plausibly related to the degenerative changes and stenosis present in Claimant's lumbar spine. Thus, she opined that any need for continued pain medications were unrelated to Claimant's admitted industrial injury to the left hip and knee and should; therefore, be prescribed outside the workers' compensation system. Secondly, Dr. Fall noted that there was "no objective documentation of any functional improvement as a result of decreased pain from the femur as a result of taking the medications". Thus, Dr. Fall concluded that continued use of "opioid medications were not medically reasonable and necessary according to the medical treatment guidelines".

21. Claimant was evaluated, at the request of Respondents by Dr. Bernton in an independent medical examination (IME) setting on July 31, 2015. Dr. Bernton completed a comprehensive records review and a physical examination. Following his IME Dr. Bernton issued a written report wherein he agreed with Drs. Wunder, Hattem, Fall and Lindenbaum that Claimant's low back complaints were/are not work-related. Rather, according to Dr. Bernton, Claimant's low back pain is attributable to progressive

multi-level degenerative disk disease and osteoarthritis in the lumbar spine as documented on MRI. Based upon the evidentiary record as a whole, the ALJ credits the opinion of Dr. Bernton over the contrary opinions of Dr. Timothy Hall. Specifically, the ALJ finds that the evolution of Claimant's symptoms, which required increasing amounts of medication and lumbar ESI's to treat, coupled with an EMG finding which went from normal in 2013 to abnormal in 2014, supports Dr. Bernton's opinion that Claimant's current symptoms are emanating from non-occupationally induced multi-level progressive degenerative disk disease rather than Claimant's increased use of the leg for functional activity as espoused by Dr. Hall.

22. Dr. Bernton testified consistently with his report, namely that Claimant's femur fracture was not in a location likely to lead to arthritis and chronic pain. To the contrary, the fracture was below the hip joint on the shaft of the femur. According to Dr. Bernton, Claimant's femur fracture has healed completely and is not the source of his chronic pain. Moreover, Dr. Bernton testified that Claimant's left meniscus tear was successfully treated and is not the source of his chronic pain. Based upon Claimant's pain complaints as documented in the medical records submitted in this case, the ALJ credits Dr. Bernton's opinions to find that neither the left femur nor the left knee are the source of Claimant's chronic pain. As noted above, the evidence presented persuades the ALJ that the source of Claimant's chronic pain, and consequently, his need for treatment, more probably than not, springs from the progressive nature of the degenerative condition in his low back.

23. Respondents have established, by a preponderance of the evidence, that Claimant's need for ongoing medications, including narcotics and additional epidural injections are no longer reasonable, necessary or related to his December 5, 2011 industrial left femur and knee injuries. Nonetheless, as Claimant has been using opioid medications for a lengthy period of time to treat the effects of his industrial injuries, the ALJ credits the opinion of Dr. Bernton, to find that it is medically contraindicated to abruptly cut Claimant off all narcotic medication. Rather, according to Dr. Bernton, Claimant will require a "reasonable" period of time to wean himself from his opioid medications. Based upon the evidence presented, the ALJ finds that Dr. Jenks has begun that weaning process. Claimant has been tapering his use of opioid medication since June 29, 2015. Nevertheless, Dr. Bernton testified that Claimant will require additional time to taper his use further. According to Dr. Bernton's un-rebutted testimony, it is reasonable to extend the time for Claimant to wean himself from his narcotic medications by approximately 4 months to March 1, 2016 after which date further treatment/medications would no longer be related to Claimant's industrial injuries and the obligation of Insurer to provide such treatment would terminate completely. As noted above, Claimant's need for ESI's to manage his chronic low back pain is also un-related to his industrial injuries. Therefore, Insurer is not obligated to authorize or pay for any such treatment.

## CONCLUSIONS OF LAW

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

*General Legal Principals*

A. The purpose of Colorado's Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* 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. A workers' compensation claim is decided on its merits. *Section 8-43-201(1), C.R.S.*

B. The ALJ determines the credibility of the witnesses. *Arenas v. Industrial 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. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and or actions; the motives of a 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 (2005). In this case, the ALJ concludes the testimony of Dr. Bernton to be credible and persuasive. His opinions are supported by sound medical principal and the medical records themselves.

C. In deciding whether a party to a workers' compensation dispute has met their 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. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). 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 to the above-findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

*Medical Benefits*

D. 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); *Section 8-41-301(1)(c), C.R.S.* The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*.

Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, the persuasive evidence establishes that Claimant's need for ESI's and opioid medications are to address the symptoms caused by the natural progression of his preexisting, non-work related degenerative disk disease of the lumbar spine and not to treat any condition related to the June 3, 2011 industrial injury. However, as Claimant has become habituated to the opioid medications which were used originally to cure and relieve him of the pain associated with his left femur fracture and left knee meniscal tear, the continued need for such medications while Claimant undergoes tapering remains reasonable, necessary and related to Claimant's December 5, 2011 industrial injury. As found, that weaning process is likely to take an additional 4 months after which the ALJ concludes that the continued need for opioid medications would no longer be related to Claimant's industrial injury. Because Claimant's need for ESI's is not causally related to his December 5, 2011 industrial injury, Respondents' are not obligated to authorize and pay for such care. In the case of Claimant's opioids, Respondents are liable to provide and pay for such medications through March 1, 2016 after which such liability terminates.

## ORDER

It is therefore ordered that:

1. Claimant's request for lumbar epidural steroid injections is denied and dismissed as the need for these injections is not causally related to Claimant's December 5, 2011 workers' compensation injury.

2. Respondents shall provide and pay for continued opioid medication through March 1, 2016 while Claimant completes his tapering program. The basis for this order is that Claimant's ongoing need is related to his dependence on said medication which was necessary to treat the pain associated with his left femur fracture and left knee meniscal tear originally. Respondents' liability to provide and pay for such opioid medications after March 1, 2016 terminates because the need for such medication would no longer be related to Claimant's industrial injuries.

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: November 18, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive
Colorado Springs, CO 80906

## ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury to her lower back while undergoing physical therapy on March 26, 2015 for her March 11, 2011 admitted left leg injury.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

## FINDINGS OF FACT

1. Claimant is a 57 year old female who worked as an Administrative Representative for Employer. On March 11, 2011 she suffered an admitted industrial injury to her left Achilles tendon while in the course and scope of her employment for Employer. Claimant cut her Achilles heel while exiting a vehicle.

2. Claimant subsequently underwent four surgeries to repair her Achilles tendon. On January 19, 2015 Eric Lindberg, M.D. performed the fourth surgery. Claimant also received physical therapy to strengthen her left leg.

3. Claimant testified that on March 26, 2015 while undergoing physical therapy with Christi Campanella, PT she injured her lower back when operating a glider exercise machine. For her first therapeutic exercise of the day, PT Campanella directed Claimant to a glider machine and instructed her to use her left leg only to press on the foot plate. Lying prone on the glider machine, Claimant exerted force on the foot plate, but was unable to move it. Claimant remarked that she advised PT Campanella that she could not move the plate and PT Campanella responded that she should use both legs to push the foot plate. As Claimant attempted to use both legs to push the foot plate she immediately experienced sharp pains in her lower back and right leg. Claimant noted that she advised PT Campanella about her pain.

4. In contrast to Claimant's testimony, PT Campanella's physical therapy note does not document any lower back injury. PT Campanella stated that Claimant did well and was putting more weight on her foot. She specifically remarked that Claimant "was able to do very light resistance on the foot on the shuttle today without the boot."

5. Claimant explained that she subsequently experienced worsening lower back and right leg pain. On March 29, 2015 she visited the Rose Medical Center Emergency Room. The medical record reflects that Claimant had undergone surgery in January to repair her left Achilles tendon and had been experiencing increased right leg

pain since undergoing physical therapy. The emergency room report also provided that Claimant began experiencing nausea and vomiting three hours earlier.

6. On March 31, 2015 Claimant visited primary care physician Mark Nathanson, D.O. at Family Practice in Aurora for an evaluation. Dr. Nathanson recorded that Claimant had fallen off a leg scooter several months ago and "back has bothered her off and on." He recommended an MRI if Claimant's lower back symptoms did not improve.

7. Based on a referral from Dr. Nathanson Claimant visited the Medical Center of Aurora for an examination on April 3, 2015. She reported back pain, vomiting and diarrhea for the past five days. Jennifer Morris, R.N. recorded "pt here with low back pain for several months, reports diarrhea and vomiting for last 5 days. Seen by Nathanson today, after what sounds like SLR exam, sent here for eval of back pain and NVD."

8. In an April 3, 2015 report Anthony Carcella, PAC noted that Claimant had been lifting her left leg and felt a "pop" in her right lower back. He remarked "now right leg hurts."

9. On April 14, 2015 Claimant visited Sara J. Meadows, D.O. for an evaluation. Dr. Meadows recorded that Claimant had a flare-up of lower back pain while in physical therapy on March 26, 2015 for her left Achilles work-related injuries. Dr. Meadows did not conduct a causation analysis of Claimant's lower back symptoms.

10. On June 1, 2015 Claimant visited Stephen D. Johnson, M.D. for a neurosurgical consultation. Dr. Johnson stated that Claimant "was pushing a glider in early April of this year as part of her physical therapy when she felt a pull in her low back area and then pain radiating into her right leg." After reviewing imaging studies of Claimant's lower back Dr. Johnson was hopeful that her lumbar symptoms would improve with conservative treatment. He recommended a second epidural steroid injection before considering lower back surgery.

11. On June 17, 2015 Claimant visited Dr. Lindberg for an examination. In considering the cause of Claimant's lower back symptoms, Dr. Lindberg explained that her condition was likely "related to an event on one of the physical therapy pieces of equipment, where she states that she had pain after that. This seems reasonable to me, given her low level of activities, doing most other things in life."

12. On June 23, 2015 Claimant returned to Dr. Meadows for an examination. Dr. Meadows noted that Claimant experienced the sudden onset of severe lower back pain and right leg symptoms with subsequent weakness on May 16, 2015. A lumbar spine MRI had revealed a large L4-L5 disc extrusion.

13. On June 11, 2015 Claimant underwent an independent medical examination with Allison M. Fall, M.D. After reviewing medical records and performing a

physical examination Dr. Fall concluded that Claimant's lower back injury was not related to her physical therapy activities on March 26, 2015. Dr. Fall summarized:

> In my opinion and within a reasonable degree of medical probability, her lumbar spine condition and leg complaints are unrelated to the Achilles tendon injury. There was no mechanism of injury from the initial injury to cause a lumbar spine injury. There was no mechanism of injury from the activities in physical therapy for a disc extrusion. The biggest risk factor she has for a lumbar spine condition is her overweight status.

14. On July 31, 2015 Dr. Fall reviewed additional medical records. She maintained that Claimant's lower back condition was unrelated to her March 26, 2015 physical therapy session. Dr. Fall detailed:

> What [Claimant] describes in physical therapy would not be a typical mechanism of injury to cause the MRI findings. She was essentially lying flat on her back and pushing a light weight with her left leg. Also, the emergency department report did not mention anything about this event but talks about her seeing her primary care physician and also associated nausea and vomiting. Therefore, my opinions remain unchanged.

15. Dr. Fall testified at the hearing in this matter. Before the hearing, Dr. Fall was under the impression that Claimant had been performing a leg press on the glide machine at physical therapy. Dr. Fall remarked that a leg press involves the upper legs, gluts and hamstrings. However, at the hearing Claimant testified that she was performing a calf raise where her back was in a protected position at her March 26, 2015 physical therapy session. Claimant was essentially lying flat on her back exercising her calf. Dr. Fall explained that the exercise would not have caused a lumbar spine injury. Accordingly, Dr. Fall determined that Claimant's need for lumbar spine surgery is unrelated to her physical therapy exercises on March 26, 2015.

16. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable injury to her lower back while undergoing physical therapy on March 26, 2015 for her March 11, 2011 admitted left leg injury. Claimant testified that on March 26, 2015 while undergoing physical therapy with PT Campanella she injured her lower back when operating a glider exercise machine. As Claimant attempted to use both legs to push the foot plate she immediately experienced sharp pains in her lower back and right leg. Despite Claimant's testimony, the bulk of the medical records and the persuasive analysis of Dr. Fall reflect that Claimant did not suffer a lower back injury while undergoing physical therapy during the quasi-course of her employment.

17. Initially, PT Campanella's physical therapy note did not document any lower back injury. Second, a March 29, 2015 report from the Rose Medical Center Emergency Room reflects that Claimant had undergone surgery in

January to repair her left Achilles tendon and was experiencing increased right leg pain since undergoing physical therapy. The report does not suggest that Claimant was experiencing any lower back symptoms. Furthermore, on March 31, 2015 Claimant visited primary care physician Dr. Nathanson. He recorded that Claimant had fallen off a leg scooter several months ago and "back has bothered her off and on." Moreover, an April 3, 2015 record from the Medical Center of Aurora reveals that Claimant had been experiencing back pain for several months. Finally, on June 23, 2015 Dr. Meadows noted that Claimant experienced the sudden onset of severe lower back pain and right leg symptoms with subsequent weakness on May 16, 2015.

18. Dr. Fall persuasively concluded that Claimant's lower back symptoms were not caused by her March 26, 2015 activities during physical therapy. She explained that Claimant's description of her activities on the glider machine at physical therapy did not constitute a typical mechanism of injury to cause the MRI findings. Dr. Fall remarked that a leg press involves the upper legs, gluts and hamstrings. Claimant was performing a calf raise at her March 26, 2015 physical therapy session.where her back was in a protected position. Claimant was essentially lying flat on her back exercising her calf. Dr. Fall explained that the exercise would not have caused a lumbar spine injury.

19. In contrast, Drs. Meadows, Johnson, and Lindberg noted that it was reasonable that Claimant may have injured her lower back during physical therapy. However, the doctors did not perform a causation analysis. Moreover, the inconsistencies in the medical records suggest that Claimant had been suffering intermittent lower back symptoms from a variety of causes for several months. Accordingly, Claimant's activities at her March 26, 2015 physical therapy session did not aggravate, accelerate, or combine with her pre-existing condition to produce a need for medical treatment.

## CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. Under the quasi-course of employment doctrine, injuries incurred while undergoing authorized medical treatment for an industrial injury are considered compensable even though they occur outside the ordinary time and place limitations of "normal employment." *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1993). The rationale for the doctrine is that, because the employer is required to provide reasonable and necessary medical treatment and the claimant is required to submit to it or risk suspension or termination of benefits, treatment by the physician becomes an implied part of the employment contract. *See Employers Fire Insurance Co. v. Lumbermen's Mutual Casualty Co.,* 964 P.2d 591 (Colo. App. 1998)*; Shreiber v. Brown & Root, Inc.,* 888 P.2d 274 (Colo. App. 1993).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury to her lower back while undergoing physical therapy on March 26, 2015 for her March 11, 2011 admitted left leg injury. Claimant testified that on March 26, 2015 while undergoing physical therapy with PT Campanella she injured her lower back when operating a glider exercise machine. As Claimant attempted to use both legs to push the foot plate she immediately experienced sharp pains in her lower back and right leg. Despite Claimant's testimony, the bulk of

the medical records and the persuasive analysis of Dr. Fall reflect that Claimant did not suffer a lower back injury while undergoing physical therapy during the quasi-course of her employment.

8. As found, initially, PT Campanella's physical therapy note did not document any lower back injury. Second, a March 29, 2015 report from the Rose Medical Center Emergency Room reflects that Claimant had undergone surgery in January to repair her left Achilles tendon and was experiencing increased right leg pain since undergoing physical therapy. The report does not suggest that Claimant was experiencing any lower back symptoms. Furthermore, on March 31, 2015 Claimant visited primary care physician Dr. Nathanson. He recorded that Claimant had fallen off a leg scooter several months ago and "back has bothered her off and on." Moreover, an April 3, 2015 record from the Medical Center of Aurora reveals that Claimant had been experiencing back pain for several months. Finally, on June 23, 2015 Dr. Meadows noted that Claimant experienced the sudden onset of severe lower back pain and right leg symptoms with subsequent weakness on May 16, 2015.

9. As found, Dr. Fall persuasively concluded that Claimant's lower back symptoms were not caused by her March 26, 2015 activities during physical therapy. She explained that Claimant's description of her activities on the glider machine at physical therapy did not constitute a typical mechanism of injury to cause the MRI findings. Dr. Fall remarked that a leg press involves the upper legs, gluts and hamstrings. Claimant was performing a calf raise at her March 26, 2015 physical therapy session.where her back was in a protected position. Claimant was essentially lying flat on her back exercising her calf. Dr. Fall explained that the exercise would not have caused a lumbar spine injury.

10. As found, in contrast, Drs. Meadows, Johnson, and Lindberg noted that it was reasonable that Claimant may have injured her lower back during physical therapy. However, the doctors did not perform a causation analysis. Moreover, the inconsistencies in the medical records suggest that Claimant had been suffering intermittent lower back symptoms from a variety of causes for several months. Accordingly, Claimant's activities at her March 26, 2015 physical therapy session did not aggravate, accelerate, or combine with her pre-existing condition to produce a need for medical treatment.

## ORDER

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

Claimant's 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: November 4, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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## ISSUES

1. Whether the viscosupplementation injections and/or total knee replacement surgery recommended by Dr. Duffey is reasonable, necessary, and related to the claimant's May 29, 2012 industrial injury; and,

2. Whether the respondents can withdraw their General Admission of Liability due to change in condition.

## PRELIMINARY MATTERS

1. The claimant filed a Claimant's Motion for Summary Judgment on January 23, 2015.

2. The respondents filed a Response to Motion for Summary Judgement that was received on February 9, 2015, the day before the hearing in this matter.

3. The ALJ deferred ruling on the Motion until after the hearing.

4. The ALJ hereby denies the Claimant's Motion for Summary Judgment as there are factual matters in dispute that render granting the motion inappropriate.

## FINDINGS OF FACT

1. The claimant was employed as a housekeeper for the respondent-employer on May 29, 2012.

2. On May 29, 2012, the claimant sustained an injury to her left knee in an accident at work. While at work, the claimant slipped on the edge of a metallic stair and fell twisting her left knee and landing on her buttocks.

3. Prior to this injury, the claimant suffered two injuries to her left knee. The first injury occurred at home while the claimant walked up the stairs in 2010. She tore her meniscus and required surgical intervention. The second injury occurred while the claimant worked as a housekeeper for Radisson Hotel in 2011. She underwent

treatment for this injury as well and was eventually released with a 15% impairment rating and was not given restrictions.

4. On May 29, 2012, the claimant began descending the stairwell outside the hotel in order to return from her smoking break. No specific objects, impediments or moisture were noted by witnesses. The stairs were metallic. As the claimant descended her left leg slipped on the edge of the metallic stair causing her to fall. The fall was witnessed by Gailon Scritchfield. At a previous hearing, Mr. Scritchfield testified that he saw the claimant descend the stairs and that he saw her foot slip off the edge of the stair.

5. The respondent-insurer filed a Notice of Contest on August 8, 2012.

6. A hearing was held on December 18, 2012, on the issue of compensability, and in particular, the respondents attempt to challenge whether the claimant's injury arose out of her employment at the respondent-employer.

7. The ALJ entered an Order finding the claimant's injury was compensable.

8. On May 20, 2014, the respondent-insurer filed a General Admission of Liability.

9. On October 29, 2014, the claimant filed an Application for hearing on the issues of medical benefits, reasonably necessary, Rule 8-43-304 for willful and continuing failure to pay mileage at the correct rate, denial of medical procedure, specifically knee injections. On January 26, 2015, the ALJ issued an Order granting the claimant's unopposed motion to add the issue of denial of medical benefits specifically relating to the total knee replacement surgery recommended by Dr. Duffey.

10. The respondents filed a Response to the claimant's Application for Hearing endorsing the issues of compensability, causation, credits, cure, 8-43-201(1), 8-43-304(1) and 8-43-304(4), the respondents seek to withdraw General Admission Liability, and, Waiver.

11. Prior to May 20, 2014, the claimant received limited treatment for her left knee injury due to her claim being denied, litigated, and challenged.

12. The claimant was initially treated for her knee injury at Emergicare by Dr. Gayle Humm. The claimant was diagnosed with a contusion to right arm and sprain to the left knee. The claimant was initially assigned temporary work restrictions of no lifting or carrying over fifteen pounds, and no kneeling or squatting.

13. On June 3, 2014, Dr. David Walden, at Premier Orthopedics, examined the claimant for the first time for this injury. He opined that:

> Clearly, the patient's most recent injury did not cause her osteoarthritis. However, she does report deterioration in her level of function and an increase in her level of pain following this incident. That is not at all unusual. I have had a chance to review her previous arthroscopy pictures from 2011 and find bone-on-bone contact in the lateral compartment with essentially no lateral meniscus, and, therefore, the tearing that is noted on the residual tissue is probably not of significance. It is similar to the finding on the previous MRI scan as well. There is perhaps no way to make the lateral compartment any worse, since it is already bone-on-bone. Although there is a possible new small medial tear, that is dwarfed in significance, likely, by the severe osteoarthritis in the knee, and therefore, addressing that would be unlikely to benefit the patient.
>
> I would recommend that the patient from a clinical standpoint is a candidate for a total knee arthroplasty. I talked to her about that. I am not certain whether or not this would be considered work-related and it is somewhat complicated based on two previous work-related injuries, both as housekeepers after relatively short employment. The arthritic changes, however, that I saw at the time of the arthroscopy are probably quite chronic in nature, although the original meniscus tear was likely caused by the injury that she sustained in 2011. This most recent injury may or may not have caused a minor tear of the medial meniscus and I do not believe that is of clinical significance.
>
> In summary, the patient is a candidate for total knee arthroplasty. We will investigate the possibility of doing so. She could potentially pursue viscosupplementation if she so chooses, however, her function is very limited, and her symptoms are quite severe.

14. On June 17, 2014, Dr. James Duffey of Premiere Orthopedics examined the claimant based on a referral from Dr. Walden. Dr. Duffey agreed with Dr. Walden that the claimant is a candidate for a total knee arthroplasty. Dr. Duffey noted that he would see the claimant back for a preoperative visit.

15. On June 18, 2014, the claimant returned to Dr. Lund at Emergicare. Dr. Lund noted that the claimant was having difficulty weight bearing and doing any tasks that required standing and walking due to left knee pain. Dr. Lund noted that both Dr. Duffey and Dr. Walden recommended a total knee replacement. Dr. Lund noted that the claimant was "awaiting insurer approval for surgery, TKR left knee. Some knee arthritis was pre-existing, but permanently aggravated by last WC injury.

16. Dr. Lund maintained the claimant's temporary work restrictions of limited to seated or sedentary work and no squatting, kneeling or crawling as of June 18, 2014. Dr. Lund also instructed the claimant to continue use of walker or cane or crutch when weight bearing.

17. On August 4, 2014, Dr. Wallace Larson performed an independent medical evaluation of the claimant. Dr. Larson opined that the claimant's diagnosis is "pre-existing, nonwork related, osteoarthritis of her left knee." He did not recommend any further evaluation, treatment, or diagnostic studies for the claimant's left knee.

18. On October 22, 2014, the claimant was examined by Dr. Lund at Emergicare. Dr. Lund again noted that the claimant had marked aggravation of underlying arthritis and new meniscus tears. Dr. Lund noted that she was waiting for the respondent-insurer to approve the requested Synvisc injection or similar joint injections for the left knee. Dr. Lund adjusted the claimant's temporary work restrictions to "alternate seated duty with stand/walk as tolerated. No squatting, no kneeling, no crouching. Limited stair climbing. No ladders. Limit lift/carry to ten pounds."

19. On January 13, 2015, Dr. Timothy Hall performed an independent medical evaluation on the claimant. Dr. Hall's impression was that the claimant suffered from "[l]eft knee pain related to meniscus tears and events and degenerative changes made symptomatic by a May 29, 2012 event at work while walking down the stairs." Dr. Hall opined that the claimant needs a total knee replacement at this point. According to Dr. Hall, "[t]he total knee replacement is needed as a consequence of the May 29, 2012 work related injury."

20. Dr. Hall based his opinion that the total knee replacement is related to the May 29, 2012 work related injury, on the fact that no physicians were anticipating in the months prior to the May 29, 2012 event having to do a knee replacement. Dr. Hall noted that "[the physician's] were not recommending this intervention because one does not do knee replacements because of degenerative changes in the knees. Knee replacements are done due to pain, which is often related to degenerative changes, but it is the pain that necessitates the intervention not the presences of degenerative changes."

21. Dr. Hall further noted that that Dr. Larson's opinion that the claimant had no injury to her knee on May 29, 2012 differs from everyone else who has evaluated the claimant.

22. Dr. Hall opined that "[t]here may have been a time following this injury when she might have been treated with less aggressive intervention such as local injection, viscosupplementation or even a lesser intervention surgically, but that time has certainly passed."

23. The claimant began working for the respondent-employer in April 2012. When the claimant started working for the respondent-employer she did not have any bending or lifting restrictions. She was able to carry out all of the tasks of that job. She was also able to engage in recreational activities when she began working for the respondent-employer.

24. Subsequent to the injury of May 29, 2012, the claimant observed that her left knee felt different. "During physical therapy it wasn't getting better. It seemed to irritate it more. And I was relaying this to the physical therapist, Rebecca, and that's when they sent me for an MRI in July of 2012, and it showed the two new tears."

25. Because the claim was initially denied by the respondent-insurer the claimant did not start receiving treatment again for her injury until May 2014.

26. At hearing, the claimant described the pain in her left knee as "[s]ometimes it's a sharp stabbing, and it's all around my knee, like above my knee and below my knee also. A sharp stabbing. It will come like up from underneath my kneecap, I'm assuming, to the sides - - on both sides, the top. Sometimes it's like fire. Sometimes I get the sensation that it's leaking, and I check every time, and it's not, but that is the sensation I get. I can't stand on it too long. I can't sit too long. I - - it's very aggravating and very uncomfortable."

27. The claimant was made aware that Dr. Duffey requested a total knee replacement surgery and it was denied by the insurance company. No one recommended a total knee replacement surgery prior to the May 29, 2012 industrial injury. She further agreed that she wants to have the total knee replacement surgery recommended by Dr. Duffey.

28. A post-hearing deposition of Dr. Wallace Larson took place on February 19, 2015 and August 18, 2015.

29. Dr. Larson testified consistent with his IME report.

30. Dr. Larson testified that he agrees that the claimant recovered from her 2011 surgery.

31. A post-hearing deposition of Dr. James Duffey took place on May 5, 2015 and August 4, 2015.

32. Dr. Duffey testified that "We never tell a patient that it's time to do your knee replacement." He further explained that "[we] tell a patient that based on their imaging studies, potentially previous inspection of the joint at the time of an arthroscopic surgery and failure to control symptoms adequately that they are a candidate to have a knee replacement whenever they feel they are no longer willing to accept pain and disability as it is."

33. Dr. Duffey testified that there is a tear of the meniscus present on the July 2012 MRI that was not present on the March 2011 MRI which was taken prior to this industrial injury.

34. Dr. Duffey testified that he disagrees with Dr. Larson's opinion that the claimant's knee is arthritic process and the injury had no effect of it. Dr. Duffey explained that he disagrees "[b]ecause based on the information available to me that [the claimant] was doing relatively well at the time of the work-related injury and then had an exacerbation… I think clearly that the last injury, one in question on 5/29/2012, did make her symptoms worse for the time being and potentially accelerated the timing on the knee replacement. But looking at the history from the beginning, it's a relatively small factor. " Dr. Duffey testified that he disagrees with Dr. Larson's opinion and testified that he believes the work-related injury was a factor in the claimant needing a total knee replacement.

35. Dr. Duffey testified that regarding the claimant's need for a total knee replacement that " . . . clearly work is very important part of this. If you can no longer do the things you need to do to earn a living, that would certainly qualify as a level of disability that's not tolerable."

36. Dr. Duffey agreed that the claimant's injury was the "straw that broke the camel's back." Dr. Duffey testified that "Yes, but I would say that for most of my arthritis patients, there is a straw that breaks the camel's back, and it's not necessarily an acute injury." Dr. Duffey testified that he often times looks to the complaints of pain and disability in determining whether a patient is a candidate for a total knee replacement. He further testified that the complaints of pain and disability often times come on suddenly and not always with an explanation.

37. Dr. Duffey testified that he agrees with Dr. Hall's impression of "Left knee pain related to meniscal tears and events and degenerative changes made symptomatic by a May 29th, 2012 event at work while walking down the stairs."

38. Dr. Duffey also testified that the viscosupplementation injections are a reasonable thing to try, but patients with advanced degenerative changes are less likely to have a positive outcome.

39. The ALJ finds the claimant to be credible.

40. The ALJ finds Dr. Duffey's analyses and opinions to be more credible than medical analyses and opinions to the contrary.

41. The ALJ finds that the claimant has established that it is more likely than not that she is entitled to viscosupplementation injections and/or total knee replacement surgery for her left knee as determined by the claimant and Dr. Duffey.

42. The ALJ finds that the respondents have failed to establish that it is more likely than not that the General Admission of Liability should be allowed to be withdrawn.

43. As to the remaining issues the ALJ finds that they have been abandoned by the parties as there were no factual recitations or arguments in either party's Position Statement concerning the remaining issues.

## 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 the claimant or respondents. Section 8-43-201, C.R.S.

4. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

5. An injury occurs "in the course of' employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting* Co. *v. Blair,* 812 P.2d 638 (Colo. 1991). The "arising out of' requirement is narrower and requires The 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.*

6. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence that the General Admission of Liability should be allowed to be withdrawn. The ALJ is not persuaded by Dr. Larson's opinion that the claimant did not suffer a compensable injury to her left knee on May 29, 2012.

7. For a compensable injury, the respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). The respondents are liable for reasonable and necessary medical treatment by a physician to whom the claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). The claimant has the burden of proving entitlement to specific medical benefits. *See* § 8-43-201(1), C.R.S; *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29, 31 (Colo. App. 2000). Whether the claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

8. The ALJ finds that the claimant has established by preponderance of the evidence that the viscosupplementation injections and/or total knee arthroplasty surgery recommended by Dr. Walden and Dr. Duffey are reasonable, necessary, and related to the May 29, 2012 compensable claim.

9. The ALJ concludes that Dr. Duffey's analyses and opinions are more credible than medical analyses and opinions to the contrary.

10. "[I]f a disability were 95% attributable to a pre-existing, but stable condition, and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling." *Seifried v. Industrial Com'n of State of Colo.*, 736 P.2d 1262, 1263 (Colo. App. 1986).

11. It is clear that the claimant's injury on May 29, 2012 severely aggravated the preexisting arthritis in the claimant's left knee. The ALJ concludes that the severe aggravation of preexisting arthritis accelerated the claimant's need for a total knee replacement surgery. This is evidenced on the severe increase in pain and disability after the May 29, 2012 injury.

12. The ALJ concludes that the claimant's testimony is credible.

13. The ALJ concludes that the claimant has established by a preponderance of the evidence that she is entitled to viscosupplementation injections and/or total knee replacement surgery for her left knee as determined by the claimant and Dr. Duffey.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The respondents' request to withdraw the General Admission of Liability is denied and dismissed.

2. The respondent-insurer shall authorize and pay for the viscosupplementation injections and/or total knee replacement surgery for the claimant's left knee as determined by the claimant and Dr. Duffey.

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: November 24, 2015

/s/ original signed by:

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

## ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer on August 17, 2011 and August 23, 2011?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits for the period of August 24, 2011 through August 29, 2011?

- Prior to the hearing, the parties stipulated to an average weekly wage ("AWW") of $373.18.

## FINDINGS OF FACT

1. Claimant was employed with employer as a housekeeper beginning on April 10, 2011. Claimant testified that on August 17, 2011, while working for employer, she was making a bed when she tried to pull out a sheet and slipped and fell onto her bottom and left hand. Claimant testified that she felt pain in her low back after she fell. Claimant testified she informed her supervisor (Joy) about her fall when she came out of the room at approximately 1:00 p.m. Claimant testified her supervisor offered her pain medication. Following the incident, a report was filled out by employer noting that claimant had fallen and injured her back.

2. Claimant testified she did not work from August 17, 2011 until August 23, 2011. Claimant testified she returned to work on August 23, 2011 and lifted a bed side table when she experienced incontinence. Claimant testified she went home to rest after the incontinence and returned to work on August 24, 2011 and reported the incident to Ms. Zibrillo. Claimant testified Ms. Zibrillo told claimant she needed to see a doctor and sent her home while she arranged for a medical appointment.

3. Claimant was taken by employer to the Cortez Memorial Hospital Emergency Room ("ER") on August 25, 2011. Claimant was evaluated by Dr. Heyl at the ER. Claimant reported to the ER that she was out of work for 3 days and went back to work and while stooping over, had low back pain again. Claimant was diagnosed with generalized low back pain and referred for x-rays of the lumbar spine. The x-rays

were negative and claimant was released with instructions to rest, use ice and avoid heavy lifting. Claimant was taken off of work by Dr. Heyl until August 29, 2011.

4. Claimant testified that she returned to work for employer on August 29, 2011 and continued to work for employer until October 13, 2011. Claimant testified she continued to experience problems with her back while she worked for employer through October 13, 2011. Claimant testified

5. Claimant presented the testimony of Ms. Sterling, a co-worker. Ms. Sterling testified that she was aware claimant sustained an injury on August 17, 2011 as she was told of the injury by claimant when it occurred and was present on August 17, 2011 when claimant filled out the accident report. Ms. Sterling further testified that claimant reported to her that she was still experiencing severe pain in her low back during the fall of 2011. Ms. Sterling testified she was claimant's roommate during this period of time and was aware of claimant's ongoing complaints. The ALJ finds the testimony of Ms. Sterling to be credible and persuasive.

6. Respondents presented the testimony of Ms. Kelly, the Human Resources Manager for employer, at hearing. Ms. Kelly testified claimant last worked for employer on October 13, 2011 and was scheduled to work until the end of the season which would have lasted until October 31, 2011, but claimant left early for "personal reasons". Ms. Kelly testified she was aware of claimant's work injury and had received the report of injury from Ms. Zurillo. Ms. Kelly testified claimant was taken off of work for August 25 through August 29, 2011 and claimant was already scheduled to be off for August 27 and August 28, 2011 for the weekend. Ms. Kelly testified she was unaware of any lost time prior to August 25, 2011 related to claimant's back injury.

7. Claimant testified that after October 13, 2011 she moved to Florida where she lived until June 2012. Claimant testified she called employer in April 2012 seeking medical treatment but was told her claim was closed. Claimant testified she moved back to Steamboat Springs, Colorado in June 2012 where she began working with a new employer, again working in housekeeping.

8. Claimant eventually sought medical treatment again from Dr. Sisk in Steamboat Springs on January 25, 2013. Claimant reported she had sustained an injury in August 2011 when she was working in Mesa Verde and was changing out a room when she tripped on some bedding and fell twisting her back. Claimant reported she was currently attempting to work, but continued to battle low back pain. Dr. Sisk recommended physical therapy and placed claimant on a Medrol dose pack.

9. Claimant returned to Dr. Sisk on March 5, 2013 and noted that the Medrol dose pack provided her some temporary relief, but no long term relief. Dr. Sisk reviewed claimant's magnetic resonance image ("MRI") and noted there was degenerative disk disease, mild foraminal stenosis, canal stenosis that was mainly at the L4-5 and L5-S1 level. Dr. Sisk referred claimant to Dr. Seigel for consideration of an epidural steroid injection ("ESI") or a facet injection.

10. Claimant was evaluated by Dr. Siegel on March 25, 2013. Claimant reported an accident history to Dr. Siegel of falling while at work in August 2011 followed by ongoing back pain and occasional leg pain since that incident. Dr. Siegel examined claimant and reviewed her MRI and provided claimant with an ESI.

11. Dr. Sisk responded to a letter from claimant's attorney on or about March 26, 2013 and indicated it was his opinion that claimant's condition was causally related to both her August 17, 2011 work injury and her August 23, 2011 work injury.

12. Claimant returned to Dr. Siegel on May 13, 2013 and reported she experienced approximately 50% pain relief following her ESI, but continued to experience non radiating low back pain at a level of 7 out of 10. Dr. Siegel performed medial branch nerve blocks at the L4-5 and L5-S1 levels. Claimant returned to Dr. Siegel on June 18, 2013 and reported one week of 90% relief following the medial branch blocks. Dr. Siegel therefore performed a second set of medical branch nerve blocks. Claimant again returned to Dr. Siegel on July 30, 2013 and reported at least 80% pain relief following the second set of medial branch nerve blocks. Dr. Siegel then performed a radiofrequency medial branch neurolysis at the L4-L5 level and L5-S1 level bilaterally and referred claimant for physical therapy.

13. Claimant underwent an independent medical examination ("IME") at the request of respondents on August 26, 2013 with Dr. Scott. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott opined in his report that claimant's fall on August 17, 2011 caused low back pain, possibly due to a sprain of a facet joint. Dr. Scott opined that the lifting incident could have aggravated a pre-existent sprain of her facet joint.

14. Dr. Scott opined in his report that claimant would have been at maximum medical improvement ("MMI") for her August 17, 2011 and August 23, 2011 incidents by the end of August 2011. Dr. Scott noted that claimant reported to him that her pain increased after she started working for her new employer in Steamboat Springs.

15. Dr. Scott testified in this case consistent with his IME report[1]. Dr. Scott testified that it was his opinion that the claimant's condition had stabilized following the emergency room visit and that the treatment beginning in January 2013 for claimant's low back condition was not causally related to her industrial injury.

16. Claimant returned to Dr. Siegel on October 2, 2013 and noted that she continued to experience pain in her low back. Claimant reported to Dr. Siegel that she had a habit of not doing anything after work, other than to kick her feet up and alternating ice and heat to her feet, ankles and low back. Dr. Siegel increased

[1] Claimant's counsel, during the deposition, moved to strike the testimony of Dr. Scott for his failure to provide claimant's counsel with an audio recording of the IME. Dr. Scott noted in the deposition that the request for the audio recording was made a considerable amount of time following the IME and the audio recording was not available. For the record, the ALJ overrules claimant's motion to strike the testimony of Dr. Scott.

claimant's prescription for hydrocodone and added trazodone and instructed claimant to return in one month.

17. Claimant was examined by Dr. Corenman on October 7, 2013. Claimant testified at hearing that she was referred to Dr. Corenman by Dr. Siegel. Claimant reported to Dr. Corenman that her back pain was the result of an injury on August 17, 2011. Dr. Corenman reviewed claimant's imaging studies and performed a physical examination. Dr. Corenman noted that there was some evidence of symptom magnification on examination and opined that claimant was not a surgical candidate.

18. Claimant subsequently underwent a course of physical therapy with Johnson and Johnson physical therapy. Claimant testified she was referred to Johnson and Johnson physical therapy by Dr. Corenman.

19. Claimant returned to Dr. Siegel on December 16, 2013 and underwent another ESI into her lumbar spine.

20. Claimant was examined by Dr. Fabian on January 21, 2014 as a referral from Dr. Siegel. Dr. Fabian noted that claimant did not have a definable surgical pathology. Claimant was examined by Dr. Tobey on February 7, 2014 as a referral from Dr. Fabian. Dr. Tobey noted that claimant's back pain could be related to the L4-5 facet effusions, but would not explain her reports of radicular pain or her left ankle/heel pain. Claimant underwent an electromyelogram ("EMG") that was normal.

21. Claimant returned to Dr. Siegel on April 17, 2014. Dr. Siegel noted claimant had mixed results with the injections. Dr. Siegel recommended claimant continue her use of medications and prescribed Norco.

22. Claimant testified at hearing that her medical expenses have been submitted to her group health insurance carrier with claimant paying co-pays for the medical care while the health insurance covers some of the costs.

23. The ALJ credits the testimony of claimant at hearing and finds that claimant has proven that the she sustained a compensable injury arising out of and in the course of her employment with employer on August 17, 2011. The ALJ credits claimant's testimony as it is supported by the ER records from Southwest Memorial Hospital and finds that claimant was off of work for at least 3 scheduled working days following the August 17, 2011 injury before returning to work on August 23, 2011. The ALJ finds that the incident at work on August 23, 2011 relates back to the August 17, 2011 injury and is not a new injury. The ALJ notes that the finding that claimant sustained a work injury on August 17, 2011 that required medical treatment is supported by the opinion of respondents' IME physician Dr. Scott who opined that claimant did sustain a compensable injury, but expressed the opinion that claimant would have been at MMI by the end of August 2011.

24. The ALJ finds that claimant has proven that it is more probable than not that her medical treatment, including the ER visit on August 23, 2011 and the medical

treatment for her low back pain when she returned to Colorado in January 2013 is causally related to her compensable August 17, 2011 work injury. The ALJ credits the medical records entered into evidence at hearing as being persuasive on this issue.

25. The ALJ credits claimant's testimony that she was off of work from August 25, 2011 through August 29, 2011 after her trip to the ER. The ALJ notes that this testimony is supported by the ER records entered into evidence in this case that took claimant off of work. The ALJ finds that claimant has proven that it is more likely than not that she is entitled to an award of TTD benefits for the period of August 25, 2011 through August 29, 2011. The ALJ finds that the 3 day waiting period was satisfied by claimant missing work from August 17, 2011 through August 22, 2011.

26. The ALJ credits claimant's testimony and the corresponding medical records and finds that claimant has proven that it is more likely than not that her medical treatment from Dr. Sisk, Dr. Siegel, Dr. Corenman, Dr. Fabian, Dr. Tobey and her physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of her August 17, 2011 work injury.

27. The ALJ finds the medical opinions expressed by Dr. Sisk and Dr. Siegel in their reports are credible and persuasive on this issue. The ALJ credits these opinions over the contrary opinions expressed by Dr. Scott in his report and testimony.

28. Although it was not addressed as an issue at the commencement of the hearing, the ALJ finds that claimant's treatment with Dr. Sisk, Dr. Siegel, Dr. Corenman, Dr. Fabian, Dr. Tobey and Johnson and Johnson Physical Therapy are authorized to treat claimant for her injuries. The ALJ credits claimant's testimony at hearing that she was not provided with a choice of physicians and credits claimant's testimony that the physicians were within the chain of referrals from her initial treatment with Dr. Sisk beginning in January 2013.

## 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 on August 17, 2011. As found, the alleged injury on August 23, 2011 did not result in the need for any medical treatment, as the ER visit was related to the August 17, 2011 incident, and, therefore, claimant has failed to establish that the August 23, 2011 incident is a compensable work injury.

5. As found, claimant has proven by a preponderance of the evidence that the medical treatment she received beginning in January 2013 from Dr. Sisk and his referrals, was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, claimant has proven by a preponderance of the evidence that her medical treatment from Dr. Sisk, Dr. Siegel, Dr. Corenman, Dr. Fabian, Dr. Tobey and her physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of her August 17, 2011 work injury.

6. 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).

7. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by 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).

8. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. Heyl at the ER. As found, claimant was off of work from August 25, 2011 through August 29, 2011. The ALJ further finds that claimant’s three day waiting period was met by the time she missed between her initial injury on August 17, 2011 to when she returned to work on August 23, 2011.

## ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical benefits necessary to cure and relieve claimant from the effects of the industrial injury.

2. Respondents shall pay claimant TTD benefits for the period of August 25, 2011 through August 29, 2011 based on the stipulated AWW of $373.18.

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

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

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

DATED: November 10, 2015

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-907-989-03

**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 September 15, 2015 and November 6, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 9/15/15, Courtroom 3, beginning at 1:30 PM, and ending at 2:15 PM; and, 11/6/15, Courtroom 3, beginning at 8:30 AM, and ending at 9:00 AM).

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection, Respondents' Exhibits A through G were admitted into evidence, without objection. A written transcript of the August 5, 2015 Evidentiary Deposition of Brian Reiss, M.D., was filed at the commencement of the first session of the hearing.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on November 12, 2015. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

## ISSUES

The sole issue to be determined by this decision concerns the causal relatedness of the recommendation of Eric C. Parker, M.D., the Claimant's referred authorized treating surgeon for C5/6 discectomy surgery.

The Claimant bears 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. On January 8, 2013, the Claimant sustained a work-related motor vehicle accident, causing injury to his cervical spine and bilateral shoulders while in the course and scope of his employment with Respondents.

2. The Respondents filed a General Admission of Liability (GAL), dated January 25, 2013, admitting for an average weekly wage (AWW) of $1,509.33, medical benefits, and temporary total disability (TTD) benefits of $848.82 per week from January 16, 2003 and "ongoing" (a period of two and three-quarter years to date).

### Findings

3. Following the Claimant's motor vehicle accident, he underwent odontoid screw fixation on August 14, 2013 by Dennis G. Vollmer, M.D. The Claimant continued to complain of neck stiffness, intermittent paresthesias in the left hand, and balance issues, for which he used a cane for ambulation.

4. An MRI (magnetic resonance imaging) scan of the cervical spine was performed on December 22, 2014, and it indicated significant spondylosis at C5-6 with disc-osteophyte complex causing moderate to severe canal stenosis and cord compression. Despite this degenerative condition in an individual over 60-years of age (d.o.b. July 31, 1950), the ALJ infers and finds that the totality of the evidence supports an aggravation and acceleration of the Claimant's underlying asymptomatic cervical condition, and the ALJ so finds.

5. As a result of the MRI findings, on February 13, 2015, Albert Hattem, M.D. the Claimant's authorized treating physician (ATP), referred the Claimant to Dr. Parker (a spine specialist) for a consultation.

6. On March 24, 2015, Dr. Parker was of the opinion that because of the significant findings on the cervical MRI scan and the Claimant's increasing balance issues, a C5-6 anterior cervical discectomy and fusion was indicated. The ALJ infers and finds that underlying Dr. Parker's surgery recommendation is his opinion that the recommended surgery is causally related to the admitted injury of January 8, 2013.

**Independent Medical Examination (IME) by Brian Reiss, M.D.**

7. An Independent Medical Examination (IME) was performed by Dr. Reiss on June 17, 2015, and Dr. Reiss' evidentiary deposition was taken subsequently by the parties. Dr. Reiss was of the opinion that the need for surgery was apparent, but Dr. Reiss was further of the opinion that the procedure was **not** related to the work injury. The ALJ finds the implicit opinion of the authorized referred surgeon, Dr. Parker, and the Claimant's "before-and-after" testimony, on the causal relatedness of the recommended surgery more persuasive and credible than the opinion of IME Dr. Reiss.

**The Claimant's Hearing Testimony**

8. The Claimant testified live at hearing, stating that the weakness and numbness in the left upper extremity (LUE) began after the work injury. According to the Claimant, he had some minor balance issues prior to the work injury, but his major complaints and symptoms began subsequent to the work injury. The Claimant would like to proceed with the recommended surgery. The ALJ finds the Claimant's testimony, concerning before and after the admitted injury is essentially undisputed, highly persuasive and credible than the opinion of IME Dr. Reiss. The Claimant's undisputed before-and-after testimony is compelling and it outweighs IME Dr. Reiss' opinions to the contrary.

**Ultimate Findings**

9. The Claimant's undisputed lay testimony concerning his condition before and after the admitted injury of January 8, 2013 is more persuasive and credible than the opinion of IME Dr. Reiss. Also, the implicit opinion of Surgeon Dr. Parker is more persuasive and credible than the opinion of IME Dr. Reiss.

10. Between conflicting testimonies, the ALJ makes a rational choice to accept the opinion of Surgeon Dr. Parker and the undisputed lay testimony of the Claimant and to reject the lack of causal relatedness opinion of IME Dr. Reiss.

11. The Claimant has proven, by a preponderance of the evidence that the admitted cervical injury of January 8, 2013, aggravated and accelerated previously dormant, degenerative conditions and, as admitted, amounted to a new compensable event. Further, the Claimant has proven by preponderant evidence that the surgery recommended by Dr. Parker is causally related to the admitted injury of January 8, 2013 and reasonably necessary to cure and relieve the effects of that injury.

## CONCLUSIONS OF LAW

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

### Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. 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 lay testimony about his condition before-and-after the admitted injury is essentially undisputed. *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 further found, the

Claimant's undisputed lay testimony concerning his condition before and after the admitted injury of January 8, 2013 is more persuasive and credible than the opinion of IME Dr. Reiss. Also, the implicit opinion of Surgeon Dr. Parker is more persuasive and credible than the opinion of IME Dr. Reiss.

**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 testimonies, the ALJ made a rational choice to accept the opinion of Surgeon Dr. Parker and the undisputed lay testimony of the Claimant and to reject the lack of causal relatedness opinion of IME Dr. Reiss.

**The Effect of the Claimant's Undisputed Lay Testimony**

c. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant's undisputed before-and-after testimony was compelling and it outweighed IME Dr. Reiss' opinions to the contrary.

**Burden of Proof**

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, contested by the insurance carrier. §§ 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 the causal relatedness and reasonable necessity of the C5/6 anterior cervical discectomy surgery recommended by Dr. Parker.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The General Admission of Liability, dated January 25, 2013, shall remain in full force and effect.

B. The Respondents shall pay the costs of the C5/6 anterior discectomy surgery recommended by Erik C. Parker, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of November 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 November 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 claimant is entitled to penalties against the respondent-insurer because it improperly terminated temporary total disability (TTD) benefits by filing a final admission of liability without stating a position on permanency; and,

2. Whether the claimant is entitled to penalties against the respondent-insurer because it failed to mail out a final admission of liability on the date indicated in the certificate of mailing?

## FINDINGS OF FACT

1. The claimant sustained a compensable work injury to his right hand on January 8, 2013, while employed with the respondent-employer.

2. The respondent-insurer filed an admission and paid ongoing temporary total disability (TTD) and medical benefits.

3. The claimant's attending treating physician for the claim is Daniel Olson, M.D., who works as a physician at the Centers for Occupational Medicine.

4. The respondent-insurer sent a letter to Dr. Olson, dated January 13, 2015, asking Dr. Olson whether the claimant had reached maximum medical improvement (MMI). Dr. Olson provided the respondent-insurer with a response stating, "The claimant would be placed at MMI on his next visit."

5. The claimant was seen by Dr. Olson on January 16, 2015. Dr. Olson provided that he would "see claimant in the next month and if the problem with sutures is [taken] care of and no further surgery is authorized, then I will place him at maximum medical improvement."

6. The respondent-insurer was still paying TTD and medical benefits pursuant to a General Admission of Liability as of February 6, 2015.

7. The claimant attended a follow up appointment at Centers for Occupational Medicine on February 6, 2015.

8. The February 6, 2015, report provides that the claimant's "recommended activity restrictions" are regular employment.

9. A physician's report of workers' compensation injury, or M-164 form, was provided to the respondent-insurer on February 6, 2015, along with the treatment note. The M-164 provides that the claimant is at maximum medical improvement on February 6, 2015, that the claimant has no permanent restrictions and no medical maintenance treatment. As a result, the claimant was released to regular employment.

10. The M-164 form also has a "0" marked in the middle of the form suggesting that no impairment rating was necessary.

11. The M-164 form was signed by both PA Steve Byrne and the attending treating physician, Daniel Olson, M.D. Both signatures were included on the report.

12. The respondent-insurer received the treatment notes and M-164 form from Centers for Occupational Medicine by facsimile on February 6, 2015.

13. The respondent had no reason to question the determination that the claimant was placed at maximum medical improvement (MMI) and released to regular employment as it was reflected in the M-164 form.

14. PA Byrne specifically stated in his February 6, 2015, report that he was placing the claimant at MMI per Dr. Olson's previous note indicating that the claimant was at MMI once the suture issue was resolved. As a result, the report was consistent with Dr. Olson's prior opinions on the case.

15. The claims adjuster on the case, Zac Bamfield, immediately filed a Final Admission of Liability on February 6, 2015 after receiving the M-164 form. Mr. Bamfield testified that he thought the zero across the middle of the M-164 form indicated that claimant had a 0% permanent impairment.

16. Regardless of whether the M-164 form actually indicated that claimant had a 0% rating, the Final Admission of Liability also terminated temporary total disability benefits pursuant to the release to regular employment. Specifically, the respondents terminated TTD benefits and Mr. Bamfield attached the M-164 form to the admission.

17. Even though the claimant was released to regular employment on February 6, 2015, he continued to receive TTD checks through February 12, 2015.

18. Mr. Bamfield subsequently was presented with concerns over whether the Final Admission of Liability should have included a 0% rating. Specifically, there was a

concern whether the “0” in the middle of the M-164 form actually meant that claimant had a 0% impairment rating. After speaking with defense attorneys, it was determined that a General Admission needed to be filed to confirm that the file was still open until the impairment rating issue was resolved.

19. Mr. Bamfield immediately filed a revised General Admission of Liability on February 17, 2015. The GAL confirmed that the claim was still open as an impairment rating may not have been established yet.

20. The GAL on February 17, 2015 was filed without any prior notification or error letter from the Division or the claimant’s attorney that the “0” on the M-164 form did not reflect a 0% impairment rating.

21. The General Admission of Liability, filed on February 17, 2015, confirmed that temporary total disability benefits were in fact previously terminated on February 6, 2015 pursuant to the prior admission filed on that date.

22. The General Admission was not filed to terminate TTD benefits. The TTD benefits had already been terminated when the prior admission was filed on February 6, 2015 with the M-164 attached confirming the regular employment release.

23. Subsequent to the filing of the General Admission of Liability on February 17, 2015, the respondents received a letter from the claimant’s attorney. The respondents received the letter on February 23, 2015.

24. The letter from claimant’s attorney indicated that the claimant would need to be seen by a Level II accredited physician for an impairment rating, that Dr. Olson was not in the office on February 6, 2015, and that the signature on the M-164 form the respondents received was a stamped signature.

25. This letter was received by the respondents on February 23, 2015, after the Final Admission of Liability had been filed on February 6, 2015 and the General Admission of Liability had been filed on February 17, 2015.

26. The facsimile from the claimant’s attorney also contained a letter from Daniel Olson, M.D. The letter, directed to the claimant’s counsel, states that Dr. Olson was out of the state when claimant was seen at his office on February 6, 2015. The claimant had been seen by PA Byrne and the signature on the M-164 form was a stamp of his signature that is placed on all of the physician assistant notes. Dr. Olson indicated that the claimant would need to return in order to be provided with permanent work restrictions and a permanent impairment rating.

27. Dr. Olson did not comment on the issue of maximum medical improvement in the letter; creating an ambiguity as to whether his stamped signature indicated concurrence with the PA's report of February 6, 2015, especially in light of his comment that the claimant needed to return for an impairment rating, which would not be necessary, unless the claimant was at MMI.

28. Thus, the respondent-insurer properly terminated TTD benefits with an admission that was filed on February 6, 2015 based upon a report that was valid on its face. It is undisputed that the admission had the M-164 form attached which detailed a regular employment release.

29. The claimant has argued that the admission filed on February 6, 2015 was actually not sent out or filed until February 19, 2015. If there was a violation it was self-cured prior to the filing of an Application for Hearing.

30. The respondents did re-instate temporary total disability the same day Dr. Olson issued a new medical report with the claimant's restrictions and his permanent impairment rating.

31. Specifically, the claimant returned to Dr. Olson for assignment of a permanent impairment rating on April 2, 2015. Dr. Olson determined claimant reached maximum medical improvement as of March 9, 2015. Dr. Olson assigned a permanent impairment rating of 27% upper extremity. The respondents received this report from Dr. Olson and filed a General Admission of Liability, dated April 2, 2015.

32. The April 2, 2015, General Admission of Liability filed by the respondent-insurer, admitted temporary total disability benefits beginning August 22, 2014 and ongoing. Indicating, that temporary disability benefits were re-instated for the entire time period between February 6, 2015 and April 2, 2015. The payment was made on April 14, 2015.

33. The respondent-insurer sent a check for temporary disability benefits to the claimant covering the dates February 13, 2015 up through April 2, 2015. The respondent-insurer continued to pay claimant temporary total disability benefits until the respondent-insurer discovered that the claimant had returned to work within his restrictions at the respondent-employer.

34. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

35. The ALJ finds that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

## CONCLUSIONS OF LAW

1. Section 8-43-304 states in pertinent part as follows:

> Violations - penalty - offset for benefits obtained through fraud - rules.
>
> (1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.
>
> (4) In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

2. Under the circumstances here, the ALJ concludes that the respondents cured any potential violation by filing the GAL on February 17, 2015 seven days before the filing of the claimant's Application for Hearing.

3. The record contains scant evidence that the respondents knew or reasonably should have known that they were in violation of any provisions of the Act or rules. To the extent that one should argue an inference of knowledge the ALJ declines to infer such under the facts of this case.

4. The ALJ concludes that the filing of the FAL dated February 6, 2015, which terminated the claimant's TTD payments, did not violate the Act or any rules there under.

5. Assuming *arguendo*, that there was a violation of the Act, the violation was self-cured on February 17, 2015 by the filing of the GAL.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

7. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The claimant's request for penalties 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: November 25, 2015

/s/ original signed by:

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

## ISSUES

1. Whether the claimant is entitled to penalties against the respondent-insurer because it improperly terminated temporary total disability (TTD) benefits by filing a final admission of liability without stating a position on permanency; and,

2. Whether the claimant is entitled to penalties against the respondent-insurer because it failed to mail out a final admission of liability on the date indicated in the certificate of mailing?

## FINDINGS OF FACT

1. The claimant sustained a compensable work injury to his right hand on January 8, 2013, while employed with the respondent-employer.

2. The respondent-insurer filed an admission and paid ongoing temporary total disability (TTD) and medical benefits.

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4. The respondent-insurer sent a letter to Dr. Olson, dated January 13, 2015, asking Dr. Olson whether the claimant had reached maximum medical improvement (MMI). Dr. Olson provided the respondent-insurer with a response stating, "The claimant would be placed at MMI on his next visit."

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6. The respondent-insurer was still paying TTD and medical benefits pursuant to a General Admission of Liability as of February 6, 2015.

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11. The M-164 form was signed by both PA Steve Byrne and the attending treating physician, Daniel Olson, M.D. Both signatures were included on the report.

12. The respondent-insurer received the treatment notes and M-164 form from Centers for Occupational Medicine by facsimile on February 6, 2015.

13. The respondent had no reason to question the determination that the claimant was placed at maximum medical improvement (MMI) and released to regular employment as it was reflected in the M-164 form.

14. PA Byrne specifically stated in his February 6, 2015, report that he was placing the claimant at MMI per Dr. Olson's previous note indicating that the claimant was at MMI once the suture issue was resolved. As a result, the report was consistent with Dr. Olson's prior opinions on the case.

15. The claims adjuster on the case, Zac Bamfield, immediately filed a Final Admission of Liability on February 6, 2015 after receiving the M-164 form. Mr. Bamfield testified that he thought the zero across the middle of the M-164 form indicated that claimant had a 0% permanent impairment.

16. Regardless of whether the M-164 form actually indicated that claimant had a 0% rating, the Final Admission of Liability also terminated temporary total disability benefits pursuant to the release to regular employment. Specifically, the respondents terminated TTD benefits and Mr. Bamfield attached the M-164 form to the admission.

17. Even though the claimant was released to regular employment on February 6, 2015, he continued to receive TTD checks through February 12, 2015.

18. Mr. Bamfield subsequently was presented with concerns over whether the Final Admission of Liability should have included a 0% rating. Specifically, there was a

concern whether the “0” in the middle of the M-164 form actually meant that claimant had a 0% impairment rating. After speaking with defense attorneys, it was determined that a General Admission needed to be filed to confirm that the file was still open until the impairment rating issue was resolved.

19. Mr. Bamfield immediately filed a revised General Admission of Liability on February 17, 2015. The GAL confirmed that the claim was still open as an impairment rating may not have been established yet.

20. The GAL on February 17, 2015 was filed without any prior notification or error letter from the Division or the claimant’s attorney that the “0” on the M-164 form did not reflect a 0% impairment rating.

21. The General Admission of Liability, filed on February 17, 2015, confirmed that temporary total disability benefits were in fact previously terminated on February 6, 2015 pursuant to the prior admission filed on that date.

22. The General Admission was not filed to terminate TTD benefits. The TTD benefits had already been terminated when the prior admission was filed on February 6, 2015 with the M-164 attached confirming the regular employment release.

23. Subsequent to the filing of the General Admission of Liability on February 17, 2015, the respondents received a letter from the claimant’s attorney. The respondents received the letter on February 23, 2015.

24. The letter from claimant’s attorney indicated that the claimant would need to be seen by a Level II accredited physician for an impairment rating, that Dr. Olson was not in the office on February 6, 2015, and that the signature on the M-164 form the respondents received was a stamped signature.

25. This letter was received by the respondents on February 23, 2015, after the Final Admission of Liability had been filed on February 6, 2015 and the General Admission of Liability had been filed on February 17, 2015.

26. The facsimile from the claimant’s attorney also contained a letter from Daniel Olson, M.D. The letter, directed to the claimant’s counsel, states that Dr. Olson was out of the state when claimant was seen at his office on February 6, 2015. The claimant had been seen by PA Byrne and the signature on the M-164 form was a stamp of his signature that is placed on all of the physician assistant notes. Dr. Olson indicated that the claimant would need to return in order to be provided with permanent work restrictions and a permanent impairment rating.

27. Dr. Olson did not comment on the issue of maximum medical improvement in the letter; creating an ambiguity as to whether his stamped signature indicated concurrence with the PA's report of February 6, 2015, especially in light of his comment that the claimant needed to return for an impairment rating, which would not be necessary, unless the claimant was at MMI.

28. Thus, the respondent-insurer properly terminated TTD benefits with an admission that was filed on February 6, 2015 based upon a report that was valid on its face. It is undisputed that the admission had the M-164 form attached which detailed a regular employment release.

29. The claimant has argued that the admission filed on February 6, 2015 was actually not sent out or filed until February 19, 2015. If there was a violation it was self-cured prior to the filing of an Application for Hearing.

30. The respondents did re-instate temporary total disability the same day Dr. Olson issued a new medical report with the claimant's restrictions and his permanent impairment rating.

31. Specifically, the claimant returned to Dr. Olson for assignment of a permanent impairment rating on April 2, 2015. Dr. Olson determined claimant reached maximum medical improvement as of March 9, 2015. Dr. Olson assigned a permanent impairment rating of 27% upper extremity. The respondents received this report from Dr. Olson and filed a General Admission of Liability, dated April 2, 2015.

32. The April 2, 2015, General Admission of Liability filed by the respondent-insurer, admitted temporary total disability benefits beginning August 22, 2014 and ongoing. Indicating, that temporary disability benefits were re-instated for the entire time period between February 6, 2015 and April 2, 2015. The payment was made on April 14, 2015.

33. The respondent-insurer sent a check for temporary disability benefits to the claimant covering the dates February 13, 2015 up through April 2, 2015. The respondent-insurer continued to pay claimant temporary total disability benefits until the respondent-insurer discovered that the claimant had returned to work within his restrictions at the respondent-employer.

34. The ALJ finds that the claimant has failed to establish that it is more likely than not that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

35. The ALJ finds that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

## CONCLUSIONS OF LAW

1. Section 8-43-304 states in pertinent part as follows:

> Violations - penalty - offset for benefits obtained through fraud - rules.
>
> (1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the workers' compensation cash fund created in section 8-44-112(7) (a); except that the amount apportioned to the aggrieved party shall be a minimum of fifty percent of any penalty assessed.
>
> (4) In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

2. Under the circumstances here, the ALJ concludes that the respondents cured any potential violation by filing the GAL on February 17, 2015 seven days before the filing of the claimant's Application for Hearing.

3. The record contains scant evidence that the respondents knew or reasonably should have known that they were in violation of any provisions of the Act or rules. To the extent that one should argue an inference of knowledge the ALJ declines to infer such under the facts of this case.

4. The ALJ concludes that the filing of the FAL dated February 6, 2015, which terminated the claimant's TTD payments, did not violate the Act or any rules there under.

5. Assuming *arguendo*, that there was a violation of the Act, the violation was self-cured on February 17, 2015 by the filing of the GAL.

6. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the respondent-insurer is subject to a penalty for filing a Final Admission of Liability on February 6, 2015, which terminated the claimant's temporary total disability benefits.

7. The ALJ concludes that the claimant has failed to establish by clear and convincing evidence that the respondent-insurer was aware of a violation for not having mailed out the Final Admission of Liability in a timely manner.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The claimant's request for penalties 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: November 2, 2014

/s/ original signed by:

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

## ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stephen D. Lindenbaum, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for her left ankle condition.

## FINDINGS OF FACT

1. Employer is a restaurant. Claimant worked for Employer as a Busser and Hostess. Her job duties involved greeting customers, seating customers and cleaning tables. On October 15, 2013 Claimant slipped on a lemon peel and twisted her ankle while working for Employer.

2. After initially receiving authorized medical treatment Claimant was referred to Arbor Occupational Medicine. On December 19, 2014 Claimant visited Authorized Treating Physician (ATP) John Raschbacher, M.D. at Arbor Occupational Medicine for an evaluation. Dr. Raschbacher determined that Claimant suffered a left ankle sprain, a left foot sprain and a lumbar contusion. He ordered an MRI of her foot and ankle and restricted her to working most of the time in a seated position.

3. The MRI revealed the degenerative condition of os trigonum syndrome. The MRI did not reflect a ligament tear or bone contusion. X-rays of Claimant's lumbar spine revealed degenerative changes.

4. Dr. Raschbacher referred Claimant to Scott G. Resig, M.D. at Denver Vail Orthopedics for an evaluation. Dr. Resig initially examined Claimant and administered a left ankle cortisone injection. Dr. Resig subsequently recommended trigonum excision surgery.

5. On April 8, 2014 ALJ Felter conducted a hearing in the matter. He considered whether Claimant suffered injuries to her left foot/ankle, right knee and lower back as a result of the October 15, 2013 incident. On April 21, 2014 ALJ Felter issued Findings of Fact, Conclusions and Law and Order. He concluded that Claimant suffered a compensable industrial injury to her left foot/ankle but not to her right hip and lower back. Claimant did not appeal the determination and the Order became final on May 11, 2014.

6. On May 9, 2014 Claimant returned to Dr. Raschbacher for an examination. Dr. Raschbacher reviewed ALJ Felter's Findings of Fact, Conclusions of Law and Order and noted Claimant's left ankle injury was compensable but her lower back and right hip were not components of her Workers' Compensation claim. He

noted that Claimant wished to proceed with treatment but, because she was pregnant, further treatment could not be rendered until she came to term. If Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Dr. Raschbacher remarked that Claimant had limitations to her left ankle range of motion but no other impairment. He placed Claimant at MMI and assigned a 6% lower extremity impairment rating. Insurer then filed a Final Admission of Liability (FAL) consistent with Dr. Raschbacher's MMI and impairment determinations.

7. On August 29, 2014 Claimant underwent a DIMEwith Stephen D. Lindenbaum, M.D. Claimant reported that she was still experiencing lower back pain. After reviewing Claimant's medical records he concluded that she had not reached MMI. In ascertaining Claimant's left ankle range of motion measurements Dr. Lindenbaum recorded 10 degrees of dorsiflexion, 30 degrees of plantarflexion, 25 degrees of inversion and 10 degrees of eversion. Dr. Lindenbaum noted that Claimant required additional evaluation but the treatment could not be provided because she was eight months pregnant. He explained that after delivering the baby she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

8. On October 21, 2014 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Claimant was still pregnant. She reported that while she was performing her job duties for Employer she was walking down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. After considering Claimant's history, reviewing medical records and conducting a physical examination, Dr. Lesnak determined that Claimant sustained an acute left ankle injury at work on October 15, 2013. He stated that there was "no evidence that [Claimant] sustained any type of injurious event to her back or hip region as a result of the 10/15/2013 incident." He explained that there were no clinical findings to suggest Claimant suffered any "symptomatic pathology" to her body besides the left ankle that was related to the October 15, 2013 incident. He agreed with Dr. Raschbacher that Claimant reached MMI on May 9, 2014. However, Dr. Lesnak noted that, because Dr. Raschbacher's range of motion measurements for Claimant's left ankle were "submaximal," he questioned their validity.

9. On October 28, 2014 Dr. Lesnak issued an addendum report after reviewing Dr. Lindenbaum's DIME determination. He maintained that Claimant did not suffer any injuries to her back or hip as a result of the October 15, 2013 work incident. Dr. Lesnak thus explained that Dr. Lindenbaum's suggestion that Claimant required additional evaluation for her back and hip was incorrect. Dr. Lesnak noted that Claimant remained at least "temporarily" at MMI for her left ankle but should undergo a surgical evaluation of the ankle after her pregnancy. He remarked that "there is absolutely no medical evidence to suggest that any of [Claimant's] reported pathology involving her lumbar spine or pelvis is in any way related to the occupational injury of

10/15/13 and clearly Dr. Lindenbaum was in error when he recommended additional medical evaluations pertaining to these subjective complaints."

10. On January 14, 2014 Dr. Lesnak testified through an evidentiary deposition in the present matter. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum thus failed to comply with Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). He summarized that, without a specific diagnosis pursuant to Table 53, a physician cannot provide an impairment rating. The diagnosis must be "very specific" that is "related to the injurious event and correlate[ed] with the symptoms and objective findings." Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy. However, he noted that she was "temporarily at MMI, but not completely at MMI." Dr. Lesnak "absolutely agree[d]" with Dr. Lindenbaum that after Claimant delivered her baby she should follow-up with her treating physicians to determine appropriate left ankle treatment. He noted that if Claimant's treating physicians recommended left ankle surgery she would not be at MMI during her post-surgical recovery period.

11. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI for her left ankle condition. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

12. Dr. Lesnak conducted an independent medical examination and specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury.

13. The opinions of Drs. Rasbacher and Lesnak do not constitute unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's MMI determination regarding Claimant's left ankle was incorrect. Dr. Rasbacher acknowledged that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Furthermore, although Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy, he noted that she was "temporarily at MMI, but not completely at MMI." Moreover, Dr. Lesnak "absolutely agree[d]" with Dr. Lindenbaum that after Claimant delivered her baby she should follow-up with her treating physicians to determine appropriate left ankle treatment. He noted that if Claimant's treating physicians recommended left ankle surgery she would not be at MMI during her post-surgical recovery period. There are thus diagnostic procedures that present a reasonable prospect for revealing treatments that may cure or relieve the effects of Claimant's October 15, 2013 left ankle injury. Accordingly, the opinions of Drs. Raschbacher and Lesnak do not reflect that it is highly probable that Dr. Lindenbaum's MMI determination was incorrect.

## CONCLUSIONS OF LAW

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

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

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

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's

determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

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

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

7. MMI exists "when any medically determinable physical or mental impairment as a result of an injury becomes stable and no additional treatment is reasonably expected to improve the condition. §8-40-301 (11.5), C.R.S.; *see Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). MMI does not exist if diagnostic procedures present a reasonable prospect for revealing treatments that may cure or relive the effects of the injury. *Eby v. Wal-Mart Stores, Inc.* W.C. No. 4-350-176 (ICAP, Feb. 14, 2001).

. 8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI for her left ankle condition. On October 15, 2013 while performing her job duties for Employer Claimant walked down a single step and slipped on a lemon peel. Claimant twisted her left ankle but did not fall. On May 9, 2013 ATP Dr. Raschbacher placed Claimant at MMI and assigned a 6% lower extremity impairment rating for Claimant's left ankle. He noted that Claimant did not suffer any other impairment. Dr. Raschbacher commented that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or her claim could be re-opened. In contrast, DIME Dr. Lindenbaum determined that Claimant had not reached MMI. He explained that, after delivering the baby, she should undergo

additional evaluation with her treating physicians for her hip, lower back and left ankle. He assigned Claimant a provisional 4% whole person impairment rating for her left ankle.

9. As found, Dr. Lesnak conducted an independent medical examination and specifically addressed Dr. Lindenbaum's DIME determination. He noted that the DIME report constituted a cursory review, did not adequately consider Claimant's medical records and failed to address causality. Dr. Lesnak explained that Dr. Lindenbaum did not provide a diagnosis for Claimant's back and hip symptoms but only noted some discomfort and pain in the regions. He concluded that Dr. Lindenbaum failed to comply with Table 53 of the *AMA Guides* by failing to delineate a specific diagnosis. Dr. Lindenbaum erroneously determined that Claimant had not reached MMI and required additional evaluation for her back and hip because the conditions were not related to her October 15, 2013 industrial injury.

10. As found, the opinions of Drs. Rasbacher and Lesnak do not constitute unmistakable evidence free from serious or substantial doubt that Dr. Lindenbaum's MMI determination regarding Claimant's left ankle was incorrect. Dr. Rasbacher acknowledged that, if Claimant proceeded with left ankle surgery after her pregnancy, any treatment would be considered maintenance care or "her claim could be re-opened." Furthermore, although Dr. Lesnak remarked that Dr. Raschbacher properly placed Claimant at MMI because of the delay related to her pregnancy, he noted that she was "temporarily at MMI, but not completely at MMI." Moreover, Dr. Lesnak "absolutely agree[d] with Dr. Lindenbaum that after Claimant delivered her baby she should follow-up with her treating physicians to determine appropriate left ankle treatment. He noted that if Claimant's treating physicians recommended left ankle surgery she would not be at MMI during her post-surgical recovery period. There are thus diagnostic procedures that present a reasonable prospect for revealing treatments that may cure or relieve the effects of Claimant's October 15, 2013 left ankle injury. Accordingly, the opinions of Drs. Raschbacher and Lesnak do not reflect that it is highly probable that Dr. Lindenbaum's MMI determination was incorrect.

## ORDER

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

1. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant has not reached MMI for her left ankle condition.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20)

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

DATED: November 9, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

## ISSUES

- Did Claimant prove by a preponderance of the evidence that on October 9, 2013 she sustained a compensable injury arising out of and in the course of her employment?
- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and related medical benefits as a result of the alleged injury?
- Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability 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. Claimant's Exhibits 1 through 3 were admitted into evidence. Respondents' Exhibits A and B were admitted into evidence.

2. Claimant seeks medical benefits and temporary total disability benefits as a result of an alleged work-related injury to her left ankle on October 9, 2013.

3. Claimant testified as follows. On October 9, 2013 Claimant was at work pulling a heavy "cage." The cage rolled into her left ankle. She did not think the incident was "that bad" and did not immediately report any injury to her Employer. Two and one-half weeks later her left foot was getting "black" and swelling. At this time Claimant feared she had "internal bleeding" but did not associate these problems with the October 9 incident at work. On October 29, 2013 she decided to go to her personal physician (PCP) for treatment. The PCP referred Claimant to a dermatologist and eventually to an orthopedist.

4. Claimant further testified that in the beginning of December 2013 she saw an orthopedic physician named Dr. Ng. According to Claimant Dr. Ng performed an x-ray and wrapped her left leg. Dr. Ng also recommended an MRI. Claimant had to get permission from her health insurance to obtain the MRI. An MRI was performed and once again her leg was wrapped.

5. Claimant believes she reported a work-related injury to the Employer on January 17, 2014. This is consistent with date of reporting reflected on the Employer's

First Report of Injury. Claimant testified the Employer referred her to Concentra for medical treatment.

6. On January 27, 2014 Respondents filed a Notice of Contest on grounds that the Claimant's alleged injury or illness was not work-related.

7. Claimant testified that between March and early May 2014 she wore a cast on the left foot. At one point she also wore a cast on her right foot. She explained that the casts were prescribed by "Dr. Christensen." Claimant did not explain how she came under the care of Dr. Christensen. The Claimant stated that the cast on the right foot was merely to protect it from injury and she was not making any claim for injury to her right foot.

8. Claimant admitted that on April 14, 2014 she sustained another injury at work when a heavy bag of coins fell off of a cage and struck her left ankle. Claimant testified that this incident made her left ankle condition worse than it was before. She underwent a second MRI and learned that her "main ligament" was "torn apart."

9. Claimant testified that she continued working for the Employer after October 9, 2013 although she was "walking around like Frankenstein." Despite being in pain Claimant continued to work for the Employer until she underwent surgery in October 2014. The October 2014 surgery was performed by "Dr. Motz."

10. Claimant testified she was off of work during October, November and December 2014. She was released to return to work in January 2015. However, when she returned to the Employer she was told that she no longer worked there. Claimant seeks temporary total disability (TTD) benefits for the period of time she was off work.

11. At hearing Claimant called Haneefa Issah (Issah) as a witness. Issah testified that she recalled observing an incident at 5:30 to 6:00 a.m. when Claimant was pulling a heavy cage stacked with money. The cage hit Claimant in the leg and Issah noticed Claimant appeared to be in pain. Claimant told Issah she was going to the restroom to see if she was bleeding or hurt. When Claimant returned Issah asked Claimant two or three times whether she wanted to report an injury. Issah recalled that Claimant declined to report the incident because she didn't think it was serious.

12. Claimant admitted that she is friends with Issah and that they drove to the hearing together. Issah also helped Claimant prepare some of her paperwork for the hearing.

13. Claimant did not introduce into evidence any medical records from her PCP, the dermatologist, Dr. Christensen or Dr. Motz.

14. On December 12, 2013 Alan Ng, DPM, examined Claimant at Advanced Orthopedic and Sports Medicine Specialists, P.C. (Advanced Orthopedic). According to Dr. Ng's office note Claimant was complaining of "pain in the distal tibia." The pain was "discovered more recently" over the last month and had gotten "progressively

worse" so as to cause "significant discomfort." Dr. Ng. recorded that three "views of the ankle does show some positive the lateral aspect of the tibia [sic]." Dr. Ng assessed a possible stress fracture and recommended that Claimant undergo an MRI. He placed Claimant "in a boot."

15. On December 30, 2014 Claimant underwent an MRI of her left lower extremity as requested Dr. Ng. The "history" for the study was noted to be "trauma" to lower left tibia with persistent pain. The radiologist's impressions were moderate deep soft tissue edema of the anteromedial mid to distal left lower leg that may relate to sequelae of trauma with soft tissue contusion. There was no bone marrow contusion or fracture. Tendinous structures appeared unremarkable.

16. Dr. Ng again examined Claimant on January 9, 2014. The office note states Claimant was referred to Dr. Ng by Dr. Mervyn Lifschitz. Dr. Ng wrote Claimant had undergone an MRI that showed "a significant stress contusion to the skin followed with the bone secondary to the part [sic] that hit her leg so essentially causing a stress injury to the soft tissue on the anterior medial distal tibia." Dr. Ng further wrote "this has not occurred since October and still giving her significant discomfort was no damage to the bone on the distal tibia but primarily the soft tissue severely contused." Dr. Ng prescribed topical medication to see "if the area will be resolved."

17. On January 23, 2014 Claimant PA-C Patrick Freeman examined Claimant at Concentra. The office note lists the date of injury as January 20, 2013. PA-C Freeman recorded that Claimant gave a history that on the date of injury she was "pulling some cages full of money when one of the cages continued to roll on the bottom edge of the cage at the inside of her left ankle." Claimant reported that on the day of the injury she had soreness but no wound, bruising or swelling. Consequently she continued to work and did not report any injury. Claimant soaked her foot for three days but the "skin on the inside of he left ankle started to turn black." Consequently Claimant went to her PCP who in turn referred her to a dermatologist and a podiatrist. On examination of the left ankle PA-C Freeman noted edema that was more significant than on the right side and there was a "patch of discolored skin over the medial proximal ankle."

18. On January 23, 2014 PA-C Freeman planned to review records from the PCP and podiatrist and review the MRI. He diagnosed a "left ankle contusion" and suspected an "occult underlying health condition as [a] contributing factor." PA-C Freeman prescribed physical therapy, released her to full duty and instructed her to return in "7-10 days for recheck." PA-C Freeman opined the injury was "recordable" and opined it was work related "as patient describes the mechanism of injury and nature of her work."

19. Dr. Ng again examined Claimant on January 30, 2014. He assessed a "continued" contusion and stated that "this may also be contributed to the fact she has significant amount of lower extremity edema secondary to venous stasis." Dr. Ng recommended a compression dressing to the lower extremity. If that did not help Dr. Ng

was considering a “steroid injection into the contusion area” to reduce symptomatology. Dr. Ng prescribed Ultram.

20. On February 13, 2014 Dr. Ng noted Claimant was seen in follow-up for a “contusion to the lower extremity [that] was complicated by secondary venous insufficiency.” Dr. Ng stated Claimant had been placed in compression wraps and this had “significantly improved from previous.” Dr. Ng opined that this result verified the previous diagnosis of “a venous stasis type of area that is not healing due to the venous pooling.” Dr. Ng assessed an unspecified peripheral venous insufficiency and recommended Claimant wear compression hose for three to four weeks.

21. On March 13, 2014 Claimant returned to Dr. Ng. On this occasion Dr. Ng wrote that Claimant presented “after being hit by a money cart at work and injured the lower one third of her tibia and incurred a wound on the medial aspect of her tibia.” Dr. Ng stated that this incident occurred “at work approximately 30-40 days ago.” Dr. Ng commented that Claimant’s wound had not changed in over 30 days despite the use of compression stockings and topical medications. Dr. Ng referred Claimant to the “wound care center” at Presbyterian St. Luke’s to assess the wound and address the venous insufficiency.

22. Claimant proved it is more probably true than not that on October 9, 2013 she sustained an injury arising out of and in the course of her employment. Claimant also proved that this was a “compensable” injury in the sense that it proximately caused a need for reasonable and necessary medical treatment.

23. Claimant credibly testified that on October 9, 2013 a heavy cart rolled into her left ankle while she was at work performing the duties of her employment. The ALJ is persuaded that although the Claimant did not initially sustain a visible wound or other obvious injury, she did experience pain that caused her to go to the restroom. The Claimant’s testimony regarding the occurrence of this event was corroborated by Issah’s credible testimony.

24. The Claimant credibly testified that in the days following the October 9, 2013 incident she developed discoloration and swelling in her left ankle, and that this caused her to seek treatment from her PCP approximately two and one-half weeks after the injury. Claimant credibly testified that the PCP then referred her to a dermatologist and an orthopedic provider. The ALJ infers Dr. Ng. is the “orthopedic provider” since he is a doctor of podiatry at Advanced Orthopedic. Claimant’s testimony concerning this sequence of events is corroborated by and consistent with the history she provided to PA-C Freeman when she was referred to him in January 2014. This history is also largely consistent with the history which Dr. Ng recorded in his various office notes. Dr. Ng has consistently diagnosed a contusion to the left lower extremity. Further, on March 13, 2014 Dr. Ng recorded a history that is consistent with Claimant’s testimony that she was struck by a cart.

25. Dr. Ng credibly and persuasively explained that the contusion resulting from the cart incident, coupled with Claimant’s underlying venous insufficiency, resulted

in a wound that failed to heal properly. The existence of the contusion is corroborated by the MRI results. Dr. Ng's opinion that the venous insufficiency contributed to the Claimant's failure to heal properly is corroborated by the note of PA-C Freeman. PA-C Freeman diagnosed a work-related contusion with an "occult underlying health condition as [a] contributing factor."

26. Dr. Ng's reports establish that the work-related contusion coupled with the venous insufficiency caused a need for medical treatment. Dr. Ng examined Claimant and made recommendations for treatment including wrapping the leg, prescribing medication and referring Claimant to a wound clinic. The Claimant's need for medical treatment as a result of the work-related contusion is also supported by PA-C Freeman's recommendations for treatment and physical therapy.

27. Claimant failed to prove it is more probably true than not that any of the medical treatment she received, except for that provided at Concentra, was authorized.

28. Issah credibly testified that on October 9, 2013 she was aware Claimant had been hit by the cage and experienced enough pain that Claimant went to the bathroom to check for injuries. When Claimant returned Issah asked Claimant two or three times whether Claimant wanted to report an injury. Issah credibly testified that Claimant did not want to report an injury because she "didn't think it was serious."

29. Based on Issah's credible testimony, the ALJ finds that Claimant did not report an "injury" to the Employer on October 9, 2013. A reasonably prudent manager would not, under the circumstances described by Issah, have reasonably expected the October 9 incident to result in a claim for workers' compensation benefits. To the contrary, at the time of the incident Claimant minimized its significance and continued to work. As determined in Finding of Fact 6 the credible and persuasive evidence establishes Claimant did not report her injury to the employer until January 17, 2014. Claimant admitted that when she reported the injury the Employer referred her to Concentra for treatment.

30. Claimant failed to prove it is more probably true than not the industrial injury of October 9, 2013 proximately caused her alleged disability in October, November and December 2014. Specifically, the ALJ is persuaded that it is more likely than not that the need for the October 2014 surgery, and the consequent temporary disability, was proximately caused by an intervening injury on April 14, 2014.

31. The Claimant credibly testified she did not lose any time from work until she underwent surgery in October 2014. She also admitted that after October 9, 2013 she sustained a second industrial injury on April 14, 2014. Claimant testified that this incident "tore apart" a ligament in her ankle. There is no credible or persuasive evidence that prior to April 14, 2014 there was any recommendation for surgery, or even the contemplation of surgery. Claimant failed to prove by credible and persuasive evidence the type of surgery she underwent in October 2014 surgery. Similarly she failed to prove by credible and persuasive evidence the cause of the need for that procedure. In these circumstances the ALJ infers it is more likely than not that the need

for surgery in October 2014, and any consequent disability, was proximately caused by the intervening injury of April 14, 2014 rather than the October 9, 2014 injury.

## CONCLUSIONS OF LAW

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

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

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

### COMPENSABILITY

Claimant contends that she proved by a preponderance of the evidence that on October 9, 2013 she sustained a compensable injury to her left lower extremity when she was struck by a rolling "cage." The Respondents argue the Claimant failed to prove that she suffered any event at work on October 9, 2013. Respondents further argue that if the Claimant proved that she sustained an event at work she failed to prove that the event was the proximate cause of any disability or need for medical treatment. The ALJ concludes Claimant proved it is more probable than not that she sustained a compensable injury.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999

(Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

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

As determined in Findings of Fact 22 through 26, the ALJ concludes that Claimant proved it is more probably true than not that on October 9, 2013 she sustained a compensable injury. As found, the evidence establishes that on October 9, 2013 Claimant was at work for the Employer performing her duties when a heavy "cage" rolled into her left lower extremity. The ALJ is persuaded that this incident caused a contusion to Claimant's left lower extremity, and that the contusion combined with Claimant's pre-existing vascular insufficiency so as to produce discoloration and delayed healing. As established by the reports of Dr. Ng, the delayed healing of the contusion necessitated medical treatment including medication and referral to a wound clinic.

COMPENSABILITY OF MEDICAL TREATMENT

Claimant contends that she should be reimbursed for out of pocket medical expenses (co-pays) mileage expenses and prescriptions associated with medical treatment rendered by multiple providers. In support of this argument Claimant contends that she reported her injury to Issah on October 9, 2013, but the Employer failed to provide a list of designated medical providers as required by the statute currently codified at § 8-43-404(5)(a)(I)(A), C.R.S. The ALJ disagrees with Claimant's argument.

The Respondents are not liable to pay for medical treatment unless it is provided by an authorized treating physician (ATP). Section 8-43-404(7), C.R.S.; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Section 8-43-404(5)(a)(I)(A) provides that the "right of selection" passes to the "employee" if the "services of a physician are not tendered at the time of injury." For

purposes of this statute the "time of injury" means the point in time when an employer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.2d 381 (Colo. App. 2006); *Freiberg v. Dow Chemical,* WC 4-524-325 (ICAO September 9, 2005). This rule applies to an employer's obligation to provide a claimant with a list of authorized providers. *Gutierrez v. Premium Pet Foods, LLC,* WC 4-834-947 (ICAO September 6, 2011).

Generally, authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers a claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *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).

Claimant's argument notwithstanding, she failed to prove it is more probably true than not that any medical provider, other than PA-C Freeman at Concentra, was an ATP. As determined in Findings of Fact 27 through 29 Claimant did not report any injury to her Employer until January 17, 2014. Claimant admitted that when she reported the injury on January 17 she was referred to Concentra by the Employer.

There is no credible and persuasive evidence that Concentra refused to treat the Claimant after January 23, 2014. Similarly, there is no credible or persuasive evidence that any treatment Claimant received after January 17, 2014, with the exception of the Concentra treatment, was the result of a referral by the Employer or a Concentra provider. Therefore none of this treatment, including any referrals made by Dr. Ng and the surgery performed by Dr. Motz, may be considered compensable.

It follows Claimant is not entitled to any reimbursement for medical expenses, prescriptions or travel expenses except for treatment by Concentra. Claims for reimbursement, other than for any expenses associated with the Concentra visit on January 23, 2014, are denied as not authorized. In light of this determination the ALJ need not consider whether any treatment rendered after January 23, 2014 was reasonable and necessary to treat the injury of October 9, 2013.

CLAIM FOR TTD BENEFITS

Claimant seeks an award of TTD benefits for the months of October, November and December 2014. Claimant alleges that during this time she was disabled from performing her regular employment as a result of undergoing surgery with Dr. Motz. The ALJ is not persuaded by this argument.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954

P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

The claimant was required to prove by a preponderance of the evidence that the disability for which she seeks compensation 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). No compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

As determined in Finding of Fact 31, Claimant failed to prove it is more probably true than not the industrial injury of October 9, 2013 proximately caused her alleged disability in October, November and December 2014. Rather, the ALJ is persuaded that it is more likely than not that the need for surgery in October 2014 was proximately caused by an intervening industrial injury in April 2014. Consequently, it is more likely than not that Claimant's alleged temporary disability commencing in October 2014 was proximately caused by the intervening injury in April 2014. It follows that Claimant failed to prove the alleged TTD was proximately caused by the October 9, 2013 injury that is at issue in this case.

## OTHER ISSUES

Claimant sought a determination of her average weekly wage (AWW). Since the ALJ has not awarded any benefits that are dependent on determination of the AWW that issue is reserved for future determination.

Claimant's position statement seeks a determination of her entitlement to permanent partial disability benefits. However, the ALJ concludes consideration of this issue is premature because there is no credible and persuasive evidence that Claimant has been placed at maximum medical improvement (MMI) for the October 9, 2013 injury. Determination of permanent partial disability benefits cannot precede a determination of MMI. In any event, this issue was not raised when the issues for determination were discussed at the time of the hearing. Consequently this issue is reserved for future determination.

Claimant's position statement raises and issue of disfigurement. However, this issue was not raised when the issues for determination were discussed at the time of the hearing. Consequently this issue is reserved for future determination.

Claimant has argued she is entitled to compensation for "wrongful termination" from employment. However, the Workers' Compensation Act does not authorize payment of benefits for "wrongful termination" from employment. Consequently, this issue is beyond the ALJ's jurisdiction.

Because the ALJ has not awarded any TTD benefits Respondents' claim for a "penalty" based on late reporting of the injury is moot. See § 8-43-102(1)(a), C.R.S. (allowing loss of up to one day's compensation for each day's failure timely to report injury).

## ORDER

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

1. Insurer shall provide reasonable, necessary and related medical benefits for treatment of the industrial injury sustained on October 9, 2014.

2. Claimant's request to be reimbursed for medical and mileage expenses other than those provided by Concentra is denied and dismissed.

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

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

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

DATED: November 23, 2015

DIGITAL SIGNATURE:

David P. Cain

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## ISSUES

- Are Respondents liable to pay Claimant workers' compensation death benefits?
- What was the Decedent's average weekly wage on the date of death?

## FINDINGS OF FACT

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

1. At hearing counsel for Claimant and counsel for Respondents stipulated to the following facts and legal conclusions.

2. On September 25, 2013 Decedent was killed in an accident arising out of and in the course of his employment. On the date of death Sanchez Trucking, Inc. (Employer) was Decedent's statutory employer. Pinnacol Assurance (Insurer) is liable to pay death benefits as Sanchez Trucking Inc.'s insurer.

3. On September 15, 2013 Claimant was "wholly dependent" on Decedent. Claimant was the only person who was "wholly dependent" on the Decedent.

4. On September 15, 2013 Claimant's mother, Griselda Ruiz, had been divorced from Decedent since July 2010 and was not supported by or dependent on the Decedent. On September 15, 2013 Decedent's daughter Daisy Liliana Ruiz was 24 years old and not wholly dependent on the Decedent. On September 15, 2013 Decedent's daughter Tatiana Griselda Ruiz Apodaca was 20 years old, was not attending an accredited educational institution and was not wholly dependent on Decedent.

5. Claimant's Exhibits 1 through 6 were admitted into evidence without objection.

6. Decedent's average weekly wage on September 25, 2013 was $425.

## CONCLUSIONS OF LAW

Insurer is liable to pay workers' compensation death benefits to Claimant. The amount of such benefits shall be based on the Decedent's stipulated average weekly wage as provided in § 8-42-114, C.R.S.

The ALJ notes that Claimant submitted a proposed order that directs the insurer to pay the death benefits to Claimant's attorney, who would then withdrawal his fees and costs and pass the balance to Claimant's mother. Claimant's mother would then deposit the remaining balance of the funds in a federally insured, interest bearing account for the use and benefit of Claimant. The ALJ is of the opinion that he may not order the benefits paid to Claimant's attorney for the purpose of withdrawing fees and costs. The ALJ concludes that such an arrangement would impermissibly impose an attorney fee lien on the Claimant's workers' compensation death benefits. Section 8-42-124(1), C.R.S.; *Freemyer v. Industrial Claim Appeals Office*, 32 P.3d 564 (Colo. App. 2000). The ALJ further notes that at the hearing Claimant's counsel did not propose to have the benefits paid to him in the first instance and Respondents did not stipulate to such an arrangement.

The ALJ should not be understood to express any opinions concerning Claimant's obligation to pay reasonable attorney fees and costs. The ALJ merely rules that the method of paying attorney fees contained in the proposed order is not permissible.

However, the Respondents expressed no objection to an order requiring them to pay the death benefits to Claimant's mother who would then deposit them in a federally insured, interest bearing account for the use and benefit of Claimant. Such an order is within the ALJ's jurisdiction under § 8-42-122, C.R.S.

## 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 workers' compensation death benefits in accordance with § 8-42-114. These benefits shall continue until such time as Claimant is no longer entitled to receive them pursuant to applicable law.

3. The workers' compensation death benefits shall be paid to Claimant's mother Griselda Ruiz. Griselda Ruiz shall deposit the benefits in a separate, federally insured, interest bearing account for the use and benefit of

Claimant. Upon reaching the age of eighteen years old the Claimant shall have unrestricted access to the funds in said account.

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

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

DATED: November 3, 2015

DIGITAL SIGNATURE:

David P. Cain

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

## ISSUE

1. Whether Respondent is entitled to recover an overpayment.

2. Whether Respondent is entitled to Modify Compensation for the period of April 10, 2014 ongoing.

## STIPULATIONS

1. The parties rest on admitted exhibits and stipulations.

2. The parties agree the Claimant's Average Weekly Wage (AWW) is $999.75.

3. The parties agree that there is no fraud on the part of the Claimant with respect to the Respondents' overpayment claim.

4. At the hearing, the parties agreed that the Average Weekly Wage listed on the October 20, 2014 Amended General Admission of Liability of $1,086.83 contained a mistake because that admitted AWW included the $87.08 Average Weekly Wage that Claimant was earning from a concurrent employer, Kohls, and the Claimant was still working and earning wages at Kohls.

## FINDINGS OF FACT

1. On September 2, 2014, legal counsel for Claimant advised legal counsel for Respondents that the Claimant was working contemporaneously for Employer and a second employer, Kohls. Counsel further advised that the Claimant's estimated Average Weekly Wage from her Kohls employment was $87.08 and that she had suffered no wage loss from the Kohls job as her employer was able to accommodate her restrictions (Respondents' Exhibit A).

2. On September 25, 2014, legal counsel for Claimant sent correspondence to legal counsel for Respondents memorializing an agreement that the Claimant's Average Weekly Wage with Employer is $999.75 (Claimant's Exhibit 2, p. 9; Respondents' Exhibit D, p. 7).

3. On September 26, 2014, the Respondent Insurer filed a General Admission of Liability admitting for medical benefits and temporary total disability

benefits. The Average Weekly Wage was reported as $999.75 and the disability TTD rate was listed as $666.50 per week (Claimant's Exhibit 2, p. 10; Respondents' Exhibit B, p. 2).

4. On October 20, 2014, an Amended General Admission of Liability was filed by Respondent Insurer ostensibly to modify the admission from temporary total disability benefits to temporary partial disability benefits. In this Amended GAL, the Claimant's Average Weekly Wage was reported as $1,086.83. However the admitted disability rate remained listed as $666.50 - which is 2/3 of $999.75, and NOT 2/3 of the amended AWW of $1,086.83. In the "Remarks" section the Respondents noted "UPS AWW $999.75 – WCR $666.50. Kohl's AWW $87.08 – WCR $58.5. Combined AWW $1086.83 – WCR $724.55. Thus, on the face of the document, it appears that although the Respondents amended the Average Weekly Wage to $1086.83, the disability benefits were nevertheless calculated based only on the UPS Average Weekly Wage of $999.75 (Respondents' Exhibit C).

5. On January 22, 2015 Respondents filed an Amended General Admission of Liability, noting that the Claimant returned to work, regular duty, on January 14, 2015, but had been paid TPD benefits from 1/14/15 – 1/16/15 resulting in an overpayment of $285.64. The admitted Average Weekly Wage in this Amended General Admission of Liability is still reported as $1,086.83. However, as with the October 20, 2014 Amended General Admission of Liability, the admitted disability rate remained listed as $666.50 - which is 2/3 of $999.75, and NOT 2/3 of the amended AWW of $1,086.83. Thus, on the face of the document, it appears that although the Respondents amended the Average Weekly Wage to $1086.83, the disability benefits were nevertheless calculated based only on the UPS Average Weekly Wage of $999.75 (Claimant's Exhibit 2, p. 10; Respondents' Exhibit D, p. 8)

6. Based on the Amended GAL dated January 22, 2015, Respondents paid the Claimant at the TPD rate of $666.50 from 4/10/14 – 8/13/14 and again from 8/25/14 – 1/16/15 (although this should have terminated on 1/13/15). Based on information listed on the face of the document, the TPD rate was calculated based on the correct UPS AWW of $999.75 and was not calculated with the $87.08 Kohls AWW added in to the total.

7. On March 4, 2015, Respondent Insurer filed a Petition to Modify Compensation for the period from April 10, 2014 to ongoing based on the following stated facts:

> Claimant is concurrently employed. The parties agreed to an AWW of $999.75 (Exhibit A). The AWW admitted in all admissions, including the current GAL (Exhibit B), is $1,086.83. This was in error. Respondents paid TPD in accordance with the erroneous AWW for the duration of the claim. Claimant is not working for UPS and Respondents must file an Amended GAL. Respondents request to file an Amended GAL with the $999.75

AWW and correct TPD rates (see addendum). This includes reducing future compensation to collect overpayment, by reduction/suspension of TPD or against future PPD owed.

Respondents relied upon WRCP 6-4(A) in support of the Petition to Modify Compensation (Claimant's Exhibit 2; Respondents' Exhibit D).

8. On March 5, 2015, the Claimant filed an Objection to the Petition to Modify, Terminate or Suspend Compensation, stating, "Respondents' Motion is not supported by facts or law (Claimant's Exhibit 3).

9. On March 20, 2015, the Division of Workers' Compensation denied the Petition to Modify, Terminate or Suspend Compensation benefits in this claim, noting that, "if you wish to pursue this issue you will need to apply for a hearing (Respondents' Exhibit E).

10. Respondent filed an Application for Hearing on June 8, 2015 regarding the denial of the Petition to Modify TTD/TPD and asserting an overpayment. Claimant filed a Response on June 9, 2015 objecting to any asserted overpayment.

11. At the hearing on September 24, 2015, the parties elected not to call listed witnesses, but instead rested on the admitted exhibits and stipulations.

12. Although the Amended General Admissions of Liability dated October 20, 2014 and January 22, 2015 listed an Average Weekly Wage of $1,086.83, which, at the hearing, the parties both agree included the $87.08 AWW from Claimant's concurrent employment at Kohls, the ALJ finds that this is harmless error because the disability benefit was not calculated based on multiplying $1,086.83 by 2/3. Rather, the disability benefit was calculated based on multiplying the correct, agreed upon Average Weekly Wage of $999.75, resulting in an admission and payment of the correct disability benefit payment of $666.50 per week.

## CONCLUSIONS OF LAW

### *Generally*

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant generally shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. However, in this case, the Respondent is seeking to prove the proposition that it is entitled to recovery of an overpayment. Therefore, Respondent bears the burden of proof by a preponderance of the evidence. *Rocky Mountain Cardiology v. Industrial Claim Appeals Office,* 94 P.3d 1182, 1186 (Colo. App. 2004); *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162, 1164 (Colo. App. 2002). A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979)

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).2

### *Statutory Construction*

When interpreting statutes, a court should give words and phrases in a statute their plain and ordinary meanings. This is true because the object of statutory construction is to give effect to the legislative intent of the statute, and the best indicator of legislative intent is contained in the language of the act. Forced and subtle interpretations should be avoided. *Jones v. Industrial Claim Appeals Office,* 87 P.3d 259 (Colo. App. 2004); *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d 176 (Colo. App. 2002). However, statutes addressing the same subject matter should be construed together. *USF Distribution Services, Inc., v. Industrial Claim Appeals Office,* 111 P.3d 529 (Colo. App. 2005). In doing so, mandatory language in one statute should be found to be stronger than permissive language in another statute. *United Airlines v. Industrial Claim Appeals Office,* 312 P.3d 235, 239-240 (Colo. App. 2013). The term "may" is generally permissive and the term "shall" is generally mandatory, unless it is necessary to interpret the term "may" as mandatory to prevent an unconstitutional or absurd result. *Danielson v. Castle Meadows, Inc.,* 791 P.2d 1106 (Colo. 1990).

### *Overpayment and Petition to Modify*

The main issue for this hearing is whether or not temporary disability payments made by the Respondents to the Claimant included an "overpayment." The Claimant relies on *Vargo v. Colorado Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981) for the proposition that even to an extent that an overpayment exists, the Respondent may only be granted prospective relief and not retroactive relief.

The Respondent argues that the *Vargo* case is inapplicable as the 1997 amendments to the Act changed the law and relies instead on the case of *Garrett v. Trinidad Drilling U.S.A., Inc.,* W.C. No. 4-704-929 (ICAO January 16, 2008) for the proposition that a respondent is entitled to amend an admission on the grounds of mistake and is further entitled to recover an overpayment for amounts paid in error by means of an offset against future workers' compensation benefits to which the Claimant may be entitled.

Based on the findings of fact made in this case, both parties have missed the mark. The parties both appear to assume that the Claimant was, in fact, paid temporary disability benefits in excess of the amount she should have received. However, as the ALJ found above, "although the Amended General Admissions of Liability dated October 20, 2014 and January 22, 2015 listed an Average Weekly Wage of $1,086.83, which, at the hearing, the parties both agree included the $87.08 AWW from Claimant's concurrent employment at Kohls, the ALJ found that this was harmless error because the disability benefit was not calculated based on multiplying $1,086.83 by 2/3. Rather, the disability benefit was calculated based on multiplying the correct, agreed upon Average Weekly Wage of $999.75, resulting in an admission and payment of the correct disability benefit payment of $666.50 per week."

The term "overpayment" is defined in C.R.S. § 8-40-201(15.5), as,

> money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

"Generally, an 'overpayment' is anything that has been 'paid' but is not 'owing as a matter of law.'" *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005). Further, in *Simpson*, the Court considered the statutory definition of "overpayment" in § 8-40-201(15.5) and found it provided for three distinct categories of overpayment:

> The statute makes clear that the phrases are disjunctive such that three categories of possible overpayment are included in the statutory definition: one category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. § 8-40-201(15.5). See *Simpson*, 219 P.3d 359.

Here, based on the documentation provided to the ALJ, the Claimant did not received money to which she was not entitled. Rather, she received temporary benefits calculated based upon the figure of $999.75, which is the amount the parties agreed was the Claimant's Average Weekly Wage for her employment with UPS. Although the General Admissions of Liability were amended by the Respondent to list an incorrect Average Weekly Wage of $1,086.83 in the top portion of the admissions documents, this Average Weekly Wage of $1,086.83 was not used to actually calculate the disability benefit. Either the Kohl's wage of $87.08 was first subtracted as an offset OR the AWW

of $1,086.83 was disregarded and substituted with the $999.75 UPS-only AWW. In either case, the ultimate calculation of the Claimant's disability payment was correct and there was no money received by the Claimant that exceeds the amount that should have been paid pursuant to C.R.S. §8-40-201(15.5) and the stipulation and prior agreement of the parties that the Claimant's AWW was $999.75.

## ORDER

It is therefore ordered that:

1. The Average Weekly Wage of $1,086.83 listed in Amended General Admissions of Liability dated October 20, 2014 and January 22, 2015 is in error and Respondents are directed to file a further Amended General Admission of Liability admitting to the stipulated Average Weekly Wage of $999.75.

2. The prior mistaken admission to an Average Weekly Wage of $1,086.83 did not result in any error or mistake in the calculation of the Claimant's temporary disability benefit in this case. In spite of admitting to an Average Weekly Wage of $1,086.83, the temporary disability benefit was nevertheless calculated based on an AWW of $999.75 multiplied by 2/3.

3. The Respondents failed to establish that the Claimant received any amounts to which she was not entitled or which exceeded the amounts that should have been paid. Thus, there is no overpayment pursuant to § 8-40-201(15.5), C.R.S.

4. The Respondents' claim for recovery of an overpayment is denied and dismissed.

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

DATED: November 5, 2015

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

## ISSUES

- Did Claimant establish by a preponderance of the evidence that the proposed cervical spinal surgery (Anterior Cervical Discectomy and Fusion) was reasonable and necessary, as well as causally related to the industrial injury.

## FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant had a significant history of injuries prior to his industrial injury which occurred on March 6, 2014. In particular, he had a skiing injury in 1994 when he landed on his head. Claimant had spinal steroid injections in 2004 and 2009. He was also injured in a motorcycle accident on August 30, 2012. Claimant confirmed that he required treatment for these prior injuries in his hearing testimony.

2. Claimant had an MRI on August 30, 2012 in which Brian Steele, M.D. noted a C5-6 right paracentral foraminal disc protrusion leading to severe right sided foraminal stenosis, with some cord compression. Also, bilateral C6/7 foraminal stenosis due to osteophytes and protruding disc material was noted. A small right paracentral disc protrusion at T3/4 was also seen.

3. Claimant treated at Panorama Orthopedics and Spine Center for his injuries after the motorcycle accident and on September 12, 2012 was evaluated by Justin Green, M.D. as he was complaining of pain and tenderness in the thoracic spine. Dr. Green's impression was multiple trauma; minimal pain from thumb fracture; thoracic pain secondary to disk herniation; no objective evidence of thoracic compression fracture; C5-6 disk protrusion; rule out bilateral upper extremity radiculopathy; no definitive findings for cervical myelopathy. Claimant was to start physical therapy, have an MRI of the thoracic spine and an injection of the cervical spine was considered.

4. On September 20, 2012, Claimant was diagnosed with an exacerbation of cervical degenerative disc disease by Nathan Yournal, PA. At that time, he was experiencing interscapular pain and bilateral upper extremity radicular pain after being injured in a MVA. He described the pain as being in his back, noting 85% was in his back and 15% was in his arms. Various treatment options including surgery were discussed with Claimant and he received an epidural steroid injection that day. Claimant had continuing pain complaints and received an intralaminar epidural steroid

injection at C6-7 administered by Karen Knight, M.D. on October 10, 2012. He received another injection at this level on November 11, 2012.

5. Claimant had developed degenerative disc disease in his cervical and thoracic spine as of 2012. He was diagnosed with degenerative disc disease at C5-6 and C6-7, along with radiculitis and required treatment. On December 18, 2012, he received an intralaminar epidural steroid injection at C7-T1 and Dr. Knight's diagnosis was debilitating neck pain, cervical degenerative disc disease, foraminal stenosis of the cervical spine and cervical radiculitis.

6. After the motorcycle accident, Claimant worked full time as a cook at Montauk which required him to stand on the line, as well as lift boxes that weighed 50-75 pounds. Claimant testified that he did not require treatment for approximately fifteen (15) months prior to the March 6, 2014 industrial injury. Claimant was able to work with the degenerative conditions in his cervical and thoracic spine and had no formal restrictions, including for his job with Respondent-Employer.

7. Claimant suffered an admitted industrial injury on the March 6, 2014 while working for Employer. He grabbed a box of frozen chicken off a stack in a freezer. The box broke and in an effort to catch it, he lunged forward. This pulled his neck and back. Claimant felt immediate pain in his neck and back.

8. Claimant was evaluated by Steve Yarberry, M.D. at Colorado Mountain Medical on March 6th and was complaining of neck stiffness, which was located at the midline of neck, upper shoulders and left lateral neck. Back pain was also noted. He also complained of pain in the left paraspinal and thoracic area. Dr. Yarberry described the work related problem as neck strain and disc degeneration was also noted. Claimant was started on physical therapy and taken off work at that time. Dr. Yarberry's note also documented Claimant's prior medical history.

9. Claimant was next examined by Dr. Yarberry on March 13, 2014, who described his work-related health problem as: neck strain. Current symptoms also included back pain. Upon examination, Claimant had pain in the left rhomboid area, with radiating pains around the chest wall and weakness in his left arm. He had burning pain in the right and left trapezius area. Dr. Yarberry kept Claimant off work.

10. Claimant returned to Dr. Yarberry on March 18, 2014. His pain was reported to be much better, but said physical therapy reaggravated his pain[1]. Claimant moved stiffly and carefully, in moderate pain. Degenerative disc disease was noted in Claimant's thoracic spine, along with degeneration of cervical intervertebral disc. Claimant's work-related problem was described as an injury to the thoracic spine. He was referred to Dr. David Karli.

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[1] The ALJ notes there was extensive discussion and analysis about whether Claimant could have been hurt in physical therapy. Dr. Douthit also commented about this in his report and testified about it. The ALJ concludes that this treatment note stated physical therapy caused Claimant to feel increased pain (which can occur), although it did not rise to the level of an injury.

11. Claimant was evaluated by David Karli, M.D. on March 25, 2014. (The treatment note was completed by James Stanley, M.S., ATC, OTC.) At that time, he was complaining of stabbing pain between his shoulder blades[2]. It was also noted that he had chronic cervical pain, which was active. (A copy of Dr. Karli's report detailing the physical examination, impression and plan was not submitted to the ALJ.)

12. An MRI was done on Claimant's thoracic spine on March 25, 2014 and the films were read by Charles Ho, M.D. Dr. Ho noted a moderate disc extrusion at T9-T10, measuring 5-6 mm by 11mm, which flattened the anterior thoracic cord. Mild multilevel thoracic degenerative disc disease was found with posterior annular bulges and small disc protrusions at the T4-5 and T6-7 levels, with no foraminal narrowing or thecal sac narrowing at those levels. Mild multilevel spondylosis was present manifested by mild facet joint and costovertebral junction arthrosis and degenerative disc changes, as described above.

13. Dr. Yarberry next saw Claimant on May 9, 2014. He noted that an MRI had been done in interim, which showed many abnormalities in the thoracic spine. Claimant had been going to PT three times per week, which he said aggravated his pain. Upon examination, decreased range of motion with some midline tenderness and paraspinal spasms was found at the neck, with tenderness noted at C7 and about T-4 in the thoracic spine. He had moderately/severe rhomboid spasms and tenderness. Dr. Yarberry decided to try different meds/muscle relaxants. Claimant's 5 lb. lifting restriction was continued.

14. Claimant returned to Dr. Yarberry on May 15, 2015, who observed that Claimant moved slowly, had midline tenderness in the lower neck and at C7, along with paraspinal spasm in the neck. Decreased ROM of the neck was also noted. In the thoracic spine, lots of rhomboid spasm was detected, along with tenderness in the upper thoracic area. Dr. Yarberry set a follow-up appointment in two weeks.

15. Dr. Karli re-examined Claimant on May 16, 2014. Claimant's primary complaint was listed as thoracic pain, but he also had a history of chronic cervical discomfort, which was active. Claimant had tenderness with flexion and extension in the thoracolumbar junction. Rotation also was uncomfortable but did not produce any radicular or myelopathic-type symptoms. Dr. Karli noted that given the lack of improvement with conservative management, it was appropriate to consider thoracic epidural steroid injections. He referred Claimant to his partner (Dr. Evans) for an interlaminar ESI for the thoracic spine.

16. A T10-11 interlaminar epidural steroid injection was administered by Dr. Evans on May 28, 2014. Claimant reported a significant decrease in his overall thoracic back pain.

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[2] In this note, Claimant described an incident in which he sneezed while shopping and felt the "worst" pain he had ever experienced in his thoracic spine. It was noted that in the few months leading up to the work comp injury he had been doing extremely well.

17. Claimant returned to Dr. Karli on June 11, 2014 with his chief complaints listed as thoracic and neck pain. The thoracic ESI gave him some transient/diagnostic relief related to a well-identified disc herniation and cord compression. Claimant was noted to be getting some flare of his chronic neck discomfort, which had responded favorably to epidurals in the past. Dr. Karli felt it was reasonable to consider a surgical consultation and wanted to wait on the cervical injection.

18. The Claimant also saw Dr. Yarberry on June 11, 2014. At that time, he was noted to be in mild to moderate pain/distress. His neck had some midline tenderness, along with paraspinal muscle spasms and tenderness, especially in the trapezius along rhomboid spasm. Claimant had intact sensation in the upper extremities, with some proximal motor weakness in the left arm. It was noted that his spine specialist recommended surgery at that T-10 level, which did not respond to the steroid injection. Dr. Yarberry agreed with the surgery recommendation and took Claimant off work for a period of one month.

19. John Douthit, M.D. performed an IME at Respondents' request on July 9, 2014. At that time, Claimant had complaints of neck pain, as well as pain radiating into the left shoulder and arm, as well as into the mid-spine going around to his chest. On physical examination, Dr. Douthit noted hyperreflexia in the upper and lower extremities, along with one- two beats of clonus in both ankles. Claimant had restricted range of motion in his neck. Otherwise, Claimant had good grip strength and equal measurements.

20. Dr. Douthit noted that he did not have the MRI (presumably the actual films), but had the report. He felt constrained to comment on the surgical recommendation. Dr. Douthit[3] concluded that the 3-6-14 incident aggravated Claimant's degenerative disease of the thoracic and cervical spine. The diagnosis was protruding disc of the thoracic spine, aggravation of degenerative disease of the cervical spine.

21. Claimant returned to Dr. Yarberry on August 7, 2014. At that time, he continued have moderate to severe thoracic spine pain in the mid and upper T spine. He also had pain in his left arm and problems sleeping. Tenderness in the neck and right/left paraspinal muscles was also documented. Claimant had gone down for an evaluation in Denver and was awaiting the results. Tramadol was restarted, along with Gabapentin. Dr. Yarberry continued Claimant's 5 pound lifting, repetitive lifting, carrying and pushing/pulling work restrictions. He was restricted from crawling, kneeling, squatting and climbing.

22. Dr. Yarberry examined Claimant on August 21, 2014. Tenderness on the c-spine, as well as paraspinal muscles in the neck (spasm) was noted. He had mid-line and right paraspinous tenderness/spasm in the thoracic spine. His thoracic pain was noted to be better with his medications; however, Dr. Yarberry thought he may have

[3] Dr. Douthit described Claimant as argumentative concerning the etiology of his symptoms and suggested a psychological evaluations and drug testing before considering surgical intervention.

some cord issues and now some SI muscle weakness. Dr. Yarberry referred Claimant to Gary Ghiselli, M.D. Claimant's restrictions remained the same as the 8/7/14 appointment.

23. Claimant was evaluated by Dr. Ghiselli on September 16, 2014. Claimant stated that his pain was in the mid thoracic region radiating into the anterior chest, stabbing in nature. The pain was radiating around the rib cage, right equal to left. Claimant also had positive Hoffman's signs (bilaterally), complaints of dropping things more often, handwriting getting worse and his balance slightly off. Upon examination, Claimant was very tender to palpation from approximately T5-10 levels. Dr. Ghiselli's assessment was: history of injury and stabbing pain, along with cord compression at T9-T10 and possible cervical cord compression; cervical spondylosis with myelopathy-thoracic region; intervertebral thoracic disc disorder with myelopathy-thoracic region; and pain in thoracic spine. Dr. Ghiselli ordered a cervical MRI to assess cord compression, as well as a repeat thoracic MRI.

24. An MRI of Claimant's cervical and thoracic spine (without contrast) was done on October 2, 2014. David Solsberg M.D. identified spondylosis throughout the cervical spine, most pronounced at C5-6 and C6-7. No protrusions/stenosis was seen at C2-3, C3-4 and C4-5. At C5-6, a right foraminal protrusion and osteophyte complex was identified, measuring 4mm. Severe right foraminal stenosis was described. At C6-7, a right foraminal 3mm protrusion was seen and a left foraminal 4mm protrusion was identified. No cord lesion or demylenation was detected.

25. Diffuse spondylosis was noted in the MRI of the thoracic spine, with a small central protrusion seen at T3-4. Increased signal intensity was noted at T4-5, consistent with demylenation or prior myelomacia. A left central protrusion was seen and T5-6, with a disc extrusion seen at T6-7, which compressed the cord. A small central protrusion was seen at T8-9, as well as a left central protrusion at T9-10, which compressed the cord. Dr. Solsberg compared this MRI with a one done on 3-25-14 and opined that the protrusions/extrusions were unchanged allowing for differences in technique. A gastroesophageal reflux and hiatus hernia were also identified. A CT was done of the thoracic spine and Dr. Solsberg noted that the protrusions seen on the MRI were less conspicuous than on the CT scan. Diffuse spondylosis was seen.

26. Claimant returned to Dr. Ghiselli on October 2, 2014. At that time, he had ongoing complaints of central pain in the mid thoracic region and pain throughout his left upper extremity. He also had neurological symptoms, such as dropping things, worsening handwriting and balance. Dr. Ghiselli's assessment was severe left C6-C7 foraminal compression, which had become myelopathic both by symptomatology and physical examination. Dr. Ghiselli was recommending a transforaminal epidural steroid injection and if relief was provided, an anterior cervical discectomy and fusion at C6-7 would be pursued.

27. Claimant underwent a left C6-7 TF ESI with local SNRB, which was administered by Dr. Karli on October 13, 2014. The indications were cervical degenerative disc disease and cervical radiculitis. There were no complications from

the procedure; however, Dr. Karli's notes did not indicate the degree to which the ESI provided relief to Claimant.

28. Claimant returned to Dr. Ghiselli on November 4, 2015. A copy of Dr. Ghiselli's report was not in either Claimant's or Respondent's exhibits admitted at hearing. However, Dr. Ghiselli referred to it in his deposition, *infra*[4]. Dr. Ghiselli recommended surgery on Claimant's cervical spine.

29. Dr. Douthit issued a second report on November 6, 2014, after reviewing the audio recording of his 7-9-14 evaluation, additional records and the surveillance video. Dr. Douthit concluded that Dr. Ghiselli's surgery recommendation was appropriate and reasonable. Claimant had radicular like symptoms and the MRI supported the possibility of nerve root compression. Dr. Douthit also opined that he was less convinced on causation based upon what he described as changing pain complaints (thoracic to cervical), the alleged injury in physical therapy and the surveillance video. Dr. Douthit recommended a review of the physical therapy records and deposing the therapist to determine if there was a provocative event. The ALJ is not persuaded by the causation opinion, as Claimant had cervical spine complaints from the outset as documented in Dr. Yarberry's March 6th note and which continued throughout his treatment. Dr. Douthit did not address the significant increase in Claimant's cervical symptoms after the industrial injury and the lack of analysis concerning the degenerative changes in Claimant's spine reduced Dr. Douthit's credibility on the causation issue.

30. The denial of the request for authorization for outpatient C6-C7 anterior cervical discectomy and fusion was sent on November 10, 2014 by Insurer. The request for surgery was denied pursuant to W.C. R.P. Rule 16-10 (B).

31. Claimant was examined by Dr. Yarberry on November 14, 2014 and it was noted that he was considering surgery on the cervical spine. He had an ESI and that helped his neck pain, but still had some parasthesias mostly on the left arm. Claimant had normal sensation to the touch in the upper extremities and thoracic spine tenderness in the interscapular area, with rhomboid tenderness/spasm noted. In the impression section, Dr. Yarberry noted that whether the slip and fall at work reinjured his cervical spine was a "very complicated issue". He noted that Claimant had myelopathic signs with clonus and hyperreflexia in the lower worse than the upper extremities. However, Dr. Yarberry did not provide an opinion as to whether he concluded that Claimant required surgery to his cervical spine.

32. Claimant returned to Dr. Yarberry for follow-up on June 24, 2015 at which time he noted that his thoracic and cervical pain was better. Upon examination, his neck was tender on the midline, with some restriction in his range of motion. His thoracic spine was tender at one spot in between his scapulae at about T6, with paraspinal spasm and tenderness to palpation also noted. A physical therapy evaluation and treatment was recommended. Claimant's restrictions were 20 pounds

[4] Dr. Douthit also referred to Dr. Ghiselli's 11-4-14 evaluation in his report, dated 11-6-14.

lifting, repetitive lifting and carrying. He was released to light duty. The ALJ infers that Dr. Yarberry concluded Claimant had improved, resulting in reduced restrictions and a return to light duty.

33. Dr. Yarberry evaluated Claimant on August 6, 2015. Claimant reported that his thoracic pain was better and that he rarely had pain. He still got cramps in his hands, which Dr. Yarberry felt that, given his multiple hand surgeries, these were not related to his work injury. On examination, no midline tenderness was noted. Minimal paraspinal muscle spasm was seen. Dr. Yarberry stated Claimant's symptoms were much better and he was close to MMI. Claimant was to continue physical therapy evaluation and treatment. The ALJ infers that Dr. Yarberry was not recommending surgery at the time of this appointment since Claimant was approaching MMI.

34. No record of any medical evaluation after August 6, 2015 was admitted at hearing.

35. The ALJ finds that Claimant was not at MMI as of the date of hearing, as no ATP has made this determination.

36. Claimant testified that he continued to have upper extremity complaints, which he attributed to the injury to his cervical spine. Although his symptoms have improved as of late, Claimant expressed a concern that his cervical spine symptoms would increase, once he returned to work. He wanted undergo the cervical spine procedure, as he thought it would reduce his symptoms. He also believed that the surgery would increase his level of functioning.

37. The ALJ found Claimant to be a credible witness when discussing his symptoms and course of treatment. Claimant's testimony that his symptoms have improved was consistent with Dr. Yarberry;'s findings in the October/November evaluations and buttressed the conclusion that he is approaching MMI.

38. Dr. Ghiselli testified as an expert in orthopedic surgery and as a Level II accredited physician pursuant to the W.C.R.P. Dr. Ghiselli testified that the reason for the surgery was to relieve the compression of the C7 nerve root on the left. (Ghiselli deposition page 16:9-13). Dr. Ghiselli opined that it was more likely that Claimant's symptoms were coming from his cervical spine, as opposed to the thoracic spine. (Ghiselli deposition page 23:1-3). Dr. Ghiselli did not specifically remember Claimant because it had been some time since he had examined him. Dr. Ghiselli has not examined Claimant in almost one (1) year. Dr. Ghiselli did not recall reviewing Dr. Douthit's November 6, 2014 report. (Ghiselli deposition page 13:1-4.)

39. Dr. Ghiselli testified that Claimant underwent the ESI injection on 10-13-14. Dr. Ghiselli did not know what was compressing the nerve root and causing Claimant's radicular symptoms. Dr. Ghiselli's lack of recollection concerning the Claimant, the MRI-s and Dr. Douthit's report makes him less credible. Dr. Ghiselli also did not provide a strong opinion on causation, saying only that the industrial injury "could have" caused the need for surgery and it depended on why he had ceased

treatment after the motorcycle accident. (Ghiselli deposition, page 14:1-2, 19-22.) "If he had no symptoms before the injury at work, then the work caused the injury. If he had symptoms that were significant and at the same time he was working, then I would opine that work probably exacerbated it but probably didn't cause it." (Ghiselli deposition, page 14:24-15:5.) That description does not precisely describe Claimant's course of treatment after the motorcycle accident, as the records documented he had symptoms for a period of time. Dr. Ghiselli did not offer a clear opinion regarding the role Claimant's degenerative disc disease played in his current symptoms. Absent more analysis, his opinion on causation is not persuasive.

40. Dr. Douthit testified as an expert in orthopedic surgery and as a Level II accredited physician pursuant to the W.C.R.P. Dr. Douthit stated the there was no noticeable difference between the 2012 cervical MRI and the 2014 cervical MRI. Both MRIs show degenerative changes at the C5-6 and C6-7. He believed that the osteophyte complexes in Claimant's cervical spine were causing the disc protrusions and the nerve root compression. Dr. Douthit opined that the there were degenerative changes in Claimant's spine, which was the basis for his opinion that pre-existing degenerative disc disease was why Claimant required surgery.

41. The ALJ reviewed a DVD video of Claimant (Exhibit M), which documented his activities over several days, including June 17, 18, 25 and 26, 2014. The video surveillance shows Claimant doing various activities, including walking, taking out the trash and riding his motorcycle. More particularly, the video surveillance shows:

- 6-17-15: Claimant walked out of house, pushed a trash can out and rode his motorcycle (twice). The motorcycle was driven on the highway.

- 6-18-15: Claimant was cleaning his motorcycle, which included wiping it with his left hand, shaking the rag out and bending over. He picked some things off the ground and put in the trash can. At one point, he rotates his head from side to side without difficulty. He also rides his motorcycle an indefinite distance.

- 6-25-15: Claimant got gas for the motorcycle (used one hand to take off the cap and the other hand to put gas in the tank.) He also was seen walking with a back pack and may have gone hiking.

- 6-26-15: Claimant was seen riding his motorcycle, making a stop and getting back on the motorcycle.

42. The aforementioned video was taken fifteen (15) months before the hearing. Claimant was not depicted exceeding his restrictions and indeed he told Dr. Yarberry that the motorcycle was his only means of transportation. The ALJ concludes that the video demonstrates that at that time Claimant did not have a degree of symptoms that precluded him from riding the motorcycle. Claimant did not exhibit pain behaviors while doing the activities depicted in the surveillance video. Also, it is possible that the motorcycle riding could cause an increase in Claimant's symptoms.

However, the ALJ notes the surveillance video did not significantly reduce Claimant's credibility, as Claimant never denied riding the motorcycle. As found, Claimant did not deny that his symptoms improved while he was off work.

43. The ALJ is not persuaded that the proposed ACDF is necessary at this time, given the documented improvement in Claimant's condition.

44. The ALJ finds that Claimant has not met his burden of proof abd has not proven that the proposed cervical surgery is necessary at this juncture based upon the most recent reports for Dr. Yarberry.

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

## CONCLUSIONS OF LAW

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

**Generally**

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1), C.R.S.

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

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). 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). Whether the Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

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).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

**Causation Issue**

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The question of whether the Claimant met his 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). In this case, there is no question that Claimant suffered prior injuries to his cervical spine. As a result of these injuries, there were objective degenerative changes and abnormalities present in his spine prior to his industrial injury. Claimant required treatment for these degenerative conditions prior to the industrial injury. There was also evidence in the record of this treatment, which included epidural steroid injections. The question before the ALJ is whether the admitted industrial injury of March 6, 2014 aggravated and/or accelerated the condition of his cervical spine to the degree that surgery is now required.

Claimant argued that the industrial injury worsened the pre-existing degenerative changes in his cervical and thoracic spine. In support, Claimant stated that he required treatment and was given work restrictions following his 3-6-14 injury. Claimant also pointed to the fact that he had never had a surgical recommendation prior to March 6, 2014 as proof that the injury accelerated the degenerative changes in the cervical spine. Finally, Claimant contended that Respondents' expert (Dr. Douthit) agreed with the conclusion that surgery was reasonable and necessary.

Respondents averred that Claimant's need for the proposed cervical surgery was the result of his pre-existing condition, not the industrial injury. Respondents argued that there was not a significant difference between the 2012 and 2014 MRI scans. Respondents also contended that the foraminal stenosis in Claimant's cervical spine was causing his symptoms and the need for surgery. Respondents also relied upon

the testimony of Dr. Douthit, on the issue of causation to support their argument that the surgery should not be authorized.

In order to determine the issues concerning the proposed cervical surgery, the ALJ has employed a two-step analysis, starting first with an evaluation of the degree to which the industrial injury caused an increase in Claimant's symptoms and required treatment. It was undisputed that Claimant had degenerative disc disease and there was objective evidence of degenerative changes in the spine. (Finding of Fact Nos. 2, 4-5). However, Claimant was able to work without formal restrictions up to March 6, 2014. Claimant's testimony and the medical records also establish that Claimant did not receive treatment for injuries sustained in the 8-30-12 motorcycle accident after approximately January, 2013. Claimant's reports of symptoms after the industrial injury (which he described at hearing) as well as the findings made upon examination on 3-6-14 by Dr. Yarberry establish this. Also, the records of Drs. Yarberry and Karli after the injury which documented the course of treatment are replete with objective findings related to Claimant's cervical spine, including tenderness, tightness and spasm. The ALJ concludes that Claimant satisfied his burden of proof on this issue and established that the subject injury aggravated and /or accelerated the condition of his cervical and thoracic spine. (Finding of Fact Nos. 8-9).

The ALJ concludes that Claimant required medical treatment both immediately after his injury, as well as the months that followed for an exacerbation of the preexisting condition in his cervical and thoracic spine. The Claimant required this treatment to cure and relieve his symptoms directly resulting from the industrial injury. In particular, this includes the evaluation and treatment of Claimant's cervical spine symptoms. Therefore, Respondents were required to provide these medical benefits, which included the various examinations, physical therapy, injections, MRI scans and the surgical evaluations.

**Reasonableness and Necessity of Proposed Surgery**

Second, the ALJ has considered whether the proposed ACDF procedure was reasonable and necessary. This represents a much closer question. As a starting point, when making the referral to Dr. Ghiselli, Dr. Karli opined that Claimant needed to consider all options and it was reasonable to have a surgical evaluation. Dr. Ghiselli recommended the cervical surgery in order relieve the compression of the C7 nerve root. (Finding of Fact No. 38). Because of Claimant's continued symptoms, Dr. Ghiselli recommended the ACDF procedure to address the compression in Claimant's cervical spine. In addition, Respondents' expert, Dr. Douthit, opined that the proposed surgery was reasonable and necessary, disagreeing on the issue of causation. (Finding of Fact No. 29). Thus, the ALJ concludes that the proposed surgery is reasonable. However, the ALJ concludes that the present necessity of the surgical procedure has not been shown.

In this regard, Dr. Ghiselli has not examined Claimant for more than a year (November, 2014). Dr. Ghiselli's June 2015 testimony did not provide a lot of detail concerning why the ACDF procedure was necessary at that point in time. There was no

evidence that he reviewed Dr. Yarberry's most recent reports and no opinion was offered regarding Claimant's improvement. Dr. Douthit's opinion regarding the reasonableness and necessity of the proposed surgical procedure was also before Dr. Yarberry's most recent evaluations.

Accordingly, the ALJ concludes that Claimant did not satisfy his burden of proof and has not proven that the surgery was necessary as of the date of hearing. The most recent examinations by Dr. Yarberry persuaded the ALJ that surgery was not necessary at the time of hearing. Claimant's significant improvement as documented by Dr. Yarberry and the conclusion that he was approaching MMI belied any conclusion that he requires the surgery to reach MMI. Therefore, the ALJ finds that Claimant has not met his burden of proof that the proposed cervical surgery is necessary at this time.

## ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the Anterior Cervical Discectomy and Fusion procedure is denied without prejudice.

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

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

DATED: November 17, 2015

**Digital signature**

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

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**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-948-599-02**

## ISSUES

- Whether Claimant has proven, by a preponderance of the evidence, that the request for hip surgery was reasonable, necessary, and causally related to the admitted work injury?

- Whether Claimant has proven, by a preponderance of the evidence that the surgery was authorized?

- Whether Claimant has proven, by a preponderance of the evidence, that she is entitled to temporary indemnity benefits between August 22, 2014 and October 2, 2014.

## FINDINGS OF FACT

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

### Background

1. Claimant worked as a resident care associate for Employer beginning on August 24, 2009. In that position, Claimant was responsible for assisting residents with activities of daily living, including bathing, dressing, grooming, toileting, transferring and getting to and from activities and meals according to their individual service plans.

2. At hearing, Claimant testified that she injured herself helping a resident push up to the dining table, she was using her legs and arms to push because the chair was stuck. She testified further that the resident was heavy and she had to exert force to get the resident placed at the table.

3. Claimant's reports of her mechanism of injury were varied and often inconsistent:

   - On February 22, 2014, Claimant reported to Boulder Community Hospital's emergency department that she was injured "while pushing a heavy object at work."

   - On Employer's First Report of Injury dated February 24, 2014, Claimant reported "I was pushing a resident in at a table, chair got stuck on carpet would not slide on carpet."

- The record of Claimant's February 24, 2014, visit to Concentra, reads, "[Claimant] was wheeling a resident back from the dining hall when she had to lift and twist the wheelchair to get it over the transition from carpet to other flooring."

- Dr. Meza's "Report of Workers' Compensation Injury" dated March 1, 2014 provides, "Patient states: 'push resident in chair up to dining room table.'"

- On March 6, 2014, Claimant reported at her first physical therapy visit that she was moving a resident in a chair in the dining hall when she twisted and injured her left hip. "Patient reports that the chair did not have sliders on the bottom of it and it got stuck on the carpet."

- On April 14, 2014, Claimant reported to Dr. Hsin that her injury occurred while she was "pushing a resident in a high back chair on carpet. She twisted and pivoted" when she felt a sharp pain.

- On Claimant's Claim for Compensation dated April 22, 2014, Claimant states her injury occurred "pushing a resident in a wheel chair that wasn't moving easily, rocking, and pushing the chair."

- On June 6, 2014, Claimant reported to Dr. Sorensen that she "was pushing a resident into the dining room and when she tried to shift the patient's wheelchair, she felt a shooting pain."

- On August 11, 2014, Claimant reported to Lief Sorensen, MD, that the mechanism of her injury was "pushing a resident into the dining room and when she tried to shift the patient's wheel chair, she felt a shooting pain down her [left] leg."

- On October 29, 2014, Claimant reported to Dr. White that her injury occurred when she "was pushing a resident who was seated in a chair up to the table."

- Additional varying mechanisms of injury are included below.

4. Respondents performed surveillance on Claimant at work on March 15, 2014. The video shows Claimant assisting residents in the dining room. Some residents are in wheelchairs and some are in dining chairs. Notably, the dining area shown on the video tape has hard surface flooring. Windows on the side of the dining room opposite the videographer reflect brightly on a smooth, hard surface floor. Claimant offered no persuasive evidence to support a finding that the flooring in the dining room was carpeted on the date of Claimant's alleged injury or that the flooring was replaced in the three weeks following her alleged injury. The Judge draws the reasonable inference that there was no carpeting in the dining room at the time Claimant allegedly injured her left hip.

## Medical Treatment

5. On February 22, 2014, Claimant presented to Boulder Community Hospital where David Kruger, DO, evaluated her. Claimant reported injuring herself pushing a heavy object at work. Claimant presented in no distress and physical examination revealed tenderness in the medial upper [left] thigh and lateral upper thigh area, with limited range of motion with flexion of the hip secondary to pain. A pelvic x-ray was obtained and read as normal by Dr. Kruger. The radiologist, Richard Finer, MD, also read the x-ray as normal, finding, "Osseous structures are intact without fracture. The hip joint spaces are normal. Soft tissues are unremarkable." Claimant was diagnosed with a hip strain.

6. Claimant was discharged within one hour of admission with instructions to limit weight bearing, and to ice the affected area. She was advised to follow-up with a workers' compensation doctor.

7. Claimant testified that prior to February 22, 2014, she did not have any similar symptoms, she had received no treatment for similar symptoms, and she had missed no work, and was under no work restrictions for similar symptoms.

8. On February 24, 2014, Claimant presented at Concentra, her workers' compensation provider. PA-C Jeffrey Winkler, who is supervised by Felix Meza, MD, evaluated Claimant. Claimant reported inconsistent mechanisms of injury at this visit. While she initially reported pushing a resident in a chair up to the dining room table, she later reported more specifically that she was wheeling a resident back from the dining hall when she had to lift and twist the wheelchair to get it over a transition from carpet to other flooring. At the visit Claimant also denied limited movement and popping symptoms. On physical examination Claimant had left hip pain on passive range of motion, moderate pain on motion in all directions, and walked with a moderate limp. Claimant "lay with her hip shortened, flexed, and internally rotated." Mr. Winkler diagnosed Claimant with sprain/strain of her hip/thigh. He gave her work restrictions, started her in physical therapy (PT), and considered her diagnosis to be work related.

9. On March 4, 2014, Claimant returned to Concentra where three additional x-rays were performed. Radiologist Steven Abrams, MD, read them as normal, showing no bony lesions, normal joint spaces and anatomical relationships, with the visualized pelvic bones appearing unremarkable. Claimant was assessed with left groin pain, with differential diagnoses of hip strain and labral tear. Although Claimant denied any prior surgeries, Dr. Meza, who performed the physical examination, noted "small, healed incisions along supra-pubic region." Claimant also later admitted to knee replacement surgery.

10. On March 6, 2014, Claimant reported at her first physical therapy visit that she was moving a resident in a chair in the dining hall when she twisted and injured her left hip. Further, "patient reports that the chair did not have sliders on the bottom of it and it got stuck on the carpet." Claimant reported current pain at 6/10 and her worst pain at 10/10. Claimant presented with an antalgic gait pattern and was unable to complete a number of assessments due to reported pain.

11. On March 17, 2014 Claimant was assessed at Concentra where she added reports of popping and clicking in her left hip. An MRI arthrogram was ordered to rule out internal derangement.

12. On March 31, 2014, Claimant was assessed with hip pain and concern for internal derangement.

13. On April 7, 2014, Mr. Winkler re-evaluated Claimant, noting that she was walking with a moderate limp. Claimant filled out a pain diagram at the visit indicating that her pain was zero over ten. Claimant's work restrictions required that she be sitting 50% of the time, and perform no lifting over ten pounds.

14. On April 11, 2014, Tanya Tivorsak, MD, at Health Images Boulder, performed an MR Arthrogram with contrast of Claimant's left hip (MRI). Dr. Tivorsak found the following:

    - Tear of the lateral labrum with partial detachment;
    - Degeneration of the anterior labrum with a mild partial detachment;
    - A small sulcus in the posterior inferior labrum;
    - Subchondral cysts in the anterior acetabulum with mild partial thickness chondral loss;
    - Mild sclerosis along the superior acetabulum;
    - Notably, Dr. Tivorsak observed normal morphology of the femoral head; and
    - No acetabular dysplasia.

15. Respondents surveiled Claimant on April 11, 12, and 15, 2014. A video of same was admitted as exhibit O. The video of April 11, 2014 shows Claimant in heeled boots walking without a limp, pumping gas, and entering her car without apparent guarding or indication of pain. The video shows Claimant, between the hours of 9:00 p.m. and 12:07 a.m. walking without limp and standing in heeled boots on what appears to be a date. Claimant stood while eating and drinking. On April 12, 2014, Claimant walks from her car into a

residence without a limp; walks from her car into and through a retail store without a limp. She carried approximately six shopping bags, one of which contained a bag of potting soil, from her car into her apartment. However, on April 15, 2014, Claimant is seen at work with a noticeable limp. A portion of the video shows Claimant at work in the dining room. The area of the dining room videotaped on April 15 clearly has no carpet but rather a hard, smooth surfaced flooring which reflects the light from windows in the dining room.

16. On April 11-15, 2014, Claimant was under work restrictions which limited her to sitting 50% of the time.

17. Claimant testified that the MRI had hurt her hip. After the MRI but before she went out, she drank alcoholic beverages and took Vicodin which alleviated her pain.

18. On April 14, 2014, Claimant consulted with Dr. Hsin who assessed femoroacetabular impingement of the left hip with labral tear. Claimant reported to Dr. Hsin that she injured her hip "pushing a resident in a high back chair on carpet. She twisted and pivoted" when she felt pain. Dr. Hsin noted that Claimant was limping, and noted, "[t]he patient does have some pain out of proportion to exam and some nonorganic findings." He noted specifically that Claimant had a positive response to his FABER test "with pain out of proportion to exam." He also noted that upon inspection of Claimant's left hip she experienced "maximum tenderness." These findings did not alter Dr. Hsin's diagnosis of femoroacetabular impingement of the left hip or prevent him from scheduling outpatient surgery.

19. Dr. Hsin testified at hearing by telephone as an expert in orthopedic surgery. He elaborated that at one point during his examination of Claimant, she "jumped off the table" exhibiting more pain than he expected from the exam. Dr. Hsin specifically testified that he did not evaluate the work-relatedness of Claimant's condition. Additionally, he opined that Claimant's negative response to injection was inconsistent with the diagnosis of labral tears and indicated that her pain probably did not originate with her hip. Based on his review of the surveillance videos he would not give her work restrictions and would not perform a hip arthroscopy without additional information.

20. On April 15, 2014, Claimant returned to see Dr. Meza at Concentra. She reported increased pain after her MRI, with worsening pain and discomfort associated with the injection. She had also been seen by Dr. Hsin, an orthopedic surgeon, who recommended hip arthroscopy. Claimant reported pain of nine to ten over ten. Dr. Meza attributed Claimant's increased pain to the MRI. He prescribed Vicodin and suggested that Claimant might be a candidate for cortisone injections prior to her arthroscopy which was scheduled for May 22, 2014. Her work restrictions were increased to "should be sitting 75% of the time."

21. On April 24, 2014, Dr. Hsin's office requested authorization for left hip arthroscopy with labral repair.

22. On April 28, 2014, Claimant returned to Concentra with worsening left hip pain. Claimant was not able to work with restrictions due to her pain.

23. On May 5, 2014, Respondents denied authorization of the surgery for medical and nonmedical reasons.

24. On May 14, 2014, Insurer filed a notice of contest for further investigation of the claim.

25. On May 19, 2014, Dr. Hsin responded to Respondents' counsel's request that he view and comment on the video surveillance taken of Claimant on April 11, 12, and 15, 2014. Dr. Hsin stated, "[Claimant's] presentation on April 11 and 12th are not consistent with her visit with me on April 14th in which she did come in with a limp."

26. Surgery scheduled for May 22, 2014 did not occur. On June 9, 2014, Claimant returned to Dr. Meza with complaints of sharp left hip pain. Dr. Meza recommended diagnostic and possibly therapeutic hip injections. At that visit, Dr. Meza reported Claimant was not limping; however, Claimant rated her pain at ten over ten.

27. On June 9, 2014, Dr. Meza dictated a response to Respondents' counsel's request that he view and comment on the video surveillance taken of Claimant on April 11, 12, and 15, 2014. Dr. Meza stated what he observed in the video and commented that he had "no further opinion at this time after reviewing the video other than those contained within my notes." Dr. Meza did not alter his diagnosis or proposed treatment plan which recommended arthroscopic surgery.

28. On July 7, 2014, Dr. Meza referred Claimant to Dr. Sorenson, a pain management physician. Claimant reported continued symptoms and rated her pain at four and five over ten.

29. On July 18, 2014, Respondents contested Dr. Meza's referral to Dr. Sorenson for medical and nonmedical reasons.

30. On July 21, 2014, Claimant returned to Concentra with reports of pain of 3.5-4/10 and an antalgic gait.

31. On August 4, 2014, Claimant reported constant sharp pain of moderate severity in her left hip. Dr. Meza continued to recommend cortisone/lidocaine injection of Claimant's hip as diagnostic and therapeutic treatment. Claimant reported her pain as 4/10 and Dr. Meza noted she was not limping.

32. On August 5, 2014, Claimant underwent a Respondents' IME with Dr. O'Brien. Claimant reported to Dr. O'Brien that her injury occurred when she twisted while positioning a chair with a person in it. On exam, Dr. O'Brien noted that Claimant had difficulty moving from a seated to standing position and demonstrated significant pain behavior; she became tearful as soon as she began to participate in the exam. Notably, "[Claimant] indicated, even when I was not touching her leg, that I was hurting her leg during the exam."

33. Dr. O'Brien has testified as an expert ten times, seven of which have been for Respondents' law firm. Dr. O'Brien accepts his medical/legal work through a referral service owned by his wife.

34. On August 11, 2014, Claimant reported to Lief Sorensen, MD, who assessed Claimant with chronic pain syndrome and hip pain. Claimant reported her mechanism of injury as "pushing a resident into the dining room and when she tried to shift the patient's wheel chair, she felt a shooting pain down her [left] leg." Dr. Sorensen noted that Claimant was limping.

35. Also on August 11, 2014, Dr. O'Brien issued his report of his Respondents' Independent Medical Evaluation of Claimant which he conducted on August 5, 2014. Dr. O'Brien noted significant pain behaviors during the exam. He reviewed the video surveillance of Claimant before writing his report. His notes regarding the surveillance can be summarized as follows:

- On April 11, 2014, for several hours beginning at 8:23 p.m., Claimant moved briskly and fluidly and performed numerous activities in heeled shoes with no apparent discomfort or limp. For example, Claimant turned, twisted, bent down, walked on uneven surfaces, and walked and stood for significant periods of time.

- On April 12, 2014, Claimant shopped at a number of stores, walking up and down curbs and up inclines. She carried bags of groceries and moved fluidly without apparent pain and with no limp.

- On April 15, 2014, Claimant is filmed at work walking with a limp and stiff knee.

Dr. O'Brien opined:

- Claimant's mechanism of injury was not substantial enough to have resulted in a labral tear.

- Claimant's MRI findings, specifically the subchondral cysts and chondral degeneration, are chronic and take years to develop.

- Claimant had documented nonorganic pain and "once nonorganic pain is documented, all medical treatment should be discontinued, as nonorganic

pain does not respond to true traditional operative and nonoperative modalities. Ongoing care in the presence of nonorganic pain only serves to inappropriately validate those subjective complaints of pain which, in fact, have no anatomic foundation and in so doing create or enhance the specter of disability which, in fact, does not exist."

- Dr. O'Brien relied on Dr. Hsin's documentation of nonorganic findings at his April 14, 2014 evaluation, and on his own observation that Claimant "demonstrated profoundly positive nonorganic physical findings" during his physical exam.

- Dr. O'Brien concluded that Claimant was misrepresenting her current level of pain and dysfunction. He determined the only way to reconcile his and Dr. Hsin's exam findings with the surveillance video were by "implicating nonorganic findings as its etiology."

- Dr. Hsin's recommendation for arthroscopic surgery was not reasonable because Claimant's injury was minor and not related to need for surgery.

- Dr. Hsin's recommendation for surgery was contraindicated because Claimant's pain was inorganic.

- Dr. O'Brien determined that Claimant's labral tears and chondromalacia were not clinically significant and were not generating pain.

36. On August 27, 2014, Insurer admitted liability for medical benefits only. Respondents attached a note to the admission stating:

> Respondents admit that claimant suffered a minor work injury on February 22, 104. Temporary disability benefits are not being paid . . . because claimant was not disabled from performing her job duties and has been accommodated by the employer . . . claimant's presentation has revealed nonorganic findings as documented in medical reports and in surveillance; and Dr. O'Brien found that claimant's ongoing condition after April 14, 2014 is not work-related.

37. On August 29, 2014, Respondents denied for medical and nonmedical reasons Dr. Meza's request for authorization for a second orthopedic opinion.

38. Also on August 29, 2014, Claimant returned to Dr. Sorensen and reported she "has now been granted medical options." Dr. Sorensen refilled Claimant's Norco prescription. Claimant reported as significant a weight loss of two pounds.

39. On September 4, 2014, Claimant returned to Concentra with unchanged symptoms and pain reports. Dr. Meza noted that Claimant could no longer

afford Celebrex and Dr. Sorenson had prescribed Vicodin. Dr. Meza also noted, "no limping" and a positive FABER test.

40. On October 6, 2014, Respondents denied for medical and nonmedical reasons Dr. Sorenson's referral of Claimant to Dr. Brian White.

41. On October 9, 2014, Claimant was seen at Concentra's pain clinic where she was prescribed Celebrex and her Norco prescription was refilled.

42. On October 29, 2014, Brian White, MD, evaluated Claimant. Claimant reported her injury occurred as she was pushing a seated resident up to a table when she felt a pop and pain deep in her groin. Claimant denied long term relief from rest, ice, activity modifications, anti-inflammatories, physical therapy, and narcotic pain medication. Dr. White noted antalgic gait. After physical exam and imaging, Dr. White assessed findings consistent with femoral acetabular impingement and labral tear and overall well preserved joint space. He specifically noted "mild hip dysplasia" and "no evidence of osteoarthritis," and that the MRI showed evidence of labral tear. Dr. White recommended hip arthroscopy with labral reconstruction.

43. On December 22, 2014, Respondents filed an Application for Hearing pursuant to Rule 16 after denying the surgery as not reasonably necessary or related to Claimant's injury.

44. On January 15, 2015, Dr. O'Brien issued a supplement report after reviewing Dr. White's October 29, 2014 evaluation. Dr. O'Brien wrote that Dr. White's evaluation in no way altered his own opinions expressed in his August 11, 2014 report. He opined that Claimant's labral tear was not the result of her work activity, but rather to her congenital hip dysplasia. Dr. O'Brien related Claimant's condition to "her personal health." He reported, "a diagnostic injection of the hip, could potentially act therapeutically, and should be considered prior to proceeding with surgical intervention, regardless of causation."

45. On May 19, 2015, Dr. White performed a left hip arthroscopy with femoral osteoplasty, limited acetabular rim trimming, microfracture procedure to the edge of the acetabulum, acetabular labral reconstruction, and capsular closure.

46. Dr. White's preoperative diagnosis was, "Left hip mild hip dysplasia with lateral center edge angle of 28 degrees and cam morphology of the proximal femur, with a history of probable hip subluxation and labral tear."

47. Dr. White's postoperative diagnosis included the following:

- Cam-type femoral acetabular impingement;

- Indentation on femoral head medial to the head and neck junction consistent with probable previous subluxation injury;

- Mild hip dysplasia with underdevelopment of the acetabulum;

- Extensive tearing of the acetabular labrum with poor quality labral tissue;

- Full-thickness buckle injury to the cartilage on the edge of the acetabulum consistent with a grade 4 type of cartilage delamination; and

- Joint instability in the peripheral compartment from deficient labrum.

**Expert Opinions**

48. Dr. White was deposed on January 21, 2015, and testified as an expert in hip surgery. Dr. White treats hips exclusively and remarked that the last ten years in the field have been marked by rapid advancements in treatment. Dr. White opined:

    - Claimant had preexisting CAM-type impingement and dysplasia which predisposed her to a torn labrum with even a low energy injury.

    - Claimant had sustained a rotational injury while pushing a patient, and that her history and exam findings were consistent with the occupational relationship described. Ninety percent of labral tears result from femoral acetabular impingement which Claimant has.

    - Claimant met the criteria for surgery in the AMA Guides because she had functional limits after eight weeks of treatment, and he was satisfied that Claimant would benefit from the arthroscopic procedure.

    - The delay in Claimant's surgery harmed Claimant because generally the longer a person has a dysfunction; the harder it becomes to rebalance their muscles. Also, in theory, an increase in a labral tear results in a more severe cartilage injury, which in turn leads to arthritis.

    - The surgery he recommended would not address Claimant's dysplasia, but would reshape the femur and repair her labrum.

    - Regarding the surveillance video, Dr. White explained that "people can cover/compensate for their disability where it is mandated." He also stated, "I do not, nor will I ever, use video surveillance to determine whether or not someone needs surgery or not."

    - Pain is subjective and Claimant's pain complaints fell within the bell-curve he would expect.

49. Dr. O'Brien testified as an expert in orthopedic surgery by depositions dated July 15, 2015, and September 18, 2015. He no longer performs surgery, but performed approximately 60 hip arthroscopies during his career, the last in 2013. Dr. O'Brien never performed the type of surgery Dr. White performed on Claimant. Dr. O'Brien opined:

- Claimant has congenital problems, specifically a too-shallow acetabular cup, which has caused the loss of cartilage making Claimant more susceptible to pain with a low energy injury. The loss of cartilage also caused Claimant's labrum to disintegrate and subchondral cysts to form over time.

- Claimant suffers from arthritis which is her main pain generator, contrary to the opinion of Dr. White that her torn labrum was her man pain generator.

- Nonorganic findings mean the absence of sustained effort or the absence of anatomic or physiologic explanation for an exam finding.

- Claimant's "end of healing" occurred when Dr. Hsin found exaggerated pain, and treatment of nonorganic pain is never effective.

- Dr. White's opinion that labral tears are painful is unfounded and unscientific.

- With respect to subluxation, the April 2014 MRI did not show an indentation of the femoral head, and there was no evidence of bruising. Also, Dr. White failed to substantiate his finding that Claimant experienced subluxation while Claimant was under anesthesia during her surgery and had not provided him intraoperative photos showing the femoral head indention. However, Dr. O'Brien testified that dislocating a hip is an "amazingly vigorous undertaking."

- All of the pathology Dr. White wanted to address in surgery was preexisting and degenerative. The surgery suggested would not be successful.

- Claimant's mechanism of injury, which Dr. O'Brien understood to be twisting while positioning a chair with a person in it, could not cause Claimant's injury because the force was insufficient to cause an injury and that Claimant's hip was biomechanically "bankrupt" ten years earlier.

- The delay in surgery did not make the procedure more difficult because the degenerative process had been life-long and a delay of a number of months would not affect the surgical outcome.

50. Dr. White submitted a final report on August 19, 2015, in response to Dr. O'Brien's trial testimony. He opined that pain associated with labral tears is equal to the pain associated with end stage osteoarthrosis. Contrary to Dr. O'Brien's opinion, Claimant did not have osteoarthritis evidenced by x-ray and intraoperative observation. Dr. White stated, "Quite possibly, if we would have had the opportunity to perform the hip arthroscopy on her sooner the degree of delamination would have been significantly less."

51. Dr. White opined that Claimant experienced a subluxation event when she was "pushing in the resident" because she had immediate pain and intra-operatively she "had an indentation over the anterior aspect of the femoral head consistent with a subluxation event."

52. With respect to the surveillance video, Dr. White stated, "I think this is cruel. I do not think that it is a measure at all of reality."

53. Based on the totality of the evidence, the ALJ finds Claimant not to be a credible historian. She reported numerous and inconsistent mechanisms of injury. To the extent some involved a dining chair sticking on carpet in the dining room, Claimant presented no persuasive evidence that the dining room was carpeted, and a video of the dining room taken shortly after Claimant's alleged injury shows smooth, hard surfaced flooring, not carpet.

54. Based on the totality of the evidence, the ALJ finds Claimant not to be credible in her reports to medical providers. She was found to have significant pain behaviors, nonorganic pain, and indicated that Dr. O'Brien was hurting her leg during an exam even when he was not touching her leg. In addition, Claimant's behavior observed on surveillance was inconsistent with her presentation with medical providers and while at work. Her behavior observed on surveillance was also inconsistent with the need for any work restrictions.

55. Based on the totality of the evidence, the ALJ credits the opinions and testimony of Dr. O'Brien that Claimant's hip pathology as seen on MRI was degenerative in nature and pre-existed the industrial injury.

56. Based on the totality of the evidence, the ALJ finds that Claimant's labral tear was not caused by an acute injury. The ALJ also finds that the labral tear was the result of chronic degeneration. As such, the ALJ finds and determines that the labral tear was not caused by the work incident of February 22, 2014. In so finding, the ALJ credits the testimony of Dr. O'Brien and finds his testimony that Claimant's hip pathology was degenerative in nature to be more persuasive than the testimony of Dr. Hsin and Dr. White on this issue.

57. Dr. O'Brien opined that there was no indication to proceed with an arthroscopic surgery – recommended by either Dr. Hsin or Dr. White –

because there was no causal relationship between Claimant's minor hip strain and the degenerative changes in her hip that required surgery. Dr. O'Brien persuasively testified that the labral tear was not caused by the work incident of February 22, 2014 but rather was the result of degeneration over many years. Dr. O'Brien further testified that the proposed surgery was directed at repairing not the injury arising out of the February 22, 2014 incident – the hip strain – but rather it was directed at repairing pathology that pre-existed the work injury. The ALJ finds Dr. O'Brien's opinions on this issue most persuasive.

58. The ALJ finds that Claimant did not meet her burden of proving it more likely true than not that her labral tear was caused by the work injury of February 22, 2014.

59. Because the work injury did not cause the labral tear, the ALJ finds Claimant has not proven by a preponderance of the evidence that the left hip arthroscopy aimed at repairing the labral tear is causally related, reasonable, or necessary to cure the effects of the February 22, 2014 work injury.

60. Based on the totality of the evidence, the ALJ finds Claimant has not proven by a preponderance of the evidence that she is entitled to temporary indemnity benefits between August 22, 2014 and October 2, 2014.

Thus, the ALJ need not address the issue of average weekly wage.

## CONCLUSIONS OF LAW

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

### Generally

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address 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. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The ALJ must assess the credibility of the witnesses and the probative value of the evidence to determine whether the Claimant has met his/her burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). 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*, 57 P.2d 1205 (Colo. 1936).

As found, Claimant is not a credible historian, nor is she credible in her reports to medical providers. As found, Claimant's testimony regarding her levels of function was inconsistent with her presentation on surveillance. As the finder of fact, the ALJ finds that Claimant's testimony regarding her levels of function to be not credible or persuasive.

### ALJ Has Jurisdiction to Decide Whether the Requested Treatment is Reasonable, Necessary and Causally Related to the Industrial Injury

A lack of procedural compliance with regard to a prior authorization request pursuant to Rule 16-10 will not defeat the Rule's purpose to focus on reasonableness and necessity. Specifically, in *Lichtenberg v. J.C. Penney Corporation*, the Panel found that "although the rule refers to 'authorization,' [the courts] have previously noted that [Rule 16]'s purpose is to establish the reasonableness and necessity of treatment provided by the authorized treating physician." W.C. Nos. 4-814-897 & 4-842-012 (I.C.A.O., Jul. 19, 2012). Therefore, Rule 16 "should not be construed to deprive the ALJ of jurisdiction to resolve the parties' dispute" regarding these issues arising under the Act. *Id.* As a result, the Panel found in *Lichtenberg*, that procedural noncompliance with Rule 16-10 does not preclude an ALJ from reviewing whether the requested treatment was appropriate under the Act. *Id.*

Consequently, regardless of whether Respondents failed to timely or properly file its contest of Dr. Hsin's request under Rule 16, the ALJ may decide whether the underlying disputed medical treatment is reasonably, necessary and causally related to the industrial injury. § 8-47-107, C.R.S. Because this jurisdiction survives Rule 16, the

failure to procedurally comply with Rule 16 cannot render a treatment automatically "authorized" under Rule 16-10(E) where the disputed treatment is not reasonable, necessary or causally related to the industrial injury. *See Lichtenberg*, W.C. Nos. 4-814-897 & 4-842-012. This ALJ retains jurisdiction to determine whether the underlying disputed medical treatment is reasonable, necessary, and causally related to the work injury.

**Claimant Failed to Prove that the Hip Arthroscopy was Reasonable, Necessary, or Causally Related to the Industrial Injury**

Regardless of the filing of an admission for medical benefits or an order containing a general award of medical benefits, respondents retain the right to dispute liability for medical treatment on grounds the treatment is not authorized or reasonably necessary. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986). The filing of an admission does not prevent respondents from contesting whether a claimant is in need of any continued medical treatment as a result of the compensable injury. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (I.C.A.O., Feb. 12, 2009). Respondents remain free to dispute the cause of the need for medical treatment, and respondents' election to do so does not shift the burden of proof away from the claimant. *See Snyder,* 942 P.2d 1337; *Velarde v. Sunland Construction*, W.C. No. 4-412-975 (I.C.A.O., Dec. 4, 2001). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Cf. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (filing of admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

It is the claimant's burden to establish entitlement to medical treatment and he/she must do so through a preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant's MRI established that her hip pathology was degenerative and not caused by the minor hip strain that occurred on February 4, 2014. Because the labral tear was found not to have been caused by the work injury, it follows that the need for surgery to repair the labrum is not causally related to the work injury. In so finding, the ALJ credits the testimony of Dr. O'Brien and found his testimony to be more persuasive than that of Drs. White or Hsin. In particular, the ALJ finds the following persuasive:

- Intraoperatively, the labrum was shown to have been disintegrated and eroded, which Dr. O'Brien credibly testified would have occurred over a long period of time;
- Credible testimony that Claimant's hip pathology was the result of her congenital hip dysplasia rather than an acute incident; and

- Credibly testimony that the MRI did not show evidence of any acute subluxation injury, including, but not limited to, bruising or indentation on the femoral head.

As such, Claimant has not established, by a preponderance of the evidence, that the left hip arthroscopy recommended by Drs. Hsin and White was causally related, reasonable, or necessary to cure and relieve the effects of the February 22, 2014 work injury, if any. Consequently, Claimant's request for this treatment is denied and dismissed.

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## ORDER

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

1. Claimant's request for surgery (performed by Dr. White) is not reasonable, necessary, or causally related to the admitted injury. Claimant's request for surgery is denied and dismissed with prejudice.

2. Claimant's request for temporary indemnity benefits between August 22, 2014 and October 2, 2014 is denied and dismissed with prejudice.

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

DATED: November 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 respondents have overcome the Division-sponsored Independent Medical Examination ("DIME") physician's finding that claimant's neck condition is causally related to claimant's admitted March 6, 2014 workers' compensation injury by clear and convincing evidence?

- The parties stipulated at the commencement of the hearing that if respondents are successful in overcoming the DIME physician's finding regarding the causal connection of claimant's neck condition to his work injury, claimant would be at maximum medical improvement ("MMI") as of March 17, 2014 with a 0% impairment for the admitted injuries to claimant's lumbar spine and right wrist.

## FINDINGS OF FACT

1. Claimant was employed by employer as a recreational basketball referee. Claimant testified that in addition to his work as a basketball referee, he also works as a baseball and softball umpire. Claimant testified that while working as a basketball referee for a youth game on March 6, 2014, he tossed the ball to begin the basketball game, back up and tripped over a child that was on one of the teams playing. Claimant testified he fell to the ground on his back and fell on his right wrist.

2. Claimant sought treatment following his injury with Dr. Lorah on March 7, 2014. Claimant reported he tripped over a child while refereeing a basketball game and fell. Claimant was diagnosed with a right wrist sprain and a low back sprain. Dr. Lorah recommended claimant use a splint for his wrist and treat with ice and rest. Dr. Lorah prescribed medications for claimant' back including naprosyn, flexeril, and vicodin.

3. Claimant testified he then went to California for a previously planned trip to visit his son, leaving the evening on March 7, 2014.

4. After claimant returned from his trip, he was evaluated by Dr. Faught on March 17, 2014. Dr. Faught noted claimant's right wrist sprain and low back strain had resolved and discharged claimant from further care.

5. Claimant returned to Dr. Faught on April 1, 2014 with complaints of pain between his shoulders and right triceps pain. Dr. Faught noted that claimant noticed this pain 5 days ago upon wakening and that his pain was worse with tilting his head back. Claimant also reported left triceps pain while shaving. Dr. Faught provided claimant with work restrictions that included no heavy lifting above his shoulders and continued claimant's prescriptions, including the naprosyn, flexerial and hydrocodone.

6. Claimant testified at hearing that when he went to Dr. Faught on March 17, 2014 he was doing great and did not believe he had a neck problem. Claimant testified that he didn't recall specifically if he struck his head on the ground when he fell, but believed that he had. Claimant testified that his medical history of developing pain in his shoulders and left tricep that he reported to Dr. Faught on April 1, 2014 was correct based on his recollection. Claimant testified he felt things were going well with his treatment up until he work up with pain in his shoulders and left arm.

7. Claimant continued to treat with Dr. Faught and was eventually referred for a cervical spine magnetic resonance image ("MRI") on April 15, 2014. The MRI was performed on April 28, 2014 and demonstrated midline protrusion at the C3-C4, C4-C5 and C5-C6 levels with foraminal narrowing on the right at C4-C5 due to bony encroachment.

8. Claimant returned to Dr. Lorah on April 29, 2014 for re-evaluation. Dr. Lorah noted that despite claimant reporting symptoms into his left upper extremities, the MRI did not show significant neural impingement on the left. Dr. Lorah referred claimant to Dr. Hahn for evaluation.

9. Dr. Hahn evaluated claimant initially on May 9, 2014. Dr. Hahn noted that claimant had fallen on March 6, 2014 while refereeing a basketball game and had developed left sided neck pain shortly thereafter. Dr. Hahn noted claimant's symptoms included arm symptoms including pain into claimant's left triceps down in to his arm and including his 4th and 5th digit. Dr. Hahn reviewed the MRI and opined claimant had a C7-T1 disc herniation on the left. Dr. Hahn diagnosed claimant with a C8 radiculopathy secondary to C7 T1 disc herniation. Dr. Hahn recommended an intralaminar epidural steroid injection ("ESI") on the left at the C7-T1 level.

10. Claimant returned to Dr. Lorah on May 14, 2014. Dr. Lorah noted that based on the revised MRI reading, claimant does have an anatomic lesion at the C7-T1 level that would correspond with his symptoms. Dr. Lorah refilled claimant's medications and noted that Dr. Hahn was recommending an injection. Claimant returned to Dr. Lorah on June 4, 2014. Dr. Lorah noted he was again recommending claimant proceed with the ESI and noted claimant had a positive Spurling test on his left. Dr. Lorah refilled claimant's prescription medications

11. The injection was eventually performed on June 10, 2014.

12. Following the ESI, claimant returned to Dr. Lorah on June 27, 2014. Dr. Lorah noted some improvement with regard to his numbness and weakness following the injection. Dr. Lorah recommended claimant consult with Dr. Krauth regarding a neurosurgical consultation.

13. Claimant was evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth noted that claimant reported he fell during a basketball game resulting in some pain in the base of his neck. Dr. Krauth noted that over the ensuing 24-48 hours, his pain localized under his left scapula and was piercing and radiating down the left arm into the fourth

and fifth fingers of the left hand. Dr. Krauth noted claimant reported that over the next several weeks he was almost incapacitated by constant, boring, interscapular pain radiating down into the arm and hand. Dr. Krauth further noted that he had reviewed the MRI scans and opined that they showed without question a small free fragment of disc in the C8 neuroforamen on the left impinging on the C8 nerve root. Dr. Krauth recommended claimant undergo a second ESI and, if claimant's radicular symptoms persisted, claimant could be a candidate for decompression of the nerve root.

14. Claimant underwent a second ESI on July 8, 2014 and returned to Dr. Krauth on July 15, 2014. Claimant reported the ESI did not help him at all and felt the pain could be worse than when he was initially evaluated by Dr. Krauth on July 2, 2014. Dr. Krauth performed a physical examination and recommended claimant undergo a lateral C7-T1 foraminotomy to decompress his C8 nerve root.

15. Respondents referred claimant for an independent medical examination ("IME") with Dr. Raschbacher on October 27, 2014. Dr. Raschbacher reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Raschbacher noted that when claimant was examined on March 17, 2014, 11 days of the injury claim date, claimant had no complaints at the lumbar spine, the right wrist and presumably no symptoms in his neck. Dr. Raschbacher also noted that the initial radiologic interpretation of the MRI was negative for any herniated disc.

16. Dr. Raschbacher took issue with the report of symptoms noted in Dr. Krauth's records that claimant developed symptoms within 24-48 hours of the fall and recommended denying treatment for the cervical spine as it was not related to claimant's fall on March 6, 2014.

17. Respondents obtained a records review IME with Dr. Rauzzino on December 15, 2014. Dr. Rauzzino reviewed the MRI study and agreed that there was a focal disc protrusion between C7 and T1 on the left which could affect the exiting nerve root. Dr. Rauzzino noted claimant's history of reporting no pain in his neck or arm until his examination on April 1, 2014 and opined that the disc herniation shown on the MRI was not related to claimant's work injury on March 6, 2014.

18. Respondents' filed a final admission of liability ("FAL") on December 23, 2014 admitting for a 0% impairment rating and denying further maintenance medical treatment. Respondents attached a copy of Dr. Faught's March 17, 2014 medical report to the FAL. Claimant objected to the FAL and requested a DIME.

19. Dr. Krauth issued a letter on February 17, 2015 to claimant's counsel in connection with this case. Dr. Krauth noted that he saw claimant in church on Sunday March 16, 2014 and noted that in speaking with claimant following the church service, claimant complained of pain in his neck and left arm. Dr. Krauth indicated in his report that as of March 16, 2014 he came to the realization that claimant was suffering from an acute cervical radiculopathy on the left.

20. Claimant underwent a DIME with Dr. Shea on April 14, 2015. Dr. Shea reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Shea noted in his report that when he was seen at Glenwood Medical Associates on March 17, 2014, he did not mention any neck or arm symptoms. Dr. Shea's report further notes claimant developed neck pain, according to the medical records, five days prior to the April 1, 2014 medical appointment.

21. Dr. Shea reviewed the IME reports from Dr. Raschbacher and Dr. Rauzzino that called into question the temporary relationship of claimant's neck symptoms and recommended no further medical treatment to the neck as the symptoms were not related to the March 6, 2014 work injury. Dr. Shea indicated in his report, however, that he considered the cervical injury as part of the original workplace injury for the following reasons: (1) claimant had a very awkward fall on March 6, 2014 when he fell backwards, twisting and landing hard on the right arm; (2) in Dr. Shea's clinical experience, when there is an awkward fall, there can be a delay of symptomatology onset of significant proportions (up to 4-6 weeks after the original accident); (3) Dr. Lorah, who treated claimant immediately after the incident and watched the whole sequence unfold from the day after claimant's falling incident concluded that the neck condition was causally related to claimant's work injury; and (4) Dr. Krauth mentioned seeing claimant on March 16, 2014 and noting that claimant was having difficulty with his left arm on that date.

22. Dr. Shea opined that claimant was not at MMI and recommended further medical treatment to include a return to Dr. Krauth and consideration of a microdiskectomy. Dr. Shea provided claimant with a provisional impairment of 11% whole person and noted that if surgery was not an option, claimant would need maintenance medical treatment including physical therapy and massage.

23. Dr. Rauzzino testified by deposition in this matter consistent with his medical report. Dr. Rauzzino noted that pursuant to the medical records, claimant's symptoms involving his left arm and neck did not develop until approximately March 25, or March 26, 2014. Dr. Rauzzino opined that in his practice, most disc herniations result spontaneously and noted that there does not need to be a traumatic injury for a disc to become herniated. Dr. Rauzzino noted that according to the medical records, claimant did not have symptoms in his left arm and neck as of March 17, 2014 when he was released from care by Dr. Faught. Dr. Rauzzino opined that if claimant's fall had resulted in an acute herniation of his cervical disk, claimant would have presented with symptoms to Dr. Lorah or Dr. Faught in the medical appointments he received after his injury. Dr. Rauzzino opined that claimant's fall on March 6, 2014 did not result in an injury to his cervical spine.

24. The ALJ credits the opinions expressed by Dr. Shea in his DIME report as being reasonable and supported by the medical records entered into evidence. The ALJ finds that the contrary opinions expressed by Dr. Rauzzino and Dr. Raschbacher do not overcome the opinion of Dr. Shea that claimant's cervical spine condition is related to the March 6, 2014 fall at work.

25. The ALJ credits the testimony of claimant at hearing regarding his work injury and the onset of his symptoms to be credible and persuasive and finds that this testimony is consistent with the accident history he provided to Dr. Shea and relied upon by Dr. Shea in formulating his opinions regarding the cause of claimant's cervical spine condition.

26. The ALJ therefore determines that respondents have failed to overcome the finding of Dr. Shea that claimant's cervical condition is related to his March 6, 2014 work injury by clear and convincing evidence.

## CONCLUSIONS OF LAW

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

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

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence that claimant's neck condition is causally related to the admitted March 6, 2014 work injury. As found, Dr. Shea's opinion that

claimant sustained a compensable injury to his neck and that claimant is not at MMI for his work injury is found to be credible and persuasive.

6. The ALJ considers the contrary opinions expressed by Dr. Rauzzino in his report and testimony, but finds the opinions expressed by Dr. Shea to be more credible and persuasive and concludes that respondents have failed to overcome the opinions expressed by Dr. Shea by clear and convincing evidence.

## ORDER

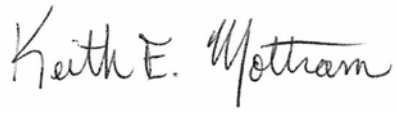
It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury, including the treatment to claimant's cervical spine.

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

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

DATED: November 13, 2015



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

## ISSUES

1. Whether Claimant suffered a compensable injury on December 11, 2013.

2. Whether Claimant was an employee or independent contractor of Employer on December 11, 2013.

3. Whether Employer was Claimant's statutory employer on December 11, 2013.

## STIPULATIONS

The parties reached the following stipulations to be entered if the claim is found compensable: the medical treatment Claimant received in relation to his injury was reasonable and necessary; Claimant's average weekly wage at the time of his injury was $1200; Claimant would be entitled to temporary total disability from December 11, 2013, to the present and until terminated by statute; and Respondents would be entitled to an offset for any benefits Claimant receives from Social Security Administration.

## PROCEDURAL HISTORY

An initial hearing in this matter took place on September 18, 2014. The ALJ issued an order on November 18, 2014. The matter was appealed. On May 4, 2015 the Industrial Claims Appeals Office (ICAO) issued a remand. On May 11, 2015 ICAO issued a corrected order of remand. On August 25, 2015 the ALJ issued a procedural order limiting the issues to be heard at the remand hearing consistent with the corrected order of remand. On September 11, 2015 Respondents filed a motion for summary judgment. On September 21, 2015 the motion for summary judgment was denied. The remand hearing was set for October 5, 2015. On October 1, 2015 Claimant filed an opposed motion for extension of time to commence hearing. On October 2, 2015 Claimant's request was denied. The matter proceeded to remand hearing on October 5, 2015.

## REMAND HEARING

The hearing pursuant to the remand order commenced on October 5, 2015. At the outset, Claimant's renewed request for continuance was denied. Claimant was given one week following the hearing to submit any proposed exhibits that he believed were relevant to the limited issues on remand. Respondents were provided one week following Claimant's submissions to respond with any objections. Also at the outset of hearing, Respondents' objection to the proceeding was noted and overruled.

Respondents requested a standing objection to the proceeding which was noted. The ALJ understood the Respondents' position, but given the procedural posture of the case, the ALJ was not inclined to ignore the remand order. The ALJ noted on the record that at the initial hearing, the evidence was not limited by the ALJ in any fashion. The ALJ noted that any paucity of evidence from the first proceeding was due to the parties' failure to present the evidence, not due to limitations on evidence imposed by the court. At the initial proceeding, the evidence established a document signed by both parties that created a rebuttable presumption that Claimant was an independent contractor. At the initial hearing, the Claimant failed to present sufficient evidence to rebut this presumption. Nonetheless, ICAO ordered a new evidentiary proceeding take place and provided Claimant with an opportunity to present additional evidence to again attempt to rebut the presumption of the relationship between the parties. The ALJ noted that the order of ICAO would be followed over Respondents' objection that this was an opportunity to provide Claimant a "second bite at the apple," and reminded the parties that the evidence at the remand hearing would be limited consistent with the remand order.

## FINDINGS OF FACT

1. Claimant worked for Employer as a service technician from June of 2008 until March of 2009 when he was laid off.

2. In early March of 2009, Claimant and 16 other service technicians were laid off. Claimant and 8 other service technicians were offered the opportunity to provide services for Employer as independent contractors.

3. When Claimant was informed that he was being laid off, Claimant decided to establish his own business, CP Window Service. Claimant accepted Employer's offer to work as an independent contractor through his new business, and began performing service for Employer under his new business CP Window Service on March 12, 2009.

4. Claimant had experience installing and repairing windows and doors and at this time he could have chosen to seek employment elsewhere. Instead, Claimant made the voluntary decision to accept Employer's offer to perform work as an independent contractor and made the voluntary decision to register and create his own company.

5. On March 4, 2012 Claimant registered a "statement of trade name of an individual" with the Secretary of State listing his business as CP Window Service. Claimant also obtained a W-9 listing an employer identification number for CP Window Service. Claimant also obtained general liability insurance for CP Window Service.

6. Claimant also purchased a truck and tools for his business, CP Window Service. The truck and tools were purchased from Employer. Claimant was responsible for the truck and tools as well as any repairs/replacements to them after he purchased them. Claimant also obtained a computer, phone, and paid for necessary

internet and phone fees and costs for his business. Claimant also on all of his filings listed a business address and phone number separate from that of Employer's.

7. While Claimant was registering and setting up his business, he continued to work for Employer as their employee and did so until March 12, 2009.

8. On March 12, 2009 Claimant attended a meeting with Employer where Claimant chose to accept Employer's offer to perform services for Employer as an independent contractor.

9. Claimant signed the "Master Service Subcontract Agreement" to reflect his acceptance of independent contractor work. This document was notarized. Claimant also presented to Employer the general liability insurance, W-9, and employer identification number that he had obtained for his new business, CP Window Service.

10. At the March 12, 2009 meeting, Claimant signed a rejection of worker's compensation coverage. Claimant was aware that he was responsible for providing or purchasing his own worker's compensation coverage for his business CP Window Service and that he could purchase insurance to cover himself. He chose not to purchase such insurance. *See* Exhibit 8.

11. The "Master Service Subcontract Agreement" signed by Claimant and Employer on March 12, 2009 specifically noted that Claimant was accepting an offer to work as an independent contractor for Employer. It provided that Claimant was not restricted from working for any other companies and was free to accept or refuse any work offered to him by Employer. It noted that Claimant was to perform the services according to the specifications provided by Employer and that all services were to be provided in accordance with all manufacturer and industry standards, as well as laws and regulations. The agreement indicated that Claimant was required to furnish all his own tools but that Employer would provide all the required service parts to Claimant. The agreement indicated that Claimant would be paid per job and that he had to submit an invoice to Employer listing which jobs he had accepted and completed prior to being paid for his services. The agreement also advised Claimant that he was responsible for payment of all federal, state, and local taxes and had to acquire and maintain his own general liability, auto, and workers' compensation insurance. The agreement stated that Claimant was required wear proper attire at all times while performing services for Employer. The agreement also stated that Employer could not terminate the agreement during Claimant's performance of a service unless Claimant breached or violated the agreement. The agreement also provided a termination section stating that Employer may terminate the agreement without liability to Claimant at any time and for any and no reason by giving 30 days written notice to Claimant, as well as providing that Claimant could terminate the agreement by giving 30 days written notice to Employer. *See* Exhibit 8.

12. At the March 12, 2009 meeting Claimant also signed a subcontract agreement form as an attachment to the "Master Service Subcontract Agreement." The

attachment agreement specifically stated that Employer required all its subcontractors to be covered by workers' compensation insurance. The agreement noted that Employer was aware that independent contractors had the right to reject workers' compensation coverage, but noted that it was not Employer's intent to be responsible for the workers' compensation claims of its subcontractors. The agreement noted, therefore, that it was the responsibility of each individual subcontractor to have workers' compensation coverage. The agreement also indicated that if Claimant was an independent contractor or sole proprietor and did not have workers' compensation insurance, then he agreed to complete a declaration of independent contractor status. Claimant signed this document. *See* Exhibit H.

13. Another attachment to the Master Service Agreement Claimant signed by Claimant on March 12, 2009, was an "Independent Contractor Addendum for Workers' Compensation Coverage." The addendum indicated that Claimant, as an independent contractor, had to provide proof of workers' compensation insurance coverage. It also noted, however, that sole proprietors were not required to carry workers' compensation coverage. In that situation, Claimant was required to sign a subcontract agreement and an independent contractor/statutory employer form. *See* Exhibit H.

14. The day following this meeting and on March 13, 2009, Claimant had the form noting his rejection of workers' compensation benefits notarized. *See* Exhibit 8.

15. On March 13, 2009 Claimant signed a form titled "Declaration of Independent Contractor Status." The form advised Claimant that as an independent contractor he was not entitled to any workers' compensation benefits in the event he was injured while performing services for Employer. The form advised Claimant that he was obligated to pay all federal, and state income taxes on any money he earned while performing services for Employer. It also advised Claimant that he would be required to provide workers' compensation insurance for any workers that Claimant hired. These advisements were listed on the form in bold, underlined, capital letter print. Claimant signed the form and it was notarized by a notary public. *See* Exhibit H.

16. On March 13, 2009 Claimant also signed and filed with the Department of Labor and Employment a "Rejection of Coverage by Partners and Sole Proprietors Performing Construction Work on Construction Sites." The form noted that Claimant had a registered trade name and was the sole proprietor of CP Window Service. Claimant checked a box on the second page of the rejection form indicating that he was electing to reject workers' compensation insurance coverage based on C.R.S. § 8-41-404. The section where Claimant marked that he was rejecting coverage noted in bold print that "[b]y signing this form, you are acknowledging your rejection of *all benefits* under the Workers' Compensation Act." The section also required Claimant to confirm that he was rejecting coverage voluntarily. Again, Claimant signed this document. *See* Exhibit A.

17. On July 20, 2009 Claimant filed a second rejection of workers' compensation coverage with the Department of Labor and Employment. Again the

rejection indicated that Claimant was the sole proprietor of CP Window Service and that he was knowingly and voluntarily rejecting all benefits under the Workers' Compensation Act and was signed by Claimant. *See* Exhibit B.

18. After March 12, 2009 when Claimant and Employer both signed the "Master Service Subcontract Agreement," Claimant, and CP Window Service, became one of Employer's independent contractors. Claimant argues his employment did not change and that he became an independent contractor in name only. However, several changes occurred after March 12, 2009.

19. Prior to March 12, 2009 and while employed as an employee, Claimant was paid by the hour. Claimant was provided a Pella uniform that he was required to wear. Claimant was provided a Pella vehicle to drive as well as a Pella computer to use. Claimant was also provided Pella tools to use to perform service work.

20. After March 12, 2009, Claimant's business, CP Window Service was paid a contract rate per job. Claimant was offered jobs on a weekly basis that he was free to accept or decline. Claimant was able to wear whatever clothing he chose as long as it appeared professional. Claimant used his own vehicle that he purchased specifically for his business CP Window Service. Claimant also used his own tools that he purchased specifically for his business CP Window Service. Claimant also used his own computer for his business CP Window Service. Claimant had to pay for and provide his own internet and phone services and he maintained his own business address and phone listing separate from Employer's.

21. After March 12, 2009 Claimant was not an hourly employee performing whatever jobs Employer told him to perform at a set hourly rate. Rather, after March 12, 2009 Claimant was offered jobs by Employer. The jobs were offered at a set price per job. Claimant was able to accept all the jobs offered, some of the jobs offered, or none of the jobs offered and could accept or reject the offers as he saw fit.

22. After March 12, 2009 Claimant would load a 'job spec and allowance' form from Employer. The form listed the number of service trips being offered to him, the number of chargeable service hours scheduled, and the number of warranty service hours scheduled. The form also listed the total Pella service contractor amount that Claimant could bill for the offered jobs. Claimant could either accept or reject the jobs offered. If he accepted, Claimant signed the bottom of the form, where it stated subcontractor signature. Directly above subcontractor signature, the form stated: "I accept the job specified above. I agree to service all products in accordance with PWD specifications. I agree to invoice upon job completion, rendering the order number above. The signed worksheet must be returned before any work commences. Any changes not contained herein will not be paid without an approved change order." *See* Exhibit 7.

23. After March 12, 2009, Claimant signed these 'job spec and allowance' forms accepting jobs offered by Employer. Claimant testified that he was not able to

reject some jobs and accept others. This testimony contradicts testimony provided by Mr. McHugh and is inconsistent with the written agreement between the parties and is not found persuasive. Claimant was free to accept or reject jobs as he saw fit.

24. After March 12, 2009, Claimant was no longer paid hourly or personally. Rather, Claimant started being paid per job at contracted rates for jobs that were offered to him and that he accepted. Payment and checks were issued to CP Window Service after CP Window Service submitted invoices to Employer outlining the jobs that had been accepted and completed. Claimant began submitting weekly invoices from CP Window Service to Employer. The amount of time that it took to complete a job varied from appointment to appointment and after accepting or rejecting the offer and the contract rate per job, Claimant billed for the jobs he had completed. Independent contractors, including Claimant, were free to bill weekly, monthly, etc. as they saw fit.

25. After March 12, 2009 Employer did not take out any withholdings from CP Window Service's checks, nor did they pay any taxes for Claimant or his business. Employer no longer issued W-2's to Claimant personally, but issued 1099's to CP Window Service.

26. After March 12, 2009, Claimant was not restricted from working for other companies. Although the "Master Service Subcontract Agreement" stated that Claimant was not restricted from working for other companies, Claimant made the independent business decision to work only for Employer.

27. Employer was not aware, nor should they have been reasonably aware that Claimant was working exclusively for Employer based on the number of jobs that Claimant was performing or based on their working relationship with Claimant. Employer had other independent contractors who performed more service work than Claimant performed for them and that earned more money than Claimant. Employer would not reasonably have known based on the jobs Claimant accepted that he was not also working or accepting jobs elsewhere. Employer encouraged all their independent contractors, including Claimant, to work elsewhere in addition to performing work for Employer. *See* Exhibit N, Exhibit O.

28. Claimant was able to hire his own employees to assist him with the jobs offered by Employer. Some of Employer's independent contractors had assistants that they hired to help with work and some worked as individuals. Claimant made the independent business decision to work as an individual and to not hire any employees for CP Window Service, although he was aware of other contractors for Employer who had decided to hire employees.

29. After March 12, 2009, Claimant was able to work any days that he wished or reject any jobs that he could not perform. As Claimant requested regular job offers from Employer, if Claimant wanted a day off or to go on vacation, Employer asked that Claimant advise them one week ahead of time that he would not be accepting any job offers for that period of time he wanted to take off. Employer had no control over which

days Claimant chose to work or how many days he wished to take off of work.

30. When Claimant accepted job offers from Employer, Employer sent Claimant a list of the jobs scheduled for the day of work that Claimant had accepted with customers' names and phone numbers attached. Claimant called the customers directly from his own business phone to schedule a time frame during that day for him to arrive at their home and perform the service work. Employer listed customers' preference on the list, but ultimately, Claimant was able to set the day's schedule as Claimant saw fit.

31. After March 12, 2009, Employer occasionally provided materials necessary for service work that could include, depending on the job, extension ladders, scaffolding, and silicone. After March 12, 2009, Employer did not provide any tools, suction cups, or glass cutters as Claimant had purchased those with the truck that he purchased for his business.

32. To get the required materials for the jobs Claimant accepted, Claimant went to Employer's warehouse building. The warehouse was staffed by three employees of Employer who provided Claimant the needed materials for Claimant's accepted service jobs. On occasion, if the warehouse was understaffed, Claimant entered the warehouse and gathered his own materials.

33. After March 12, 2009, Employer provided minimal training once per year where a person from Pella Manufacturing came to Colorado to go over new product lines and discuss problems with current products or installation. All the independent contractors who performed service work for Employer were invited and able to attend if they wished. Claimant attended these annual trainings.

34. Prior to March 12, 2009 Claimant underwent initial training when hired as an employee of Employer in Arizona. After March 12, 2009 Claimant did not undergo any initial training or training other than attending the once per year Pella Manufacturing training.

35. The quality of work Claimant performed inspected by Mike Schlaughter who occasionally rode with different service technicians to inspect their work. Mr. Schlaughter was an employee of Employer. Mr. Schlaughter did not direct how Claimant performed service jobs. Claimant worked independently without direction or oversight in performing his window and door service work from March 12, 2009 until his injury in 2013, with only occasional inspection by Mr. Schlaughter. Employer did not control or direct how Claimant performed his work.

36. Claimant's business operations were never combined in any way with Employer's business operations.

37. After March 12, 2009, the service work performed by Claimant and the 8 other independent contractors accounted for less than three percent of Employer's total

business operations.

38. After March 12, 2009 Claimant performed work under his business name CP Window Service. Claimant renewed this trade name with the Secretary of State in March of 2010 and March of 2011. In April of 2012 Claimant filed a new "Statement of Trade Name of an Individual" with the Secretary of State as he had missed the renewal deadline, and again listed his trade name as CP Window Service. Claimant again renewed this trade name in April of 2013. Each time Claimant registered his business, he provided a business address and telephone number. *See* Exhibit K.

39. Employer issued CP Window Service IRS 1099 forms at the end of each year, documenting the amounts paid to CP Window Service. In 2012, CP Window Service was paid $72,185.49. In 2013, CP Window Service was paid $66,152.47. *See* Exhibit J.

40. After March 12, 2009 and in 2009, 2010, and 2012, Claimant filed tax returns for his business CP Window Service. Claimant noted on his taxes after March 12, 2009 that he was self-employed. He listed a business address. After March 12, 2009, Claimant listed deductions for car and truck expenses of his business and insurance expenses of his business. Claimant noted that he placed his vehicle in service for business purposes on March 9, 2009. Claimant also claimed a second vehicle that was used more than 50% of the time for his business was placed into service for business purposes on March 15, 2010 and noted that he used both vehicles for his business, with one vehicle reported as used 82.24% of the time for business/investment use, and the other vehicle being used 100% of the time for business/investment use. *See* Exhibit J.

41. On December 11, 2013, Claimant was severely injured performing a job. Claimant fell out of a second story window onto a concrete patio. As a result of the fall Claimant has been rendered a complete paraplegic.

42. Claimant's medical records following his injury refer to his employment in several places.

43. On December 15, 2013, Claimant reported to his examining physicians that he did contract work. *See* Exhibit E, Exhibit F.

44. On December 17, 2013 Claimant informed a case manager at Swedish Medical Center that he was self-employed at the time of his injury and that he was working as an independent contractor for the job he was on. Claimant also informed the case worker that there was no possibility of him receiving workers' compensation coverage. *See* Exhibit E.

45. On December 27, 2013, Claimant informed the clinical liaison at Craig Hospital that at the time of his injury, he was working as an independent contractor for Employer. *See* Exhibit F.

46. On January 8, 2014, claimant informed Jeffrey Berliner, M.D., that at the time of his accident, he was working as an independent contractor for Employer. *See* Exhibit F.

47. On January 13, 2014 Claimant's admission form for Swedish Medical Center listed that Claimant was self-employed. *See* Exhibit E.

48. In January of 2013 Claimant applied for Social Security Disability benefits and listed his employment history as self-employed window installer from January of 2009 through December of 2013. *See* Exhibit F.

49. Claimant filed a claim for workers' compensation on May 5, 2014 and argues he is an employee of Employer not an independent contractor. Respondents filed a notice of contest on May 28, 2014 denying the claim and argue Claimant was an independent contractor and is not an employee or a statutory employee.

50. The testimony of Employer representative Mr. McHugh is found credible and persuasive. The testimony of Claimant, overall, is not found as credible or persuasive.

## CONCLUSIONS OF LAW

### *Generally*

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals*

*Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

***Independent Contractor v. Employee***

Section 8-40-202(2)(a), C.R.S. provides that an individual performing services for pay is deemed to be an employee, "unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed." The putative employer may establish that the claimant was free from direction and control and engaged in an independent business or trade by use of a written document, or by proving the presences of some or all of the nine criteria set forth in § 8-40-202(2)(b)(II), C.R.S.

In this case the parties agree that Claimant performed services for pay for Employer but there is a dispute as to whether the services were performed as an independent contractor or as an employee. If Respondents establish that Claimant is an independent contractor, then Claimant has no cause of action and is not entitled to benefits under the Workers' Compensation Act. *See* § 8-41-401(3), C.R.S.

A document may satisfy Respondents' burden to prove Claimant's status as an independent contractor and that Claimant is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of his services. A document creates a "rebuttable presumption of an independent contractor relationship between the parties where such document contains 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." *See* § 8-42-202(2)(b)(IV), C.R.S. As found above, a document containing the above information required by statute was signed by both Claimant and Employer on March 12, 2009 and was notarized. In this case, Respondents have initially established through this document that the relationship presumed between the parties is that of independent contractor and Employer. The document signed by both Claimant and Employer creates a presumption that Claimant was engaged in an independent trade, occupation, profession, or business and that he

was free from control and direction in the performance of his services. The burden in this case thus shifts to Claimant to overcome the rebuttable presumption that he was working as an independent contractor. Claimant can overcome the rebuttable presumption by proving as a matter of law that he was not free from control and direction in the performance of service and was not customarily engaged in an independent trade or business. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO August 26, 2005). In this case, Claimant has failed to present sufficient evidence to rebut the presumption of the relationship status.

Claimant failed at the initial hearing to present sufficient evidence to rebut the presumption that he was working as an independent contractor for Respondents. Claimant was not limited in the evidence he was allowed to introduce to attempt to rebut the presumption. After the initial hearing, the ALJ ruled that Claimant had failed to present sufficient evidence to rebut the presumption of an independent contractor relationship. The ALJ also ruled that the relationship between the parties changed greatly after March 12, 2009 and rejected Claimant's argument that the relationship changed in name only. After this ruling, and despite Claimant's failure to present sufficient evidence to rebut the presumption of the relationship status created by the written document, the matter was remanded to allow Claimant an additional evidentiary proceeding. After remand hearing, the ALJ concludes, again, that Claimant has failed to present sufficient evidence to rebut the presumption that he was working as an independent contractor at the time of his injury. Claimant has failed to show, by preponderant evidence, that he was not free from control and direction in the performance of his services and he has also failed to show that he was not customarily engaged in an independent trade or business. Rather, after weighing all the evidence and testimony from both the first hearing and the remand hearing, the ALJ once again concludes that Claimant was free from Employer's control and direction in performing his service work, and also that Claimant was customarily engaged in his independent window service trade, under his business CP Window Service.

***Free from control and direction in the performance of the service***

Under § 8-40-202(2)(b)(I);(II), C.R.S., to prove that an individual is engaged in an independent trade, occupation, profession, or business and is free from control and direction in the performance of the service and therefore an independent contractor, it must be shown by a preponderance of the evidence that the person for whom services are performed does not:

A. Require the individual to work exclusively for the person for whom services are performed; except that the individual, however, may choose to work exclusively for such person;
B. Establish a quality standard for the individual; except that the person may provide plans and specifications but cannot oversee the actual work or instruct the individual as to how the work will be performed;
C. Pay a salary or an hourly rate instead of a fixed or contract rate;

D. Terminate the work of the individual during the contract period unless the individual violated the terms of the contract or fails to produce a result that meets the specifications of the contract;
E. Provide the individual more than minimal training;
F. Provide the individual tools or benefits; except that materials and equipment may be supplied;
G. Dictate the time of performance; except that a completion schedule and a range of mutually agreeable work hours may be established;
H. Pay the individual personally instead of making checks payable to the individual's business name; and
I. Combine the business operations of the person for whom service is provided in any way with the individual's business operations instead of maintaining all operations separately and distinctly.

The existence of any one of these factors is not conclusive evidence that an individual is an employee, nor does the statute require satisfaction of all nine criteria to prove that the individual is an independent contractor. *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1998). When a majority of the factors favor a finding of an independent contractor relationship, there is no legal barrier to finding the claimant was an independent contractor. *Id.* See also *Gerlock v. Stoehr Drive-In Cleaners*, W.C. No. 4-451-606 (ICAO, July 23, 2001). The existence of two of the nine factors does not compel a finding that claimant was an employee. *Nelson, supra*. In the present case, a majority of the factors favor a finding that Claimant was an independent contractor on the date of his injury.

The first factor favors a finding that Claimant was an independent contractor. After March of 2009, Claimant was not required to work exclusively for Employer. This fact is specifically noted in the independent contractor agreement Claimant signed, and was acknowledged by Claimant in his testimony. Claimant was free to perform service work or window work under his business CP Window Service for anyone. However, Claimant chose to work exclusively for Employer and made this independent business decision while operating CP Window Service. Some of the independent contractors that performed work for Employer worked more hours and jobs than Claimant and some worked fewer. Some worked for other Employers and some worked exclusively for Employer. Employer was not aware that Claimant was working exclusively for them nor would they reasonably have been aware based solely on the schedule and number of jobs that Claimant performed since some contractors performed many more jobs than Claimant. Employer had no way of knowing whether or not Claimant was performing similar work for other companies while also performing service work for them. Employer encouraged all of their independent contractors to work elsewhere in addition to the work performed for them. The court has expressly disapproved the notion that the lack of work for someone other than the putative employer is dispositive proof of an employee-employer relationship, and the fact that Claimant did not work for any other company while performing his services as an independent contractor does not require a finding that Claimant was an employee. *Indus. Claim Appeals Off. v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2014); *Gould v. Stover, Ecotreck, Dry*

*Masters Restoration, Epic Flood*, W.C. 4-880-589-03 (ICAO June 26, 2014). Here, although Claimant made an independent business decision to only work for Employer, Claimant was not required to work exclusively for Employer and Employer would not reasonably have been aware that Claimant was working exclusively for them. Respondents explained credibly that many of their independent contractors performed a much larger number of jobs per day and that Claimant could have reasonably been working elsewhere at the same time with the schedule he averaged. Additionally, many contractors worked weekends and Employer had no reason to suspect Claimant was not doing the same and working elsewhere on the weekends.

The second factor favors a finding that Claimant was an independent contractor. Claimant was required to perform his work to industry standards and there was no evidence that Employer oversaw the actual work performed by Claimant or instructed Claimant on how the work was to be performed. Conflicting testimony existed as to whether Claimant's work was ever inspected by Mr. Schlaughter. Even crediting Claimant's testimony that Mr. Schlaughter on occasion rode along with different service technicians to inspect the work being performed, the testimony and evidence leads the ALJ to a conclusion that this was a quality inspection ride along and the evidence failed to establish that Mr. Schlaughter oversaw the work performed or instructed Claimant on how to perform the work. Rather, Claimant picked up materials and went to job sites daily for over 4.5 years by himself and performed the work by himself to industry standards with only occasional inspection and ride along by Mr. Schlaughter. Case law has established that the fact that an independent contractor's final product may be inspected to insure quality does not establish the level of control required to prove that a person is not an independent contractor. *Nelson, supra.*

It is not disputed that after March 12, 2009, Claimant was no longer paid an hourly rate but was paid a fixed contract rate per job that he accepted and completed. After March 12, 2009 Claimant submitted invoices from CP Window Service to Employer outlining and billing for the jobs he had accepted and completed. The third factor also favors a finding that after March 12, 2009 Claimant was an independent contractor.

The fourth factor presented conflicting evidence as to whether or not the work of Claimant could be terminated during the contract period. The Master Subcontractor Service Agreement states both Employer could not and would not terminate Claimant's contract unless Claimant violated the contract or failed to produce a result that met the specifications of the contract and it also provides that Employer may terminate the agreement without liability to Claimant at any time and for any and no reason by giving 30 days written notice to Claimant. The credible testimony of Employer representative was that the contract would not be terminated unless Claimant failed to perform to their expectations. The fourth factor, with conflicting evidence, does not persuade the ALJ either way as to whether Claimant was performing services as an independent contractor or employee.

The fifth factor favors a finding that Claimant was an independent contractor. As

found above, after March 12, 2009 Claimant was not provided with more than minimal training by Employer. Claimant merely attended an optional once a year training when a member of Pella Manufacturing would come to Colorado to go over new products and installation questions. After becoming an independent contractor in March of 2009, Claimant was not provided any training beyond this annual update. This training was minimal.

The sixth factor favors a finding that Claimant was an independent contractor. After March 12, 2009 Employer no longer provided Claimant with benefits or tools. Before March 12, 2009 and while an employee, Claimant was provided a company vehicle, company computer, and some tools. When Claimant decided to create his own business and accept the offer of becoming an independent contractor for Employer, Claimant purchased his own vehicle for his business, purchased his own tools for his business, had to replace his own tools, had to purchase his own computer for his business, and had to procure insurance for his business. Claimant continued to be provided materials necessary for the jobs he accepted that included, on occasion, scaffolding, scaffolding and ladders. The sixth factor states that it must be shown that the person for whom services are performed does not provide tools or benefits, but can supply materials and equipment. Here, after March 12, 2009 Employer not longer provided Claimant with any tools or benefits, but merely provided materials on occasion. Thus, the sixth factor also favors a finding of an independent contractor relationship.

The seventh factor favors a finding that Claimant was an independent contractor. Employer in this case did not dictate or control the time of Claimant's performance of the work. As found above, Employer offered Claimant jobs for a particular date that Claimant could accept or reject. Claimant was able to accept any or all the jobs offered to him. If he accepted all, Claimant then was able to call the customers for each job he accepted and set up a time window for performance of the job. Claimant was able to schedule these time slots as he saw fit. Although Claimant attempted to accommodate customers' preferences, Claimant was still able to set his own schedule for service. Claimant also had complete control over which jobs he accepted, which days he worked, which days he took off from work, and how many days he wished to accept jobs in any given time period. Claimant was free to work whatever hours he chose and was free to work on other projects for persons other than Employer.

The eighth factor favors a finding that Claimant was an independent contractor. All of the money paid to Claimant after March 12, 2009 was paid to CP Window Service and not to Claimant personally. Employer did not take out any withholdings or taxes from these checks. Claimant, as found above, paid his own business taxes, claimed business deductions, and CP Window Service received 1099s each year from 2009 to 2013 from Employer.

Finally, the ninth factor also favors a finding that Claimant was an independent contractor. There was no persuasive evidence that Employer and Claimant combined business operations in any manner.

After reviewing the nine factors, the ALJ concludes that Claimant has failed to show through the nine factors that he was not free from control and direction in the performance of his services for Employer. Rather, after weighing all nine factors, the ALJ concludes that they support the conclusion that Claimant performing services for Employer as an independent contractor. Consistent with the statutory requirements, the evidence presented at the initial hearing as well as the remand hearing establishes that the nine factors weigh in favor of an independent contractor relationship and therefore prove, more likely than not, that Claimant was engaged in an independent trade, occupation, profession, or business and that he was free from control and direction in the performance of his services at all times after March 12, 2009 and at the time of his injury. The evidence surrounding the nine factors weighs heavily in favor of Respondents and as the putative employer, Respondents have established that the claimant was free from direction and control and engaged in an independent business or trade by proving the presence of most all of the nine criteria set forth by § 8-40-202(2)(b)(II), C.R.S. Claimant thus has failed to rebut the presumption of the relationship status through the nine factors.

***Customarily Engaged in an Independent Trade or Business.***

Although the written document in this case establishes a rebuttable presumption of an independent contractor relationship and although the nine criteria set forth by § 8-40-202(2)(b)(II) also establishes in this case that Claimant was customarily engaged in an independent trade or business, the ALJ also concludes that Claimant was in fact engaged in an independent trade or business. After examining all relevant factors and the nature of the working relationship between Claimant and Employer, the relationship still is more likely than not that of independent contractor/Employer. Here, Claimant had an independent business address and phone number listed on various documents he filed when initially applying for and later renewing his business name, CP Window Service. Claimant also provided these on various tax forms filed on and after March 12, 2009. Claimant had financial investment in the form of the vehicles he purchased and used for his business (claimed on his tax returns), the computer he purchased for his business, his phone and internet charges he needed for his business, and the liability insurance he chose to purchase for his business. Claimant also purchased and used his own tools in his business. After March 12, 2009 Claimant was able to accept/reject job offers at the contracted prices offered by Employer as he saw fit. Claimant was able to employ others to assist him and to work for CP Window Service if he so chose and other independent contractors performing work for Employer did so. Here, Claimant chose not to take on other customers. Employer did not require or expect this. Employer in this case did not know nor would they reasonably have known that Claimant was working exclusively for them. Based on the number of service jobs performed by Claimant compared to other independent contractors who performed more jobs, Employer did not reasonably know that Claimant was not working elsewhere while Claimant was performing work for them. Based on the working relationship between Employer and Claimant, Employer would have no reason to suspect Claimant was not engaged in an independent business. The invoices submitted by Claimant for his business CP Window Service, the amount of jobs Claimant accepted and performed, and the comparison of Claimant to other contractors performing much higher amounts of jobs would not lead Employer to reasonably believe

Claimant was working exclusively for them. Claimant made this choice, but the decision was made entirely by Claimant and neither expected by Employer nor reasonably known by Employer.

Additionally, Claimant's argument that the relationship changed in name only on March 12, 2009 is not persuasive. The entire nature of the working relationship between Claimant and Employer changed greatly on March 12, 2009. The numerous and significant changes included: Claimant's control of which jobs he performed and accepted; Claimant no longer being paid hourly and personally but being paid at a contract rate to CP Window Service; Claimant submitting invoices under his business name for the work he had completed; Claimant no longer being provided a company car, computer, or tools; Claimant's complete control over which days he worked and accepted jobs as well as how many days he wished to take off; and Claimant's establishment and renewal of his own business entity as well as the tax forms issued to and filed by claimant as a self-employed independent contractor. After March 12, 2009, Claimant was free from the direction and control in the performance of his services and was engaged in an independent trade of window installer for his own company CP Window Service. Claimant has failed to rebut the presumption of an independent contractor relationship established by the master service subcontractor agreement that both he and Employer signed and agreed to. Claimant has been engaged in an independent trade, profession, or business as an independent window and door installer/service technician since March 12, 2009. Therefore, pursuant to § 8-40-202 and § 8-41-401(3) Claimant does not have a cause of action under the Workers' Compensation Act.

### ***Softrock, Longview, and US Dept. of Labor***

In the case *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014), the Supreme Court revised the standard previously used when analyzing whether or not an employee is customarily engaged in an independent trade or business. The previous standard sought to simply ask if the employee had customers other than the employer. If not, it was reasoned that the employee was not engaged in an independent business and would necessarily be a covered employee. In *Softrock* the court rejected that this was dispositive proof of an employer-employee relationship and directed the fact finder to conduct an inquiry into the nature of the working relationship considering not only the nine factors but any other relevant factors. An example of other factors that could be considered was shown in *Long View Systems Corp. v. Industrial Claims Appeals Office,* 197 P.3d 295 (Colo. App. 2008). The analysis of the nature of the working relationship including any other relevant factors was meant to limit the problems presented by the single factor test prior to *Softrock*.

Here, the ALJ has conducted an inquiry and made extensive findings as to the nature of the working relationship. The ALJ concludes, again, that the nature of the working relationship in this case shows that it was an independent contractor/employer relationship. Even after remand hearing and allowing Claimant to present additional evidence, and considering all of the evidence surrounding the relationship between the

parties, the ALJ concludes that Claimant was an independent contractor. Claimant had a phone and business address listing, a business name and registration he created and renewed annually, financial investment in his cars, tools, computer, phone, insurance, and business filings, liability insurance, and made the decision not to work for others as his own business decision made entirely by him and not expected by the Employer. When looking at the relationship and how it worked day to day, Claimant was offered contract jobs at set prices and could either accept or reject any or all of the jobs. Claimant was subject to risk of loss if he accepted a job and it took him a long amount of time as he was still paid the same contract rate. Employer had no knowledge or reason to believe Claimant was working exclusively for them based on Claimant's schedule and the number of jobs he completed. Claimant made his own business decisions as to how many jobs to accept, request, and whether or not to hire any assistants to help him with his work. When viewing the relationship, as a whole, and the many changes that took place on March 12, 2009 the ALJ has weighed all of the evidence and concludes that at all times on and after March 12, 2009 the relationship between the parties was more likely than not that of independent contractor/employer.

Claimant argues that the US Department of Labor Wage and Hour Division's Administrators opinion no. 2015-1 supports his argument that he is an employee and not an independent contractor. The ALJ rejects this argument. The Administrators opinion is intended to provide guidance regarding the application of the standards for determining who is an employee under the Fair Labor Standards Act. Although it is intended to provide guidance, it is not determinative nor is any one of its factors determinative as to whether a worker is an employee. The factors to consider per the Administrators opinion include: whether the work is an integral part of the employers business; whether the workers managerial skill affects the workers opportunity for profit or loss; the workers relative investment compared to the employer investment; whether the work performed required special skill or initiative; whether the relationship between the worker and the employer was permanent or indefinite; and the nature and degree of the employers control.

Viewing the factors outlined by the Administrators opinion, the ALJ concludes that analyzing the facts of this case and applying them to the guideline factors, the factors come out mixed and do not establish more likely than not that Claimant is an employee. The service work was an integral part of Employer's contract to sell and provide Pella products and was required to be done. Claimant did have the ability to affect his own profit or loss in his business by using his managerial skills. Claimant was able to accept more or less jobs, was able to reject jobs he thought would take too much time, was able to hire others, purchase additional tools or equipment, and was able to advertise for CP Window Service. Claimant purchased at least two vehicles for his business as well as several tools, computer, and internet/phone services to help him profit. The decisions not to hire employees, advertise, etc. were managerial decisions that Claimant made which impacted his bottom line. Claimant's investment compared to the investment of Employer was not as great, but Claimant did have a significant investment in his business by way of: vehicles; tools; computer; phone; internet and phone costs; insurance costs; and registration/filing fees for his business. Claimant

maintained these investments for his business from 2009 through 2013 when he was injured. Claimant's work required specialized skill and he performed his specialized skills installing and repairing windows and doors independently with no oversight from Employer. Claimant's contract had no term and was indefinite or permanent. Finally Employer did not have significant control over any meaningful aspects of Claimant's work. Claimant was free to accept/reject jobs as he saw fit. Claimant was able to contact customers to schedule the time of the job as he saw fit. Claimant performed the jobs with no oversight from Employer. Even viewing the guideline provided by the Administrators opinion, it fails to establish more likely than not that Claimant qualifies as an employee. The guideline factors applied to the facts of this case come out mixed and do not persuasively show that Claimant is an employee.

### ***Statutory Employer***

§ 8-41-401(3) C.R.S. provides that an individual who is excluded from the definition of employee shall not have any cause of action of any kind under the Workers' Compensation Act. See also *Pulsifer v. Pueblo Professional Contractors, Inc.*, 161 P.3d 656 (Colo. 2007). Independent contractors who have the option of obtaining workers' compensation insurance but fail to do so are barred from having a claim under the Workers' Compensation Act. *Stampados v. Colorado D&S Enterprises, Inc.*, 833 P.2d 815 (Colo. App. 1992). The court has held that the purpose of § 8-41-401(3) is "to encourage participation in the workers' compensation system and limit the exposure of those contractors who obtain coverage from lawsuits or claims brought by uncovered independent contractors who are injured on the job." *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. Div 5 2009). The limitation on damages set by the general assembly was "premised on the belief that when an individual 'chooses to opt out of Work[ers'] Comp[ensation] [he or she] can't have the best of both worlds." *Id*.

§ 8-41-404(1)(a), C.R.S. states that every person performing construction work on a construction site shall be covered by worker's compensation insurance and a person who contracts for the performance of construction work on a construction site shall either provide workers' compensation coverage for or require proof of workers' compensation coverage from, every person with whom he has a direct contract to perform construction work on the construction site. However, the statute also states that the section shall not apply to a sole proprietor who has filed a statement of trade name and has filed with the Division a form rejecting workers' compensation coverage. § 8-41-404(4)(a)(VI). A sole proprietor is entitled to elect workers' compensation coverage regardless of whether the sole proprietor employs any other person under any contract of hire, and may obtain workers' compensation coverage for himself. § 8-40-302(5)(b), C.R.S.; *Cavaleri v. Anderson*, 298 P.3d 237 (Colo. App. Div 3 2012).

In this case, Claimant was an independent contractor performing work for Employer. Claimant, as the sole proprietor of CP Window Service, was entitled to get workers' compensation coverage for himself. Although he had the option to obtain such insurance, Claimant chose to opt out. Since Claimant was not an employee at the time of his injury, he is not entitled to workers' compensation benefits. Additionally, since

Claimant was an independent contractor who opted out of coverage he also is not entitled to workers' compensation benefits.

The ALJ finds that Claimant understood the nature of the "Master Subcontractor Service Agreement" when he signed it on March 12, 2009. Prior to signing the agreement and prior to the meeting with Employer, Claimant had procured general liability insurance and had filed and registered CP Window Service with the Secretary of State. Claimant signed the agreement on March 12, 2009 and the following day after even more time to think it over and understand what he was doing, Claimant again expressly rejected workers' compensation coverage. Claimant again rejected workers' compensation coverage four months later in July of 2009. Additionally, Claimant reported to multiple medical providers and on his application for Social Security Disability benefits that he was a contract worker, self employed, and/or that he was unable to file a workers' compensation claim. This supports the conclusion that Claimant was aware of the relationship he was entering into with Employer and knowingly chose to decline workers' compensation coverage.

According to § 8-41-401(1)(a)(I), C.R.S. any company operating any business by contracting out any part of the work to any contractor, shall be construed to be an employer as defined by articles 40 to 47 of the Act and shall be liable to pay compensation for an injury resulting from said work to any contractor or employee of any contractor. However, § 8-41-401(3), C.R.S. provides that notwithstanding any provision of this section or section 8-41-402 to the contrary, any individual who is excluded from the definition of employee pursuant to section 8-40-202(2), or a working general partner or sole proprietor who is not covered under a policy of workers' compensation insurance…shall not have any cause of action of any kind under articles 40 to 47 of this title. In this case the ALJ concludes that Claimant is excluded from the definition of employee, is an independent contractor and sole proprietor who rejected coverage of workers' compensation insurance and thus Claimant has no cause of action under the Workers' Compensation Act and has failed to establish that he is a statutory employee of Employer.

## ORDER

It is therefore ordered that:

1. Claimant was an independent contractor of Employer on December 11, 2013.

2. Employer was not Claimant's statutory employer on December 11, 2013.

3. Claimant therefore did not suffer a compensable injury on December 11, 2013 and his claim for workers' compensation benefits is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman 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: November 25, 2015

/s/ Michelle E. Jones

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

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## ISSUES

- Did Claimant establish by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course and scope of her employment on April 30, 2014?
- Did the Claimant prove by a preponderance of the evidence that she is entitled to an award of reasonable, necessary and related medical benefits?
- If compensable, was the right shoulder surgery Claimant underwent reasonable, necessary and related to her industrial injury?
- If Claimant suffered a compensable injury, what was her average weekly wage?
- Did the Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability benefits from May 1, 2014 until terminated by law or order?

## FINDINGS OF FACT

1. On April 30, 2014, Claimant was employed by as a recreation instructor by Respondent, City and County of Denver. Claimant was hired by Respondent in 2012. This was a part-time position and Claimant worked at Swansea Elementary School in Denver.

2. In this position, Claimant would serve snacks to the children, including setting up the tables, serving the snack and then doing the clean up. She would set-up and pick up art supplies at the tables, as well as participate in sport activities, including volleyball, tetherball and basketball.

3. Some of Claimant's payroll records from 2014 were admitted into evidence. Claimant's hourly wage was $13.441346 per hour.

4. On April 30, 2014, Claimant went with a new employee to get snacks from the refrigerator. She was showing the new employee how to do this task. She picked up a crate that had milk cartons in it. Claimant estimated that the crate had 45-50 milk cartons in it. On top of the crate was a tray that had crackers on it. Claimant turned and was walking to a cart when she felt pain in her right shoulder, which caused her to

drop the crate.[1] The co-employee picked up the milk cartons from the ground and Claimant finished working that day.

5. Claimant testified that she reported the injury to Kurt Russell, whom she described as her supervisor at Community Parks and Rec. She also called the "Ouchline" to report her injury[2]. Claimant was referred to Concentra for treatment. Concentra was the designated ATP for Employer.

6. Claimant testified that she had not injured her right shoulder before April 30, 2014. There was no record of a prior injury to the right shoulder before the ALJ. The ALJ concludes Claimant suffered a compensable injury on April 30, 2014.

7. Claimant's medical history was significant for chronic low back pain including two (2) surgeries, prior carpal tunnel syndrome and mental health issues. In this regard, medical records from Denver Health, Concentra and Swedish Medical Center from 1997-2014 were admitted into evidence. Claimant was diagnosed with mental health and related issues by physicians at Denver Health. A history of substance abuse was noted in these records. She received treatment for right and left carpal tunnel syndrome at Concentra in 2007-08. She treated for chronic low back at Swedish Medical Center.

8. Aurora Ovalla testified on behalf of Respondent. She was hired in February, 2014 and worked with Claimant. She held the same instructor position as Claimant and stated they worked seventeen (17) hours per week. She was also present when Claimant registered a number of physical complaints for various parts of her body. She did not witness the alleged injury, but Claimant told her that she told her that she had pain in her right shoulder. Ms. Ovalla confirmed that the crate which held the milk cartons weighed 20-30 pounds. The tray on top could weight 5-10 pounds.

9. Claimant testified that she returned to work the following day, but was sent home because she was taking Percocet. Claimant confirmed that she took Percocet for an unrelated medical condition.

10. Claimant was examined on May 1, 2014 by Steve Danahey, M.D at Concentra. At that time, Claimant was noted to have pain in the right anterior and posterior shoulder, over the AC joint and the upper part of deltoid and trapezius muscles. Claimant's pain radiated to the right side of her neck. Slight swellin was noted on the frontal view exam. Dr. Danahey's assessment was shoulder pain (acute, strain of shoulder, trapezius strain). Dr. Danahey issued work restrictions of no lifting over 5 lbs; no pushing and/or pulling over 10 lbs; and no repetitive right shoulder motion.

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[1] The ALJ notes that Claimant provided the same description of her injury on the Patient Information form completed at Concentra on May 1, 2015. [Exhibit 2, page 11].

[2] Documents from the Ouchline were admitted at hearing. [Exhibit I, page 149].

11. The ALJ draws the inference that Dr. Danahey's restrictions precluded Claimant from performing her job duties, which included lifting the crates full of milk cartons. Because of these restrictions Claimant missed more than three shifts of work.

12. X-rays were taken of Claimant's right shoulder on May 1, 2014. The osseous alignment was normal at the glenohumeral joint. No acute injury or significant degenerative change was seen.

13. A physical therapy evaluation of Claimant was done on May 5, 2014 by Angela Wilt, PT. At that time, pain was noted along the suprascapular process. Claimant began physical therapy, which was to be 2x/wk for 2 weeks.

14. Dr. Danahey also examined Claimant on May 5, 2014. Claimant was unable to tolerate ROM tasks for her right shoulder due to pain complaints. Dr. Danahey's diagnoses and lifting restrictions were the same as the May 1st appointment. However, he ordered no use of the right arm. He also ordered an MRI.

15. Claimant returned for physical therapy on May 8, 2014. She reported no change in her right shoulder pain, but found the meds and sling helpful. No modified duty was available at work. Restrictions in Claimant's range of motion were noted by Angelo Wilt, PT. Some modalities of treatment were provided and home exercises were recommended.

16. Claimant had an MRI of the right shoulder on May 9, 2014. The films were read by Kevin Woolley, M.D., whose impression was acromial morphology which predisposes to rotator cuff impingement; tendinosis of the distal supraspinatus and infraspinatus tendons; no rotator cuff tendon tear; minimal subdeltoid bursitis; irregularity of the superior glenoid labrum which likely represents chronic degenerative tearing of the labrum, doubtful clinical significance, clinical correlation is advised.

17. Claimant returned to Dr. Danahey on May 13, 2014. She stated that she had upper back pain and right lateral shoulder pain to a degree that she had to take Oxycodone during the day. Limitations in range of motion, as well as weakness were noted on the right upper extremity. Dr. Danahey noted an MRI had been obtained showing tendinitis and bursitis, no RC tear, morphology predisposing impingement. Dr. Danahey thought an injection may need to be considered. He issued restrictions of no repetitive lifting over 5 pounds, no pushing/pulling over 10 pounds, no reaching above the shoulders.

18. An Employer's First Report of Injury (E-1) was filed on May 14, 2014. The E-1 listed the date of injury as 4/30/14. An individual named "Rose" (no last name) was listed as a witness and the injury was reported to Curtis Garrett. The E-1 described the injury as follows: "Claimant had bent over and lifted two crates, one had approx. 48 milk cartons, the other steel crate had crackers. She lifted both them out of the fridge. While walking to place them on the cart, she dropped them because she got R/shoulder pain." Claimant's average weekly wage was listed as $228.48.

19. Respondent filed a Notice of Contest on May 15, 2014. The reason the claim was being contested was listed as “further investigation for medical records and additional information”.

20. Claimant was evaluated by Dr. Danahey on May 20, 2014, at which time she was complaining of shoulder pain. Dr. Danahey recorded that Claimant wanted additional Percocet and was narcotics seeking. Claimant reported that she was taking Percocet per her PCP for her back, which she had not previously reported. Dr. Danahey stated Claimant was to get no additional narcotics. Dr. Danahey issued restrictions of no repetitive lifting over 10 pounds, no pushing/pulling over 15 pounds and noted she should continue to PT as scheduled. Claimant was referred for an orthopedic evaluation to consider an injection. MMI was anticipated in six weeks.

21. Respondent submitted a DVD documenting Claimant’s activities on May 28 and 29, 2014. (Exhibit M). Claimant was observed doing a number of activities, including entering and exiting a vehicle, walking and sitting. More particularly, the DVD documented the following:

May 28, 2014

12:17 p.m.: Claimant exited a house wearing a sling; kept right arm close to side.

12:38 p.m.: Claimant walking without a sling, held right arm close to side.

14:01 p.m.: Claimant was walking with no sling; was able to move right arm back and forth, then straightened it.

14:20-14:38: Claimant closed the car door with right hand, walked into store and was moving right arm and hand while using cell phone.

May 29, 2014

9:29 a.m.: Claimant walked to car with a purse in her left hand, paper in right (no sling). Claimant opened door with right hand.

9:43 a.m.: Claimant had purse on right arm, closed car door with right arm (no sling).

13:07 p.m.: Claimant was at a shopping mall, not wearing sling. Her purse was over her right shoulder and she was seen gesturing with the right hand, as well as using her right arm. At one point, she puts her hand down at her side.

13:42 p.m.: Claimant at jewelry store using right arm freely.

14:00 p.m.: Claimant opened car door with right hand/arm.

In summary, with the exception of the one segment where Claimant was seen wearing her sling (taken off 30 minutes later); she was able to move and use her right arm. There was no evidence that the right shoulder motion was restricted or that she was in pain. The ALJ infers that Claimant had significant improvement in her symptoms as evidenced by her activities on May 28-29, 2014.

22. Claimant was seen in consultation by Mark Failinger, M.D. on May 29, 2014. At that time, Claimant reported and pain and numbness in her right shoulder. Dr. Failinger noted pain with abduction isolated in the supraspinatus, with good external rotation strength. Dr. Failinger's impression was right shoulder rotator cuff tendinosis and degenerative labrum. Dr. Failinger did not impingement in Claimant's shoulder. Dr. Failinger stated that the pain Claimant was experiencing was "OUT OF PROPORTION to what I saw in the MRI" and thought it could be related to the high doses of narcotics Claimant was taking. Dr. Failinger recommended an injection, which Claimant wanted to try. Her right shoulder was injected at the May 29th visit.

23. The ALJ credits Dr. Failinger's opinion that Claimant was exaggerating her pain complaints, particularly given her activities as documented on the DVD. The ALJ also notes that Dr. Failinger's report provides support for the conclusion that Claimant had improved by May 29th.

24. Claimant returned to Ms. Wilt for physical therapy on June 2, 2014. At that time, she reported she received a cortisone injection on Friday and felt significant relief of right shoulder pain. She reported some soreness today "from using her arm this weekend, may be too much". Sharp pain in the anterosuperior shoulder joint region was noted at the evaluation. Claimant's diagnosis was shoulder pain (acute), and strain of shoulder, right and trapezius strain. Claimant was to continue therapy per treatment plan.

25. Claimant admitted at hearing that the reference in the medical records to using her arm too much over the weekend was accurate. These activities were not related to her employment with Employer. The ALJ infers that the increase in Claimant's symptoms was the result of an injury or aggravation that occurred over the weekend.

26. There were no additional records admitted into evidence which documented a return by Claimant to Concentra for completion of the physical therapy. The ALJ has no record that Claimant returned to Dr. Danahey.

27. An IME was performed on August 21, 2014 by Mark Paz, M.D. at Respondent's request. Dr. Paz noted tenderness on palpation of the right supraclavicular fossa and the sternoclavicular junction. Full range of motion was noted in her cervical spine. On Claimant's right shoulder, tenderness was noted over the clavicle and AC joint.

28. Dr. Paz' assessment was right shoulder pain, right shoulder rotator cuff strain, right shoulder impingement syndrome, right upper extremity parasthesias, polysubstance dependence, history of; drug abuse, history of; obstructive sleep apnea

obesity; depression; migraine headaches; lumbar degenerative disc disease; sciatica; hypothyroidism; panic attacks and fibromyalgia.

29. On the issue of causation, Dr. Paz concluded that based upon the direct history, the medical records (including MRI) it was medically probable that the right shoulder tendinosis was associated with the 4-30-14 event. Dr. Paz reviewed Claimant's prior medical records and noted she had no documented history of a right shoulder injury. Dr. Paz opined that Claimant was at MMI.

30. Claimant was examined by David Ziegler, M.D. at Denver Health on October 17, 2014. At that time, she was complaining of sharp pain radiating into the anterior portion of the arm. Claimant stated she had a history of pain for six (6) months after suffering and injury at work. She had conservative treatment including PT, RICE, NSAIDs, and TENS unit; none of which helped the pain. Dr. Ziegler noted mild tenderness to palpation along the right biceps tendon. Dr. Ziegler's assessment was right shoulder rotator cuff tendinopathy and impingement. He started her on a home exercise program and Claimant received a subacromial injection at this appointment.

31. Claimant returned to Dr. Ziegler on November 11, 2014. She reported pain relief from the injection for about one (1) week, but the pain returned. Claimant had tenderness over the right biceps tendon and AC joint on examination. She had positive Neer's and Hawkin's. Dr. Ziegler assessment was right shoulder pain secondary to rotator cuff tendinopathy, subacromial impingement and biceps tendonopathy and referred her for a surgical consultation.

32. Claimant had a surgical consultation with Jamie Stambaugh, M.D. and Jarrod King, M.D. at Denver Health on December 11, 2014. Dr. Stambaugh's report indicated that Claimant had started on conservative care at the Nonop Clinic, including PT and injections. She had pain over the anterior and superior portion of the right shoulder, along with tenderness over the greater tuberosity. On examination, she had positive impingement findings, positive Neer's and Hawkin's tests. The impression of the physicians was right shoulder impingement. Surgical options were discussed (including right shoulder scope, subacromial decompression, evaluation of rotator cuff and biceps tenodesis) with the Claimant and she elected to go forward with surgery.

33. The ALJ finds that Claimant's pain complaints were more extensive than those noted on May 29th, the last time Dr. Danahey examined her. In particular, Claimant had pain associated with rotator cuff tendinopathy and shoulder impingement. Although Claimant's history of an injury was documented, no opinion was provided by Dr. Ziegler or King that the right shoulder impingement was the result of the injury.

34. Claimant underwent surgery on her right shoulder on February 18, 2015, which was performed by Dr. King. Dr. King's preoperative diagnoses were right shoulder pain and right shoulder impingement. The surgical procedures performed included arthroscopic subacromial decompression and acromioplasty; arthroscopic lysis of adhesions and release of glenohumeral arthrofibrosis; and arthroscopic debridement of partial articular-sided supraspinatus tendon avulsion. Dr. King's post-operative

diagnoses were right shoulder subacromial bursitis, right shoulder glenohumeral arthrofibrosis, and right shoulder partial articular-sided supraspinatus tendon avulsion (less than 5% of the tendon involved).

35. Dr. Paz testified as an expert in internal medicine and was Level II accredited pursuant to the W.C.R.P. Dr. Paz described the anatomy of the shoulder in connection with Claimant's injury and surgery. He noted that the acromion bone is a projection off of the scapula, is joined by ligaments to the clavicle. That forms the roof of this pathway for the supraspinatus to pass through to join the humerus., which is otherwise a confined space. Over time and with repetitive injury and recurrent injury, along with arthritis, the space can narrow and compress the supraspinatus muscle in particular. Dr. Paz went on to describe the small fluid-filled sac called the bursa, observing that the bursa can become inflamed when pressure and repetitive motion irritate it. Normally it is paper thin and it is just a lubricating surface. However, with inflammation it fills with fluid and it causes more compression within this tunnel pathway for the suprasinatus and it will compress the supraspinatus. Dr. Paz concluded that this mechanism of injury did not involve elevation above the shoulder and would not cause impingement syndrome

36. Dr. Paz opined that impingement syndrome is not typically caused by an acute injury. Instead, with impingement syndrome, the patient will present with symptoms of increasing shoulder discomfort. . Dr. Paz described impingement as a "chronically evolving condition" that was typically insidious.

37. The ALJ finds Dr. Paz' explanation persuasive and notes that Claimant was not performing a task for Employer on April 30, 2014 that would have caused impingement syndrome. The mechanism of injury led her to develop tendinosis, but not the impingement. The ALJ further concludes that Claimant's need for surgery was not related to the industrial injury, as it was for the shoulder impingement.

38. The ALJ finds that Claimant developed impingement syndrome in the right shoulder as a result of either a repetitive injury or degeneration over time or a traumatic event while reaching overhead. However, the injury of April 30th did not cause the impingement syndrome. The surgery Claimant underwent on 2-28-15 was to treat right shoulder impingement.

39. The surgery Claimant underwent requires prior authorization, pursuant to the W.C.R.P. The ALJ takes administrative notice of the W.C.R.P. The ALJ finds that no request for authorization was made prior to the shoulder surgery.

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

## CONCLUSIONS OF LAW

### Generally

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

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

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

### Compensability

Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." *See CF & I Steel Corp. v. Industrial Commission,* 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. (term "injury" includes disability resulting from accident or occupational disease.

The question of whether the Claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment 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) (proof of causation is threshold requirement that must be established before

any compensation is awarded); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999) (Claimant seeking benefits for occupational disease must establish existence of the disease and that it was directly and proximately caused the conditions of employment).

As determined in Findings of Fact 4-6, Claimant satisfied her burden of proof that she suffered an injury arising out of and in the course and scope of her employment. The ALJ notes first, Claimant made a timely report of the injury and that her description of the incident was consistent both in what she reported on the Ouchline and Dr. Danahey, as well as her testimony at hearing. Dr. Danahey's notes and the physical therapy records establish that Claimant suffered a shoulder strain/sprain and sprain of the trapezius. Slight swelling was noted by Dr. Danahey when he first evaluated Claimant. The act of lifting and carrying the milk cartons could cause an injury of this type and under the circumstances described, Claimant proved that it was more probable than not that she was injured in this fashion.

Second, the ALJ determined that Claimant established that she was performing the task of lifting the crates when she was injured. Support for this conclusion was found in the Employer's First Report of Injury, which documented the incident and noted there was a witness ("Rose"). No evidence was submitted by Respondent which directly contradicted Claimant's version of events on April 30th. No independent witness or documentary evidence dispelled the conclusion that Claimant suffered an injury on April 30, 2014.

Third, the ALJ notes that Dr. Paz concluded that there was no evidence of a prior injury to Claimant's right shoulder before April 30, 2014. The ALJ was persuaded that it was more probable than not that her right shoulder tendinosis was associated with her work activities that day. Therefore, the ALJ finds that Claimant suffered a compensable industrial injury that day.

**Subsequent Intervening Injury**

The ALJ concluded Claimant suffered a compensable injury arising out of her employment. However, this does not end the inquiry. While Claimant suffered a compensable injury, the evidence presented at hearing leads to the conclusion that any disability resulting for this was short-lived. After receiving treatment at Concentra for approximately one (1) month, although Claimant continued to subjectively report significant pain, she had far less by way of objective findings. Dr. Failinger's May 20th report is evidence of this. Also, the surveillance video admitted into evidence documented use of her right arm and shoulder with no evidence of pain and/or restriction with this use.

More importantly, the medical records document that Claimant suffered and intervening injury and/or aggravation of her right shoulder over the weekend of May 31-June 1, 2014. This was documented in the physical therapy note of June 2nd. Finding of Fact 24. Claimant's testimony at hearing confirmed this fact. Finding of Fact 25. The Colorado Worker's Compensation Act provides that all results proximately and

naturally flowing from an industrial injury are compensable. *Standard Metals Corp. v. Ball,* 172 Colo.510, 474 P.2d 622, 625 (Colo. 1970). However, when Claimant suffers a later accident or injury, the law does not contemplate that Claimant would receive additional compensation or medical treatment if it resulted from the subsequent or intervening injury. *Post Printing Publishing Co. v. Erickson,* 94 Colo.382, 384 (Colo. 1934). Whether a particular condition is the result of an independent intervening cause is a question of fact to be resolved by the ALJ. *Owens v. ICAO,* 49 P.3d 1187, 1188-1189 [citing *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, *supra].*

In the case at bench, Claimant was engaged in activities over the weekend of May 31-June 1 that caused either a new injury or aggravation of her right shoulder condition. This constituted a subsequent intervening event that serves to terminate the liability of Respondent. This is similar to *Post Printing Publishing Co. v. Erickson, supra,* 94 Colo. at 383-384. In that case, Claimant originally sustained a compensable injury to his right knee, then broke his right ankle after slipping on an icy sidewalk. Rejecting the argument that the compensable injury weakened his condition and should be considered a natural and proximate development of the original injury, the Colorado Supreme Court concluded that the second injury was the result of an efficient intervening cause and the employee was not entitled to additional compensation. *Id.*

This is distinguished from the situation in *Standard Metals Corp. v. Ball, supra*, 474 P.2d at 624-625 where Claimant suffered a fracture to his leg and then re-fractured the leg. The Colorado Supreme Court determined that the industrial injury directly caused a weakness in the leg bone, noting that expert testimony supported the finding that a direct causal connection was present. This weakness caused the re-fracture, which was found to be compensable. *Id.*

In the present case, Claimant's activities over the May 31-June 1 weekend caused additional symptoms. The injury and/or aggravation sustained at that time constituted an intervening injury. Claimant then received medical treatment almost six (6) months later. She was subsequently diagnosed with impingement of the right shoulder and underwent surgery for the impingement. Dr. Paz opined that the impingement was not related to the industrial injury. Findings of Fact 35-36. Claimant proffered no evidence to the contrary to rebut this opinion. Therefore, the ALJ determines that the injury and/or aggravation constituted an intervening injury and was not a result of the industrial injury. Claimant is not entitled to additional compensation or medical benefits.

**Medical Benefits**

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, surgical, dental, nursing, and hospital treatment, 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.

Under this provision of the Act, Claimant has the burden of proving his/her entitlement to medical benefits. If Claimant meets this burden, Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). 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). There are multiple issues in the case at bench, starting is whether Claimant established that she required medical treatment to cure and relieve the effects of the April 30th injury. Also the ALJ must determine whether the shoulder surgery was reasonable, necessary and related to her industrial injury, as well as whether this procedure was authorized.

As found, Claimant sustained an admitted industrial injury on April 30, 2014 and is therefore entitled to receive medical treatment that will cure and relieve the effects of said injury. Respondent provided treatment when it sent Claimant to its ATP at Concentra. Respondents are liable for said treatment.

As to Claimant's treatment at Denver Health, including the surgery performed on the right shoulder, the question is whether the need for treatment was caused by the injury. Where the 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 is sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of proof is generally a factual question for resolution by this ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). This ALJ's factual determination must be supported by substantial evidence and plausible interferences drawn from the record. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

As found, Claimant's activities over the weekend (May 30-June 1) were the cause of a significant increase in her pain complaints, including her inability to participate in some of the physical therapy exercises. Any treatment Claimant required to address this increase in symptoms is not causally related to the industrial injury.

Moreover, the testimony of Dr. Paz persuaded the ALJ that the surgery Claimant underwent was not related to her industrial injury. He opined that to the extent that the surgery addressed impingement syndrome, it was not related to the April 30th injury.

Last, there was no evidence that Claimant's treating physicians at Denver Health requested prior authorization for the February 28, 2015 surgery. This was required by the W.C.R.P. Respondent is not liable for said treatment absent a request for prior authorization.

Therefore, Claimant is not entitled to medical benefits after May 30, 2014.

**AWW**

As found, Claimant's hourly wage was $13.441346 per hour. There was contradictory testimony as to the number of hours those instructors working for

Employer worked per week. The ALJ utilized the actual payroll records from Employer [Exhibit 4]. These records are summarized as follows:

| Period | Paycheck date | Total hours | Total pay |
|---|---|---|---|
| 2/9/14-2/22/14 | 2/28/14 | 43.5 | $584.70 |
| 2/23/14-3/8/14 | 3/14/14 | 33.0 | $443.56 |
| 4/6/14-4/19/14 | 4/25/14 | 15.5 | $208.34 |
| 4/20/14-5/3/14[3] | 5/9/14 | 34.75 | $467.09 |
| | | | **$1,703.69** |

Each of the aforementioned pay periods covered approximately two (2) weeks [13 days per period]. Using the actual wages for all of the payroll records admitted, the ALJ calculated Claimant's average weekly wage to be $212.96 per week [$1,703.69/ 8=$212.96]. However, the period of 4/6/14-4/19/14 appears to be an outlier, which reduces the AWW.

The ALJ also considered the average number of hours Claimant worked for the three periods in which she worked the full period. Using this method of calculation, Claimant worked an average of 18.54 hours per week [111.25 hours /6= 18.54] X $13.441346=$249.22. The ALJ has concluded that this is a fair calculation of the AWW given Claimant and Ms. Ovalla's testimony. Therefore, the ALJ finds that Claimant's AWW was $249.22.[4]

**TTD**

Claimant testified that she returned to work the day after the injury and was sent home because she was taking Percocet. Claimant took this medication for a condition unrelated to her industrial injury. She did not work after she was injured. Respondent argued that no TTD benefits should be awarded because it was a non-industrial condition which precluded Claimant from working. However, the ALJ concludes that Claimant's shoulder injury caused Claimant to sustain a wage loss.

As found, Claimant was given work restrictions by the ATP, Dr. Danahey on May 1, 2014. These restrictions included a lifting restriction of no lifting over 5 lbs; no pushing and/or pulling over 10 lbs; and no repetitive right shoulder motion. These restrictions precluded Claimant from working as an instructor for Employer. The impairment of earning capacity may be evidenced by a complete inability to work or by

[3] Even though this period included the date of injury, Claimant averaged 17.37 hours for each of these weeks.

[4] Respondent argued that Claimant's AWW was $275.10, which was described as the state minimum AWW. However, this was scheduled impairment rate on 4/30/14.

restrictions which impair Claimant's ability to effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595 (Colo. App. 1998). Dr. Danahey continued Claimant's work restrictions when subsequently examined her. Therefore, Claimant is entitled to TTD based upon the fact that her restrictions precluded her from performing the instructor job, at least through May 30, 2014.

As noted *supra,* Claimant either aggravated her industrial injury or suffered a new injury on the weekend of May 31-June 1, 2014. Claimant was engaged in physical activity which caused her right shoulder additional injury. That new injury and or aggravation was the cause of any disability following starting May 31, 2014. There was no evidence that Claimant continued to be disabled after that time as Claimant did not return to Respondent's designated ATP. Absent evidence that she continued to have an impairment of earning capacity related to the industrial injury, Claimant is not entitled to recover TTD benefits. The intervening injury serves to cut-off any liability of Respondent for TTD after May 30, 2014

In addition, the ALJ concluded that the impingement syndrome was not a result of her Claimant's industrial injury. The evidence established that the surgery she underwent in February, 2015 was not to address the results of the industrial injury. As such she is not entitled to temporary disability benefits following the surgery. Therefore, Claimant is not entitled to receive TTD benefits after May 30, 2014.

## ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury arising out of and in the course and scope of employment on April 30, 2014.

2. Respondent shall pay Claimant TTD benefits from May 1- May 30, 2014 at the rate of $166.15 per week.

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

4. Claimant's request for an order requiring Respondent to pay for medical benefits related to the treatment Claimant received at Denver Health is denied and dismissed.

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: November 25, 2015

**Digital signature**

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-950-990-03

**FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

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Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 15, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/15/15, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant's Exhibits 1 through 11 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 established a post hearing briefing schedule. The Claimant's opening brief was filed, electronically, on October 19, 2015. The respondents' answer brief was filed, electronically, on October 21, 2015. The Claimant was given the option of filing a reply brief within 2 days of the answer brief, or by October 23, 2015. No timely reply brief was filed and the matter was deemed submitted for decision on October 26, 2015.

## ISSUE

The issue to be determined by this decision concerns a conversion from a scheduled rating to a whole person rating, specifically, whether the Claimant sustained functional impairment beyond the arm at the shoulder so as to justify conversion of his admitted 16% left upper extremity (LUE) scheduled impairment rating to a 10% whole person impairment? The Claimant accepts the four corners of authorized treating physician John D. Sanidas, M.D., May 27, 2015 medical opinions and is not seeking to overcome opinions concerning maximum medical improvement (MMI), degree of permanent impairment, or causal relatedness of related conditions. Consequently, the Claimant's burden of proof is 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. Prior to February 8, 2014, the Claimant had no symptoms or functional limitations in his left shoulder, trapezius, or left neck muscles.

2. On February 8, 2014, the Claimant sustained an admitted compensable injury to his left shoulder in his employment as a split shift worker, where he worked part of his time as a car washer/vehicle fueler and part-time as a primary sorter for the Employer. The Claimant was injured while attempting with a co-worker to lift a 50 pound box onto a conveyor belt that was at the Claimant's eye level and he felt something in his left shoulder.

3. The Claimant underwent a course of medical treatment which resulted in surgery on July 1, 2014, performed by authorized treating physician (ATP) Michael Hewitt, M.D [*See* Claimant's Submission Tab 5, Bate Stamp (BS) 17-19]. On July 1, 2014, the Claimant underwent the following procedures:

   a. Left shoulder arthroscopic rotator cuff repair;
   b. Arthroscopic subacromial decompression;
   c. Distal clavicle co-planing; and,
   d. Examination under anesthesia, left shoulder.

*Id*.

4. On the Claimant's demonstrative Exhibit 11, Claimant's retained expert Ronald Swarsen, M.D., diagramed on a representation of the shoulder where the Claimant's operations occurred. Dr. Swarsen demonstrated the left shoulder arthroscopic rotator cuff repair on Claimant's Exhibit 11 in red ink, the arthroscopic subacromial decompression in blue ink, and the distal clavicle co-planing in orange ink. Dr. Swarsen then placed a green line which demarcated the glenohumeral joint and he testified that the Claimant's medical procedures all occurred above the glenohumeral joint.

5. Following the Claimant's surgery, and subsequent to physical therapy, the Claimant was placed at maximum medical improvement (MMI) by ATP Dr. Sanidas on May 27, 2015. ATP Dr. Sanidas assigned the Claimant a 16% LUE impairment rating which he converted to a 10% whole person impairment rating, as required by the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment,* 3rd. Ed., Rev (hereinafter the "*Guides"*).

6. On June 12, 2015, the Respondents filed a Final Admission of Liability (FAL) accepting ATP Sanidas' 16% LUE and admitting to maintenance medical benefits.

7. On July 2, 2015, the Claimant filed an Application for Hearing requesting conversion of the 16% extremity rating into a 10% whole person rating "based upon the site of permanent functional impairment."

8. On July 30, 2015, the Respondents filed a Response to Application for Hearing, indicating that that only issue for consideration was that "injury appropriate as scheduled rating."

**Conversion**

9. Prior to the hearing, the Claimant was evaluated by the Respondents' retained expert Lawrence Lesnak, D.O., who issued an initial report on March 24, 2015 and an addendum on March 25, 2015 (*See* Claimant's Exhibits 9 and 10).

10. At hearing, the Claimant, Ronald Swarsen, M.D. (the Claimant's retained expert) and Lawrence Lesnak, D.O., testified.

**The Claimant**

11. The Claimant's testimony about his pain and discomfort was essentially undisputed. In fact, the Respondents' expert, Dr. Lesnak, was of the opinion that the Claimant "exhibited no pain behaviors or non-physiologic findings."

12. As a result of his admitted left shoulder injury, the Claimant wakes up at night when he rolls on his left shoulder.

13. As a result of the associated pain with his left shoulder injury, the Claimant has to turn his entire body and cannot turn his neck as he did prior to his injury to look

over this left shoulder when changing lanes in traffic or looking over his shoulder to back up his truck. Additionally, the Claimant has changed how he puts on his shirts, due to pain in the shoulder.

14. The Claimant has aching pain in the left shoulder which he describes as "in the shoulder area." He also has tightness in the trapezius muscle and left side of the body and he indicated that he has radiating pain from the seam of the shoulder into the base of the neck.

15. The Claimant experiences pain in his shoulder when he raises his left arm above his body, then maintains it there for any period of time.

16. Although the Claimant has no permanent restrictions, he still deals with pain on a daily basis and chooses to work through the pain.

17. The Claimant experiences pain at the left shoulder from the seam up into the base of the neck and in the back between the spine in the area of the scapula when he moves the arm in various planes.

**Ronald Swarsen, M.D. –Claimant's Independent Medical Examiner (IME)**

18. At the Claimant's request, Ronald Swarsen, M.D., performed a medical records review and testified at hearing. Dr. Swarsen expressed the opinion that the surgery performed by ATP Dr. Hewitt, was to structures above the glenohumeral joint (which is **above** the shoulder and not **at** or **below** the shoulder). Dr. Swarsen's opinions corroborate the opinions of ATPs Jay Raschbacher, M.D., Dr. Hewitt, and Dr. Sanidas. Dr. Swarsen's opinions are based on a thorough study of the medical records. The ALJ infers and finds that an actual physical examination of the Claimant by Dr. Swarsen was unnecessary and would not have added to the bases of his opinions.

19. Dr. Swarsen illustrated his testimony by marking the sites that make up the muscles of the shoulder on the Claimant's Exhibit 11, which consists of an anatomical chart of the shoulder and the surrounding structures. Dr. Swarsen stated the opinion that the areas where the Claimant complains of pain correctly belong to the shoulder and not the arm. Dr. Swarsen is of the opinion that the Claimant's complaints of ongoing pain are localized to the muscles and structures of the shoulder. Dr. Swarsen stated that it was common for a patient with the Claimant's injury and surgery to have the Claimant's type of pain complaints.

**Respondents' IME, Lawrence Lesnak, D.O.**

20. Dr. Lesnak, at the request of the Respondents, performed an examination, medical records review and testified at hearing. Dr. Lesnak stated the opinion that "there is absolutely no evidence that [Claimant] has any type of functional limitation proximal to his left shoulder joint and left upper extremity" (*See* Claimant's Exhibit 9, BS 60).

21. Dr. Lesnak's opinion, however, is directly contrary to the subjective complaints he took from the Claimant following his examination on March 24, 2015. This fact significantly undermines the overall credibility of Dr. Lesnak's opinion that "there is

**absolutely** (emphasis supplied) no evidence that [Claimant] has any type of functional limitation proximal to his left shoulder joint and left upper extremity." In that examination Dr. Lesnak noted that:

> "[Claimant] complains of frequent left-sided subscapular pains that occur with any type of lifting of his left arm. He also has nearly constant mild pain and aching sensations throughout his anterior, lateral, and posterior shoulder region that do not appear to be associated at this point in time with any activities. He states that he has persistent numbness in his left upper or lateral arm that began after the surgical procedure took place on 07/01/2014. Sometime in November, 2014, he developed some left scapular numbness. He states that he has difficulties sleeping on his left shoulder because of his symptoms and he states that his symptoms seem to be worse with any type of activities at or above the shoulder level."

(*See* Claimant's Exhibit 9, BS 57).

22. Dr. Lesnak's description of the Claimant's symptoms are consistent with the Claimant's testimony at hearing, as well as the medical records tendered by the parties. His opinion that the impairment is only to the arm, however, is contrary to that of ATP Sanidas, who is of the opinion that the Claimant's impairment is to the left shoulder (*See* Claimant's Exhibit 3, BS 11-13), ATP Raschbacher, who on January 26, 2015 gave the opinion that "the situs of impairment is and would be the shoulder itself" (*See* Claimant's Exhibit 7, BS 49), and Michael Hewitt, M.D.'s, operative report which only addresses surgery to the "left shoulder" (*See* Claimant's Exhibit 5, BS 17-19).

**<u>Ultimate Findings</u>**

23. The ALJ finds the Claimant's testimony about his physical complaints credible and virtually undisputed. Further, the ALJ finds the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewitt and Dr. Raschbacher more persuasive and credible than the opinions of Dr. Lesnak. Indeed, the ultimate opinion of Dr. Lesnak is inconsistent with his observations as illustrated in Finding No. 21 herein above and his opinion is contrary to the weight of the evidence. Therefore, Dr. Lesnak's opinions are neither persuasive nor credible.

24. Between conflicting opinions, the ALJ makes a rational choice to accept the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewiit and Dr. Raschbacher, and to reject the opinions of Dr. Lesnak.

25. Accepting the four corners of ATP Dr. Sanidas' rating report, the ALJ finds that the totality of the evidence supports the proposition that Dr. Sanidas' converted rating of 10% whole person is the appropriate rating because the site of the Claimant's functional impairment transcends the shoulder.

26. The Claimant has proven, by a preponderance of the evidence that the site of his functional impairment is above the left shoulder not at or below the left shoulder. Indeed, the Claimant has proven, by preponderant evidence that the admitted injury of February 8, 2014, caused anatomical, structural injury above the shoulder and not **at** or **below** the left shoulder.

## 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 is, essentially, undisputed.*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 further found, the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewitt and Dr. Raschbacher were more persuasive and credible than the opinions of Dr. Lesnak. Indeed, the ultimate opinion of Dr. Lesnak was inconsistent with his observations as illustrated in Finding No. 21 herein above and his opinion was contrary to the weight of the evidence. Therefore, as found, Dr. Lesnak's opinions were neither persuasive nor 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, between conflicting opinions, the ALJ made a rational choice to accept the opinions of Dr. Swarsen, Dr. Sanidas, Dr. Hewitt and Dr. Raschbacher, and to reject the opinions of Dr. Lesnak.

**Conversion**

c. Where a claimant suffers an injury not enumerated in § 8-42-107 (2), C.R.S., the claimant is entitled to whole person impairment benefits under § 8-42-107 (8), C.R.S. In the context of § 8-42-107(1), C.R.S., the term "injury" refers to the manifestation in a part or parts of the body which have been functionally impaired or disabled as a result of the industrial accident. *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996)*; Martinez v. Albertsons*, W.C. No. 4-692-947 [Indus. Claim Appeals Office (ICAO), June 30, 2008]. The determination of the site of functional impairment is distinct from a claimant's medical impairment rating; and, upper extremity impairment ratings contained in the AMA *Guides* may, or may not, be consistent with the scheduled injury ratings contained in § 8-42-107(2), C.R.S. *See Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo.1996). Indeed, there is a

disconnect between the statutory schedule ("at or below the shoulder") and the AMA *Guides.* Apparently, for this reason, the ICAO and the Court of Appeals came up with "the site of functional impairment" test.

d. When an injury results in a permanent medical impairment not set forth on a schedule of disabilities, an employee is entitled to medical impairment benefits paid as a whole person. See § 8-42-107 (8) (c), C.R.S. Section 8-42-107(1) (a), C.R.S., limits medical impairment benefits to those provided in section (2) where a claimant's injury is one enumerated in the schedule. The schedule of injuries includes the loss of the "*arm at the shoulder".* See § 8-42-107(2) (a), C.R.S. The "shoulder," and "above the shoulder" is not listed in the schedule of impairments. See *Martinez v. Albertsons*, *supra*; *Maree v. Jefferson County Sheriff's Department*, W.C.No. 4-260-536 (ICAO, August 6, 1998); *Bolin v. Wacholtz*, W.C.No. 4-240-315 (ICAO, June 11, 1998).

e. Although § 8-42-107(2) (a), C.R.S., does not define a "shoulder" injury, a dispositive issue is whether the Claimant has sustained a functional impairment to a portion of the body listed on the schedule of disabilities. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366 (Colo. App. 1996). It is the function of the ALJ to determine, as an evidentiary proposition, the site of functional impairment, not necessarily the site of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities, or whether it transcends the extremity listed on the schedule. As found, the Claimant's injury transcends the left shoulder.

f. Whether a claimant has suffered the loss of an arm at his shoulder within the meaning of § 8-42-107(2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8) (c), C.R.S., is for a factual determination on a case by case basis. See *DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Martinez v. Albertson's, supra*; *Keebler Company v. Indus. Claim Appeals Office*, 02CA1391 (Colo. App. 2003) (NSOP).

g. Pain and discomfort which limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. See *Langton v. Rocky Mountain Healthcare Corp.*, 937 P.2d 883 (Colo. App. 1996); *Eidy v. Pioneer Freightways*, W.C.No. 4-291-940 (ICAO, August 4, 1998); *Beck v. Mile Hi Express, Incorporated*, W.C. No. 4-238-483 (ICAO, February 11, 1997).

h. As found, the Claimant suffers pain at the top of his left shoulder, which limits his ability to perform the function of lifting above the head, sleeping and turning his head, a potential job hazard in his work of moving the Employer's trucks from the wash bay to the gas pumps. As found, the Claimant functional impairment is above the arm and not on the schedule of impairments. *See Phase II Company v. ICAO*, [97 CA 2099 (Colo. App. September 3, 1998)] (NSOP)

i. As found , the Claimant's credible and virtually undisputed testimony confirms that the presence of pain, discomfort, and loss of function to the structures of his left shoulder and not his arm. There is substantial evidence that the Claimant has suffered a functional impairment beyond or above the arm at the shoulder. See *City*

*Market v. Indus. Claim Appeals Office,* 68 P.3d 601 (Colo. App. 2003). Specifically, the Claimant suffers a functional loss in the left trapezius muscle and the area of the left shoulder joint, which are beyond the arm and are to the shoulder girdle. Thus, a whole person award is appropriate. *See Brown v. City of Aurora,* W.C. No. 4-452-408, (ICAO, Oct. 9, 2002). The Claimant's left shoulder causes pain and reduced function in the structures which are above the shoulder joint.

j. The Claimant's shoulder causes pain and reduced function in structures which are above the shoulder joint. Thus, his injury should be compensated as a whole person, because the site of his functional impairment is **off** the schedule. *See Velasquez v. UPS*, W.C.No. 4-573-459 (ICAO April 13, 2006); *Heredia v. Marriot*, W.C.No. 4-508-205 (ICAO, September 17, 2004); *see also Smith v. Neoplan USA Corporation*, W.C.No. 4-421-202 (ICAO, October 1, 2002); *Colton v. Tire World*, W.C.No. 4-449-005 (ICAO, April 11, 2002); *Guillotte v. Pinnacle Glass Company*, W.C.No. 4-443-878 (ICAO, November 20, 2001); *Copp v. City of Colorado Springs*, W.C.No. 4-271-758; 4-337-778 (ICAO, January 24, 2001); *Olson v. Foley's*, W.C.No. 4-326-898 (ICAO, September 12, 2000); *Gonzales v. City and County of Denver*, W.C.No. 4-296-588 (ICAO, September 10, 1998).

**Burden of Proof**

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 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 of proving that his permanent impairment is 10% whole person.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the Claimant permanent partial disability benefits, based on 10% whole person permanent medical impairment, from May 27, 2015 and continuing until paid in full.

B. The Respondents are entitled to a credit for all scheduled disability benefits paid pursuant to the Final Admission of Liability, dated June 12, 2015.

C. 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.

DATED this_____day of November 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 November 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

## ISSUES

Whether the claimant carried her burden to establish by a preponderance of the evidence that the medical benefits at issue, specifically the bills associated with emergency room visits at Penrose St. Francis Hospital in May 2015 and the dental treatment she received in April 2015 and June 2015, were related to and reasonable and necessary for the work-related injury.

## FINDINGS OF FACT

1. On May 19, 2014, the claimant sustained an admitted industrial injury while vacuuming in the course of her employment as a housekeeper. The claimant's accident happened when the vacuum's plug came out of an electrical socket and she struck her head on a shelf when she arose after reaching down to pick up the cord.

2. On May 19, 2014, the claimant underwent a CT scan of the head, which was negative for any acute intercranial injury.

3. On June 12, 2014, the claimant was seen by neurologist Adam Graham, M.D., who diagnosed a concussion, but opined that her ongoing symptoms, which have reportedly included nausea, dizziness, blurred vision, vertigo, and falls, were disproportionate to the accident and might be explained by her preexisting fibromyalgia.

4. On June 30, 2014, the claimant underwent a second CT scan of the head, which was also negative for evidence of any brain injury.

5. On July 2, 2014, the claimant was seen by Ingrid Carlson, M.D., who noted that she was theatrically stumbling in the waiting room before the examination. Dr. Carlson opined that the claimant's symptoms were disproportionate to the accident and there were no objective findings to explain her reported visual disturbances. Dr. Carlson recommended a personality evaluation and counseling.

6. On August 14, 2014, the claimant followed-up with Dr. Graham, who again opined that her symptoms were disproportionate to the accident.

7. In March or April 2015, the claimant fell and struck her mouth against a door frame in her residence, causing injuries to her mouth and teeth. The claimant contends that she fell due to dizziness stemming from the work-related injury. The claimant contacted the adjuster in her workers' compensation claim and the claimant was told to see Dr. James.

8. On April 10, 2015 the claimant was seen by Dr. James who noted that the claimant was reporting that she was getting dressed normally, then fell against a door frame and hit her mouth and broke her teeth. No specific date for this incident was provided.

9. On April 30, 2015, the claimant was seen at Rocky Mountain Prosthetic Dentistry, where her medical provider diagnosed a broken denture and recommended a remake of the denture and endodontic treatment of tooth number 27.

10. The claimant testified that she developed an infection in her mouth due to her dental injuries, which made it difficult for her to eat and therefore led to dehydration. The claimant visited the emergency room at Penrose St. Francis Hospital twice due to these problems between May 25, 2015 and May 28, 2015.

11. On May 5, 2015, Jeff Raschbacher, M.D. issued a report in which he opined that he could not clearly relate the claimant's syncopal episodes to the work-related injury, because patients with mild traumatic brain injuries typically improve over time.

12. On June 3, 2015, Al Hattem, M.D. issued a report in which he also questioned the causal relationship between the work-related injury and the claimant's cognitive symptoms, because patients with head injuries typically improve over time.

13. On June 8, 2015, the claimant was examined by John Hildebrandt, DDS and reported needing to have six teeth removed. Dr. Hildebrandt observed that x-rays were negative for any bony pathology, however, and instead opined that the claimant's denture simply did not fit well. Dr. Hildebrandt referred the claimant to Dr. Todd Pickle to evaluate the denture, in addition to recommending a psychiatric evaluation. The claimant testified that she saw Dr. Pickle on June 9, 2015, who rendered the corresponding dental treatment.

14. On August 6, 2015, the claimant was evaluated by neurologist Stanley Ginsburg, M.D., who diagnosed a minor closed-head injury and recommended a psychiatric evaluation. Dr. Ginsburg opined that most head injuries improve or stabilize,

but the claimant's has deteriorated; her constellation of symptoms is unusual; and there is evidence to suggest that some of her findings may be non-physiological.

15. The claimant testified that she uses marijuana on a daily basis for headaches.

16. Dr. Ginsburg testified that it is not probable that the claimant's alleged fall in March 2015 was caused by the work-related injury. To this end, Dr. Ginsburg explained that 90% of patients with similar injuries stabilize or improve; most people get better quickly; he would expect a recovery over a reasonable amount of time even with a more significant head injury; it is highly unusual to develop additional symptoms as the claimant has reported; his examination of the claimant's cranial nerves demonstrated that her eye movements were normal; the CT scan results did not reveal a significant brain injury; and the claimant's gait is abnormal, but in a very non-physiological way. Dr. Ginsburg further testified that it would be highly unusual for someone to sustain dental injuries by falling mouth-first into an object in the absence of some force from behind.

17. The ALJ finds the opinions of Dr. Ginsburg to be credible and more persuasive than medical evidence and opinions to the contrary.

18. The ALJ finds that the claimant has failed to establish that it is more likely than not that any injuries occurring as a result of a fall into a door frame in the March or April 2015 time frame were causally related to her industrial injury of May 19, 2014.

## CONCLUSIONS OF LAW

1. The claimant had the burden to prove her entitlement to the medical benefits at issue by a preponderance of the evidence. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which would lead the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

2. An employer is responsible for the direct and natural consequences which flow from a compensable injury. *Travelers Ins. Co. v. Savio,* 706 P.2d 1258 (Colo. 1985).

3. Even after an admission is filed, however, the respondents retain the right to dispute the relatedness of continuing treatment. This principle recognizes that the mere admission that an injury occurred cannot be construed as a concession that all

subsequent conditions and treatments were caused by the admitted injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997).

4. The respondents are only liable for those medical benefits which are related to and reasonable and necessary for the work-related injury. *Section 8-42-101(1)(a), C.R.S.*

5. Based on the Findings of Fact, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that her need for the medical benefits at issue, specifically the bills from the emergency room visits at Penrose St. Francis Hospital in May 2015 and the dental treatment she received in April 2015 and June 2015, was caused by or a natural consequence of the work-related injury. As a result, the claimant's claims for the medical benefits at issue must be denied and dismissed.

## ORDER

It is therefore ordered that:

1. The claimant's claim for medical benefits at issue herein is denied and dismissed.

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

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

DATE: November 24, 2015

/s/ original signed by:

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

## ISSUE

Whether Claimant has established by a preponderance of the evidence that left knee arthroscopy is reasonable, necessary, and causally related to her May 18, 2014 work injury.

## FINDINGS OF FACT

1. Claimant works for Employer as a certified nursing assistant. On May 18, 2014 she suffered an admitted injury to her left knee while attempting to transfer a patient from a wheelchair to a bed.

2. On May 18, 2014 Claimant felt an immediate onset of pain and received subsequent medical treatment. Claimant was eventually referred to an orthopedic surgeon for evaluation.

3. On December 15, 2014 Claimant was evaluated by Michael Hewitt, M.D. Claimant reported injuring her knee on May 18, 2014 while working as a certified nursing assistant and while transferring a patient from a wheelchair to a bed. Claimant reported pivoting with her left knee and noting an immediate onset of pain. Claimant reported persistent popping and catching with activity and pain in the anteromedial aspect of the knee. Dr. Hewitt noted on examination that Claimant had a reproducible catch as she entered full extension. Dr. Hewitt assessed left knee twisting injury with a clinical examination concerning for medial meniscal tear. Dr. Hewitt noted that the first MRI performed had poor quality images and was done on an open scanner. Dr. Hewitt recommended repeat imaging in a closed scanner to better assess for medial meniscal tear. *See* Exhibit 2.

4. On December 29, 2014 Claimant underwent an MRI of her left knee that was interpreted by Gen Maruyama, M.D. Dr. Maruyama identified in the medial compartment no evidence of meniscal tear or bone marrow edema. His impression was focal chodromalacia involving the mid femoral condyle articular cartilage toward the intercondylar notch, a focal area of chondral fissuring extending to the subchondral cortical bone, and mild fraying of the free edge margin of the medial meniscus root attachment without a discrete meniscal tear. *See* Exhibit 2.

5. On February 23, 2015 Claimant was evaluated by John Aschberger, M.D. Dr. Aschberger noted Claimant had continued pain and irritation in her left knee. Dr. Aschberger noted that Claimant's physical examination was fairly impressive regarding the pop and restrictions that occurred throughout range of motion. He noted her

significant continued pop going from flexion to extension at the medial knee that was uncomfortable. Dr. Aschberger noted the option of proceeding with arthroscopic intervention. Dr. Aschberger opined that the MRI was not that impressive, but that Claimant's examination suggested pathology that was resulting in her symptomatology. *See* Exhibit 1.

6. On June 1, 2015 Claimant was evaluated by Dr. Hewitt. Dr. Hewitt noted he had previously submitted for viscosupplementation injections which were not approved. Dr. Hewitt noted Claimant's continued mechanical catch as she straightened her knee. Dr. Hewitt opined that with her persistent reproducible mechanical symptoms, he felt her final treatment option was that of a knee arthroscopy. He opined that Claimant was one year out from a documented work injury with persistent mechanical symptoms that had not responded to conservative management. He noted that Claimant wished to proceed with a knee arthroscopy. Dr. Hewitt noted that the knee would be visualized entering extension to see and assess for soft tissue or bone impingement that could be causing the mechanical catch. *See* Exhibit 2.

7. On September 23, 2015 the parties performed an evidentiary deposition of Allison Fall, M.D. Dr. Fall had previously examined Claimant. Dr. Fall noted on examination the audible popping in Claimant's left knee. Dr. Fall tried to reproduce the popping with different positions to determine what was causing it. When Dr. Fall stabilized the patella so that it wouldn't track out of alignment, the popping would go away. Dr. Fall opined that Claimant had poor VMO tone and noted that the VMO is one of the quadriceps muscles that helps with patellar tracking. Dr. Fall opined that Claimant was overweight. Dr. Fall opined that on MRI there was nothing showing an acute injury requiring surgery.

8. Dr. Fall opined that the medical treatment guidelines and studies show that when patients have underlying degenerative changes, arthroscopic surgery typically doesn't improve the patient's outcome, doesn't decrease pain, and doesn't increase function. Dr. Fall opined that the likelihood of a scope helping a patient was very minimal and she disagreed with the recommendation for left knee arthroplasty in Claimant's case. Dr. Fall opined that Claimant has grade 2 arthritis noted by MRI. Dr. Fall opined that Claimant should decrease her weight and strengthen the muscles around her knee, which could be done without medical supervision in order to help with tracking of the patella in the groove. Dr. Fall noted that Claimant was previously prescribed or recommended a home exercise program but performed minimally with it and recommended that Claimant increase her exercise.

9. Dr. Fall noted she could not find any reasons in this case to deviate from the medical treatment guidelines or find any reason for the recommendation of surgery made by Dr. Hewitt. Dr. Fall opined that the left knee arthroscopy would not help Claimant with her pain or with anything. Dr. Fall reiterated that she did not know why Dr. Hewitt was recommending the surgery.

10. On October 7, 2015 the parties performed an evidentiary deposition of Dr. Aschberger. Dr. Aschberger opined that Claimant had significant findings on examination that were not well explained by the MRI scan. Dr. Aschberger opined that one way to clarify the findings that were not explained by MRI would to be to proceed with arthroscopic surgery. Dr. Aschberger opined that with surgery they could go in and look to see if there is something inside Claimant's knee causing the pop and discomfort. Dr. Aschberger opined that imaging is not one hundred percent and that although surgeons prefer to go in after finding something specific on an MRI, in Claimant's case, they would go in and look to see what they could find and if there is an explanation then fix it, if reasonable.

11. Dr. Aschberger opined that Claimant's presentation was reliable, that she was not exaggerating pain behaviors, and that her physical examination was consistent and replicable. Dr. Aschberger opined that if Claimant had a torn meniscus that was not clarified by the MRI and they were able to resect or repair the meniscus then it would help with Claimant's pain. Dr. Aschberger also opined that if they went in and found nothing, they would then be satisfied that there was not much different they could do for Claimant.

12. Dr. Aschberger opined that if patellar tracking was a major issue, she would have gone through standard rehab with intensive strengthening of the quad, but that the problem was that Claimant was not able to tolerate very much in the way of strengthening and that they had already attempted rehab without Claimant doing much better. He opined that Claimant would rehab better if there was something in the knee that they could clear up. Dr. Aschberger opined that he could not predict whether or not they would find anything during the procedure or whether or not the procedure would improve Claimant's function.

## CONCLUSIONS OF LAW

### *Generally*

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw

plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

***Medical Benefits***

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The ALJ concludes that Claimant has failed to meet her burden to show that left knee arthroscopy is reasonable and necessary treatment for her May 18, 2014 work injury. Although there is a chance that the doctor might find something in her left knee that can be fixed when they go in for surgery, Claimant has failed to show more likely than not, that the surgery is necessary to cure and relieve the effects of her injury. The left knee arthroscopy recommended by Dr. Hewitt has not been shown to be needed or essential to cure and relieve the effects of her injury and even Claimant's own expert Dr. Aschberger is unsure as to whether the surgery will help at all. Although Claimant continues to have left knee symptoms, a surgery that is speculative as to whether it will find anything and whether it will improve any symptoms is not a necessary surgery. As found above, the objective MRI testing did not show any injury exists in her left knee that would likely be repaired by arthroscopic surgery. Claimant also has grade 2 arthritis in her left knee and as noted by the medical treatment guidelines even with a documented meniscal tear (which Claimant does not have), there is little likelihood of surgery helping Claimant with that level of arthritis in her knee. The opinion of Dr. Fall that the surgery is not reasonable and necessary is found credible and persuasive. The recommended surgery falls outside the medical treatment guidelines, and neither Dr. Hewitt nor Dr. Aschberger have given a persuasive opinion as to why they believe the

surgery is necessary and as to why it will help cure and reliever Claimant of the effects of her injury in this case. Rather, they both appear to be speculating that they might find something in the knee when they go in for arthroscopy. Weighing all the evidence and testimony, the ALJ concludes that Claimant has failed to meet her burden to show the surgery is reasonable and necessary.

## ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show that a left knee arthroscopy is reasonable and necessary. Claimant's request for left knee arthroscopy is denied and dismissed.

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

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

DATED: November 20, 2015

/s/ Michelle E. Jones

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

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## ISSUES

The following issues were raised for consideration at hearing:

1. Whether the lumbar MRI is reasonable, necessary and related medical treatment?

2. Whether the right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment?

## FINDINGS OF FACT

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

1. Claimant is a 36 year old man who worked for Employer as a laborer starting on November 25, 2013.

2. On September 21, 2014, Claimant was working in the course and scope of his employment for Employer. Claimant suffered an admitted injury when he was in the rear passenger seat of an automobile involved in a motor vehicle accident. The vehicle Claimant was riding in flipped over and Claimant suffered an injury to his lower back.

3. Respondents filed a General Admission of Liability on August 27, 2015.

4. On October 2, 2014, Larry Decker, a physician's assistant (P.A. Decker), prepared a report in which he states Claimant has low back pain with right gluteal leg pain and recommends an MRI.

5. On October 7, 2014, the MRI showed central disc protrusion at L4-5 with annular tear and L5 showed a chronic anterior disc protrusion simulating an avulsion.

6. On October 13, 2014, P.A. Decker returned Claimant to full duty. P.A. Decker notes that Claimant has pain shooting down his right leg but has very good flexion and extension. He notes straight leg test is negative.

7. On October 28, 2014, Claimant visited Durango Orthopedics and saw Clayton LaBaume, a physician's assistant (P.A. LaBaume). He recommended an MRI of

Claimant's pelvis. Claimant was given restrictions of lifting no more than 25 lbs. and was placed at light duty.

8. On November 6, 2014, P.A. LaBaume recommended right-side SI joint injections as well as physical therapy. Claimant was given restrictions of: no repetitive bending, lifting, or twisting; no kneeling or squatting; no prolonged sitting greater than 60 minutes at a time; no lifting greater than 25 lbs.; and no operation of vibratory or mechanical equipment.

9. On December 1, 2014 Claimant received a right sacroiliac joint injection by Dr. Bohachevsky.

10. On December 30, 2014, P.A. LaBaume reported that Claimant benefited from a sacroiliac joint injection for approximately four days. P.A. LaBaume notes that Claimant has questions about work restrictions and returning to work. P.A. LaBaume deferred to the judgment of Dr. Jernigan.

11. On January 16, 2015, Claimant received a right sacroiliac joint injection by Dr. Bohachevsky

12. On March 16, 2015, P.A. LaBaume noted tenderness over Claimant's L4-5 and L5-S1 facets and opined that it might be contributing to Claimant's pain. P.A. LaBaume recommended medial branch blocks on the right.

13. On March 20, 2015, Claimant received right-sided L4-5, L5-S1 medial branch blocks by Dr. Bohachevsky.

14. On April 24, 2015, P.A. LaBaume notes that when Claimant drives or sits for extended periods of time Claimant begins having pain extend down the buttocks and the posterior thigh on the right. P.A. LaBaume states that he plans to review Claimant's case with a surgeon.

15. On May 7, 2015, P.A. LaBaume states that he talked to Dr. Orndorff and Dr. Bohachevsky, and the annular tear could be causing radiculitis. He notes despite the fact that there is no neuroforaminal stenosis, sometimes epidural steroid injections can improve pain. He recommends a right L4 transforaminal epidural steroid injection.

16. On June 11, 2015, Dr. Welling reported that Claimant did not tolerate fentanyl and recommended that Claimant double up on the Norco.

17. On July 7, 2015, Dr. Welling notes that Claimant now has chronic back pain and he is able to forward flex only a few degrees and only a few degrees of lateral bending.

18. On August 12, 2015, Dr. Welling notes that Claimant ambulates with a very painful gait and moves very slowly. He states that Claimant is only able to forward flex a few degrees and lateral bending maybe 5 degrees and has significant buttock pain. Dr. Welling takes Claimant off of work.

19. On August 20, 2015, P.A. LaBaume notes that Claimant has ongoing pain that is severely affecting Claimant's life. He states Claimant has problems sleeping and the pain is affecting his sex life. He notes Claimant continues to take Norco and utilize a Butrans Patch without much relief. On physical exam, he notes, inspection of the lumbar spine does reveal significant tenderness over the bilateral L4-5 and L5 area. He notes Babinski response is with downgoing toes, straight leg raise test is positive for causing back pain, and FABER test is positive bilaterally. P.A. LaBaume reports that Claimant's last MRI was completed approximately ten months ago and "I do believe the patient appears to be in worse pain than when I have seen him previously." P.A. LaBaume states "because of the patient's ongoing and what I believe is worsening pain, I would like to refer the patient for MRI of the lumbar spine to further evaluate his symptomatology.

20. On September 28, 2015, Dr. Welling reports that a repeat MRI was denied and that Claimant needs another consultation with a neurosurgeon.

## CONCLUSIONS OF LAW

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

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), *supra*. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, *supra*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

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).

The 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).

Here, the Claimant has proven by a preponderance of the evidence that the need for the lumbar MRI is reasonable, necessary and related medical treatment. Claimant's pain and physical examination findings have become worse since the last MRI. Claimant's MRI on October 7, 2014, showed a central disc protrusion at L4-5 with annular tear and a chronic anterior disc protrusion simulating an avulsion at L5. After numerous injections, Claimant continued to experience pain. Dr. Welling noted on July 7, 2015, that Claimant now has chronic back pain and was only able to forward flex a few degrees and a few degrees of lateral bending. This physical examination finding was different than previous physical findings of no limitation on bending. On August 12, 2015, Dr. Welling took Claimant off of work, noting that Claimant ambulates with very painful gait and moves very slowly. This was the first time Claimant was taken off work completely. Finally, on August 20, 2015, P.A. LaBaume noted that Claimant's ongoing pain was severely affecting his life including causing problems sleeping and effecting his sex life. He notes Norco and a Butrans Patch provided little relief, and on physical exam the Babinski response was with downgoing toes, the straight raise leg test was positive for causing back pain, and the FABER test was positive bilaterally. The physical findings on examination all demonstrate a worsening since the last MRI. P.A. LaBaume notes that Claimant was in worse pain than when he had previously seen the Claimant and recommends a repeat MRI. The authorized treating physician is able to make referrals for diagnostic purposes and to research what is causing a patient's pain. This referral is reasonable, necessary and related and it is order that Respondents shall authorize the lumbar MRI.

Claimant has also proven by a preponderance of the evidence that the right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment. On May 7, 2015, P.A. LaBaume consulted with both Dr. Orndorff and Dr. Bohacheveky and notes the annular tear could be causing radiculitis. He notes despite the fact that there is no neuroforaminal stenosis, sometimes epidural steroid injections can improve pain. He recommends a right L4 transforaminal epidural steroid injection. Claimant proved by a preponderance of the evidence that the right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment.

## ORDER

It is therefore ordered that:

1. The lumbar MRI is reasonable, necessary and related medical treatment and shall be authorized by Respondents.

2. The right L4 transforaminal epidural steroid injection is reasonable, necessary and related medical treatment and shall be authorized by Respondents.

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: November 18, 2015

DIGITAL SIGNATURE:

Margot W. Jones

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

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## ISSUES

- Did Claimant prove by a preponderance of the evidence that she was Decedent's common law spouse and is therefore entitled to workers' compensation death benefits?

- If Claimant was not the common law spouse of Decedent is she entitled to receive death benefits as a putative spouse?

## FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 13 were admitted into evidence. Respondents' Exhibits A though E were admitted into evidence.

2. Claimant contends she was the common law spouse of the Decedent and is entitled to workers' compensation death benefits as Decedent's widow.

3. Decedent worked for the Employer as a driver and laborer. He was hired by the Employer in March 2012.

4. Decedent's date of birth was July 18, 1986.

5. Decedent died on April 16, 2014 as a result of injuries arising out of and in the course of his employment. On October 10, 2014 Respondents filed a Fatal Case Final Admission admitting that a minor child (JBJ) is entitled to death benefits.

6. In August 2014 Claimant filed a Dependent's Notice and Claim for Compensation alleging that she is entitled to death benefits as the Decedent's surviving spouse.

7. Claimant's date of birth was October 13, 1995. Thus, she was 18 years of age at the time of decedent's fatal accident.

8. Decedent testified as follows. She was born in Mexico. In January 2011 she met her "husband," the Decedent , at a funeral in Mexico. After the funeral the Decedent went to talk to Claimant's parents because Decedent said they "were going to get married." Decedent then asked Claimant's mother for Claimant's hand in marriage. Claimant's mother agreed to the marriage. Claimant has considered herself married to Decedent since January 2011.

9. Respondents' objected to admission of any statements allegedly made by Decedent to Claimant and statements Decedent allegedly made to Claimant's parents. The Respondents argued Claimant's testimony concerning statements made by the Decedent is barred by § 13-90-102, C.R.S. (dead man's statute). The ALJ permitted Claimant to testify to Decedent's statements but reserved for future determination whether the statements would ultimately be admitted into evidence.

10. Claimant testified that after the January 2011 funeral Decedent returned to the United States but she remained in Mexico. Claimant testified that Decedent then began sending her money to support herself.

11. Claimant testified that shortly after returning to the United States Decedent was arrested for transporting marihuana. According to Claimant these charges resulted in Decedent's incarceration from January 2012 until December 2012.

12. Claimant testified that after Decedent was released from jail in December 2012 she came to Colorado to live with the Decedent. She stated that she lived with Decedent at his mother's home. However, Decedent's mother (Josefa Avila Soto, hereinafter Soto) was charging rent and Decedent did not have enough money to support Claimant. Consequently, Claimant returned to Mexico on January 4, 2013.

13. Claimant testified that her Facebook page listed her as married to Decedent, and that this listing continued through the date of his death. In this regard the ALJ notes that on February 15, 2013 Claimant's Facebook page listed her as "married" to Decedent. On February 16, 2013 Claimant's Facebook page listed her as "engaged" to the Decedent. Claimant explained that the Decedent had gone on her Facebook page and changed her relationship status from married to engaged. Claimant readily conceded that Decedent had access to her Facebook page. Therefore, the ALJ finds Claimant's Facebook page is not a reliable indicator of how Claimant was representing her marital status to family, friends and community.

14. Claimant testified that Decedent's Facebook page lists him as married to her. The ALJ notes that on February 16, 2013 Decedent's Facebook page listed him as "engaged" to Claimant. On March 31, 2013 Decedent's Facebook page listed him as "married" to Claimant. The ALJ assigns little weight to these postings insofar as they would permit the inference that Decedent was holding himself out as married to Claimant. Claimant admitted that she had access to Decedent's Facebook page and made postings on Decedent's page. Therefore, the ALJ finds Decedent's Facebook page is not a reliable indicator of how Decedent was representing his marital status to family, friends and community.

15. Claimant testified as follows. She returned to the Colorado in March 2013 and again lived with Decedent at Soto's house. In July 2013 Decedent and Claimant left Soto's house and moved together to an apartment in Westminster, Colorado.

16. Respondents' Exhibit C is an Apartment Lease Contract (lease) dated July 8, 2013. The lease states that the lease is between the Decedent and Pinnacle Real

Estate Management for Apartment 2-105, 6980 Stuart Street, Westminster, Colorado. The lease recites there are no "occupants" of the premises other than Decedent and Claimant's name does not appear on the lease.

17. Claimant testified her name does not appear on the lease because she was a "minor" at the time the lease was signed.

18. Claimant testified that at the apartment she cooked and cleaned house while Decedent worked and brought home money for expenses. Claimant stated that she never had a job while residing in the United States.

19. Claimant testified that she and the Decedent rented a television together.

20. Claimant's Exhibit 11 consists of three documents from "Rent-A-Center, Inc." There is a customer "information" document listing the decedent and "Jennifer Mitchet" as the customers and showing they reside at apartment 2-105, 6980 Stuart Street, Westminster, Colorado. Although "Jennifer Mitchet" is not Claimant's name, it is very close to her actual name of "Yenifer Michel." One Document is a "Payment History" showing that the Decedent leased a television set in March 2014 and made several lease payments. This documentation corroborates Claimant's testimony that she and the Decedent leased a television "together."

21. Claimant testified that she turned 18 year of age on October 13, 2013, and that there was a birthday party held at Decedent's mother's house.

22. Claimant testified that she was pregnant at the time of decedent's death and the decedent was the father of the child. Claimant explained the child was conceived in the "marital home" and was born to Claimant on July 23, 2014. The child is JBJ.

23. Claimant testified that she told friends and family that she was married to the Decedent.

24. Claimant testified that after Decedent's death she went to the funeral home and provided some information that was included in the Decedent's Death Certificate. Specifically, she stated that she advised a funeral home representative that she was the wife of the Decedent. Claimant further testified that Soto provided the information to the funeral home that is contained in the Decedent's obituary.

25. Decedent's Death Certificate lists Claimant as the Decedent's "spouse." The funeral director signed the Death Certificate which lists Soto as the "Informant."

26. Decedent's Obituary, which was apparently posted by the funeral home on its website, states that the Decedent is survived by his wife [the Claimant].

27. Eloy Larza (Larza) is Claimant's father. Mr. Larza testified as follows. Claimant met Decedent at a funeral in Mexico. Decedent came to him after the funeral and expressed his intention to marry Claimant. Eventually Claimant moved to the

United States to live with Decedent. Decedent financially supported Claimant after she moved. Larza did not provide support to Claimant after she moved in with Decedent. After Decedent died Claimant had no means of support so he and his wife moved to Denver, Colorado to provide support to her.

28. Respondents objected to Mr. Larza's testimony insofar as he discussed statements made to him by the Decedent. Respondents argued that Larza's testimony is inadmissible because he is "interested" in the litigation within the meaning of the dead man's statute.

29. Lilliana Arellano (Arellano) testified for Claimant. Arellano considers herself married to Decedent's cousin, Roy Rogelio. Arellano explained that Decedent and Rogelio were close friends before Decedent met Claimant. Arellano testified she attended family events at which Decedent and Claimant were present. She thought of them as married and stated that Decedent would call Claimant "his lady."

30. Savilo Avilla (Avilla) is Decedent's uncle. Mr. Avilla testified he has known Decedent since he was born and has known Claimant since Decedent brought her to the United States. Avilla testified that he observed Claimant and Decedent together at various family events and Decedent treated Claimant as a wife. He also knew that Decedent and Claimant lived together in an apartment.

31. Avilla further testified that Decedent said he was "thinking about" getting married but wanted to buy a house first. Avilla testified that he told Decedent and Claimant that they should get married. However, Decedent and Claimant said they wanted to buy a house and get married afterwards. On re-direct examination Avilla explained that when he told Decedent and Claimant they should get "married" he was referring to an official ceremony with a license.

32. Soto testified at the request of Respondents. Soto testified that her son met Claimant at a funeral in Mexico. Soto was present at the funeral. At the time of the funeral Decedent did not tell Soto that he was in love with "a girl" or that he married Claimant or intended to marry her.

33. Soto testified that her son commented that Claimant's parents were going to bring Claimant to Colorado and leave her here. Soto stated that she told Claimant's parents that Claimant was a minor and they couldn't leave her. Nevertheless Claimant's parents left her. Decedent and Claimant then lived in Soto's home for about 5 months. During this 5 month period of time Decedent did not tell Soto that he was married to Claimant and Claimant did not tell Soto that she considered herself married to Decedent. Soto further testified Decedent did not refer to Claimant as his wife but did refer to Claimant was his "old lady." After 5 months Claimant and Decedent moved out to rent an apartment together.

34. Soto testified that she recalled that Decedent gave Claimant a ring with a heart on it. Soto thinks that Decedent gave the ring to Claimant for her birthday.

35. Soto testified that she made all of the arrangements for Decedent's funeral including supplying the information contained in the obituary. However, Soto denied that she told the funeral home that Decedent was survived by his wife, the Claimant. Soto did not know who told the funeral home that Decedent was survived by his wife. However, she testified that Claimant and her father went to the funeral home on "the last day" that funeral arrangements were being made. However, Soto also testified that the funeral arrangements were completed by April 18, 2014, and at that time Claimant's father was still in Mexico.

36. Ernest Romero (Romero) testified as follows. He was close friends with the Decedent. He first met Decedent in the early 2000's and they worked together at Deep Rock. Later Romero worked with Claimant at the Employer. Romero helped Decedent get his citizenship. Decedent dated different girls when he worked at Deep Rock. Romero knew that Decedent went to a funeral in Mexico. When Decedent returned from the funeral he told Romero that he had met a girl. At one point Decedent stated that he was always broke because he was sending money to Mexico to "help out" Claimant and her parents. Romero was aware that Claimant moved into Soto's home in March 2013 and that Claimant and Decedent got an apartment together in July 2013. Romero knew Claimant did not work and that Decedent was supporting her. Romero testified that Decedent did not say he was married to Claimant or refer to Claimant as his "wife." However, Decedent did refer to Claimant as "my lady."

37. Sylvia Atencio-Jesperson (Atencio-Jesperson) testified as follows. She is the vice president in charge of operations for Employer. Her duties include hiring and firing of employees and dealing with employment-related paperwork including health insurance benefits. Decedent was listed as "single" under the Employer's health insurance plan. Atencio-Jesperson explained that a single employee's "girlfriend" can be covered under the Employer's health insurance plan if the employee completes a form designating the "girlfriend" as his common law spouse. Decedent did not add Claimant to the health insurance plan after she became pregnant. Decedent never told Atencio-Jesperson that he was married.

38. On March 6, 2012 Decedent completed a W-4 (Withholding Allowance Certificate). Decedent placed an "x" in a box indicating he was single and claimed one withholding allowance. Decedent claimed a second withholding allowance by listing himself as "head of household." The W-4 contains printed instructions stating that the taxpayer may claim "head of household" status if the taxpayer is "unmarried" and pays "more than 50% of the costs of keeping up a home for yourself and your dependents."

39. On August 5, 2013 Decedent completed another W-4. Decedent placed an "x" in a box indicating he was single and claimed one withholding allowance based on this status.

40. Respondents called attorney Todd Stahly (Stahly) as a witness. Stahly was qualified as an expert in family law, domestic relations, and common-law marriage. On July 21, 2015 the ALJ entered an Order Regarding Expert Testimony that limited the scope of Stahly's testimony. Specifically, the ALJ ruled that he would not consider

Stahly's testimony insofar as it described the "legal criteria for common law marriage" and expressed Stahly's opinion that the "facts in the case do not support the existence of a common law marriage." However, the ALJ admitted Stahly's testimony for the limited purpose of helping the ALJ to understand the "significance of tax documents and employer records" in the context of common law marriage.

41. Stahly opined the W-4 forms completed by decedent were very significant in determining the existence of a common law marriage in this case. Specifically, he pointed out that on both W-4 forms Decedent indicated that his marital status was "single" rather than "married." Further, Stahly pointed out that the W-4 forms are the only documents he reviewed that were under oath. Stahly also opined that it is significant that Decedent did not list Claimant as his "emergency contact" when he applied for employment with the Employer.

42. Claimant proved it is more probably true than not that she became Decedent's common law spouse after she turned 18 and before Decedent's death on April 16, 2014.

43. The weight of the credible evidence establishes that Claimant cohabited with the Decedent before and after she reached the age of 18. Claimant credibly testified that she moved into an apartment with the Decedent in July 2013 and was still living there at the time of his death. The fact of Claimant and Decedent's cohabitation was well known to friends and family as shown by the testimony of Soto, Larza, Avilla and Romero.

44. The Claimant proved it is more probably true that she and Decedent had agreed to live as a married couple and that this was their reputation among family, friends and community.

45. Decedent's intention to be married to Claimant is evidenced by several facts. Decedent declared his intention to be married to Claimant when he met with Claimant's father and mother in January 2011 and asked for Claimant's hand in marriage. Decedent also told Claimant of his desire to be married and Claimant credibly testified that she considered herself married to decedent in January 2011.

46. Decedent provided financial support to Claimant even before she moved to the United States to live with him. Claimant credibly testified that she never worked when she was in the United States and that Decedent provided financial support to her after they moved to the apartment. The ALJ finds that Decedent's long history of providing financial support to Claimant is a strong indicator of his intent to be married to her and an acknowledgement of his obligation to support her. Indeed, Decedent confided to Romero that he was often broke because he was providing support to Claimant.

47. Decedent and Claimant conceived a child at the apartment where they lived. The child was born after Decedent's death but is acknowledged to be the Decedent's child. The ALJ infers that the act of conceiving the child evidences the

agreement of Claimant and Decedent to live together as husband and wife and to start a family together.

48. The weight of the evidence establishes that Decedent represented to his family and community that he was married to Claimant. Although Decedent did not often, if ever, refer to Claimant as his "wife," he told his mother that Claimant was his "old lady," he told Romero that Claimant was "my lady," and he told Arellano that Claimant was "his lady." The ALJ finds that, in context, the words "my old lady" and "my lady" and "lady" are colloquial synonyms for the words "my wife." Thus, Decedent's use of these terms evidences his agreement to be married to Claimant and that he represented to his community that he was married to her.

49. Soto credibly testified that Decedent gave Claimant a ring "with a heart on it" for her birthday. The ALJ infers from Claimant's testimony that the ring was given to her on October 13, 2013, when Claimant celebrated her 18th birthday at Soto's house. The ALJ finds that Claimant was not in the United States for any birthday prior to her 18th birthday on October 13, 2013. The ALJ infers from the Decedent's action in giving the Claimant a heart-shaped ring on her 18th birthday that Decedent was presenting a concrete acknowledgement of his marital commitment to Claimant.

50. In March 2014, shortly before Decedent's death, Claimant and Decedent went together to lease a television set. The TV was used in the apartment which Claimant and Decedent shared.

51. Although Soto made the funeral preparations for Decedent's funeral, the death certificate lists Claimant as Decedent's spouse. The death certificate lists Soto as the "informant" and is signed by the funeral director. The ALJ infers from this document that Soto told the funeral director that Claimant was Decedent's spouse. The ALJ finds that the death certificate represents a public acknowledgement by Soto that she considered the Decedent and Claimant to be married. Further the death certificate represents credible evidence that at the time of death Claimant and Decedent were representing to friends and family that they were married.

52. Soto's testimony that she did not tell the funeral home that Claimant was married to Decedent is not credible. Soto's testimony is persuasively rebutted by the death certificate. The evidence fails to establish any plausible motive for the funeral director to list the Claimant as Decedent's spouse and Soto as the "informant" if these factual representations were not true. Moreover, Soto herself admitted that she made all the arrangements for Decedent's funeral and that these arrangements were completed by April 18, 2014, before Claimant and her father went to the funeral home. It is not plausible that Claimant made all of the funeral arrangements but did not tell the funeral home representatives that Claimant was Decedent's spouse. As shown by the death certificate and the obituary, the fact that the Decedent was survived by a spouse is of both legal and sentimental significance. The ALJ infers that a representative of the funeral home asked Soto about the Decedent and she told the representative that Decedent was married to Claimant. Although Claimant also told the funeral home that

she was Decedent's spouse, the ALJ infers that Claimant provided this information after Soto had already do so.

53. The ALJ acknowledges that Decedent completed W-4 forms that listed his marital status as "single" rather than married. However, the ALJ concludes this evidence is not particularly persuasive in light of evidence that both Decedent and Claimant were aware of Claimant's minority status at the time the W-4's were completed. The parties' awareness of Claimant's minority status prior to October 13, 2013 is evidenced by Claimant's credible testimony that her name was not on the apartment lease because she was a "minor." The ALJ infers that Decedent did not acknowledge that he was married on the W-4 forms because these were official documents and he was afraid that listing Claimant as his spouse might trigger legal difficulties for him and Claimant.

54. Avilla's testimony that Decedent and Claimant told him they did not want to get "married" until they purchased a house is not persuasive evidence that they did not consider themselves married. Arellano credibly explained that from his observations Decedent treated Claimant as a wife. Moreover, Arellano credibly explained that when he spoke to Decedent and Claimant about getting "married" he was referring to a formal marriage with a license.

55. Evidence inconsistent with these findings is not credible and persuasive.

## CONCLUSIONS OF LAW

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

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

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

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

## LEGAL VALIDITY OF COMMON LAW MARRIAGE BETWEEN DECEDENT AND CLAIMANT

Claimant argues that the evidence establishes that she entered into a valid common law marriage with Decedent as early as January 2011. Respondents, citing § 14-2-109.5, C.R.S., argue that Claimant was too young to enter a valid common law marriage. Respondents further argue that Claimant could not "ratify" the common law marriage after she turned 18 on October 13, 2013. The ALJ agrees with Respondents that Claimant could not contract a valid common law marriage prior to October 13, 2013, but disagrees that she was precluded from entering into a valid common law marriage after that date.

Insofar as pertinent, § 14-2-109.5 (1)(a), C.R.S., provides that a common law marriage after September 1, 2006 "shall not be recognized as a valid marriage in the state unless, at the time the common law marriage is entered into" each party is "eighteen years of age or older." Respondents contend that this statute renders "void" the Claimant's alleged common law marriage to Decedent. Moreover, relying on principles of contract law, Respondents assert that the statute precluded Claimant from "ratifying" her common law marriage after she turned 18.

Statutes should be interpreted to effectuate the legislative intent. Where the statutory language is unambiguous, there is no need to resort to rules of statutory construction because the General Assembly is presumed to have meant what it clearly said. *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002). Further, when the General Assembly enacts legislation in a particular area it is presumed to be aware of pertinent judicial precedent. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App.1994).

The Court of Appeals issued its opinion in the case of *In re Marriage of J.M.H.*, 143 P.3d 116 (Colo. App. 2006) on June 10, 2006, prior to the effective date of § 14-2-109.5 (1)(a). In *J.M.H.* the court was required to determine whether a female could enter into a valid common law marriage at the age of 15. The J.M.H. court noted that Colorado recognizes "common law marriage" and that Colorado appellate courts had not previously "determined the age of consent for a valid common law marriage." The *J.M.H.* court stated that the "General Assembly's authority to modify or abrogate the common law" will not be recognized unless the intent to do so is "clearly expressed." Therefore, the court concluded that in the absence of any provision voiding common law marriages marriages between parties of certain ages "all marriages regularly made according to common law are valid and binding." Because *J.M.H.* was decided when there was no statute prescribing the age of consent to a common law the court applied the "common law age of consent for common law marriage." The common law age of consent was determined to be fourteen for a male and twelve for a female.

The language of § 14-2-109.5 (1)(a) clearly and plainly establishes that the General Assembly intended to abrogate the common law right of persons to contract a common law marriage prior to the time both of them have reached their eighteenth birthdays. Therefore, the ALJ agrees with Respondents that the statute prohibited Claimant from consenting to a valid common law marriage with Decedent prior to her 18th birthday on October 13, 2014.

However, § 14-2-109.5 (1)(a) contains no language suggesting that the General Assembly intended to deprive citizens of their common law right to consent to common law marriage *after* they reach the age of 18. Moreover, if the General Assembly had intended to deprive some citizens, such as persons in Claimant's circumstances, of their right to consent to common law marriage after the age of 18 it was required to expressly state that intent. *In re Marriage of J.M.H.*, *supra*. However, the General Assembly expressed no such intent and the ALJ may not simply infer it had such intent. For these reasons the ALJ rejects Respondents' argument that because Claimant could not consent to common law marriage before she reached 18 years of age she is statutorily barred from doing so after she reached the age of 18.

Moreover, the ALJ does not consider this interpretation of § 14-2-109.5 (1)(a) as authorizing retroactive "ratification" of an otherwise invalid marriage. Rather, a party arguing for the existence of a common law marriage must prove the presence of all elements of a common law marriage *after* both of parties reach the age of 18. Cf. *Rocky Mountain Fuel Co. v. Reed,* 110 Colo. 88, 130 P.2d 1049 (Colo. 1942) (cohabitation after removal of an obstacle to marriage raises "presumption" of marriage; mutual consent may be established by conduct as well as words; because law deprecates illegal relations and favors legal ones a slight change in circumstance may establish transition from former to later). The fact that a party proves the existence of all criteria for a valid common law marriage after both parties reach the age of 18 says nothing about whether or not the party could consent to a common law marriage prior to age 18. Indeed, in this case the ALJ has found that Claimant was statutorily precluded from entering into a common law marriage before her 18th birthday. The ALJ does not hold that any purported common law marriage attempted by Claimant before she reached the age of 18 has any legal force or effect.

EXISTENCE OF COMMON LAW MARRIAGE ON OR AFTER OCTOBER 13, 2013

Claimant contends that a preponderance of the evidence establishes that she was Decedent's common law spouse and is now his widow. Therefore, she claims to be the Decedents' presumed dependent for purposes of § 8-41-501(1)(a), C.R.S. The ALJ agrees with this contention.

Section 8-41-503(1), C.R.S., provides that dependency "shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions…" Thus, the issue in this case is whether Claimant proved she was Decedent's common law spouse after she turned 18 and before Decedent's death on April 16, 2014.

The existence of a common law marriage "is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987). The "agreement" of the parties to be married need not be expressed in words but may be "tacitly expressed." *Id.* at 664. Where the existence of an agreement is disputed the agreement may be inferred from "evidence of cohabitation and general repute." *Id.* at 664. The two most important factors demonstrating the parties' agreement to be married are "cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife." *Id*. 665. Moreover, the parties' agreement to be married may be evidenced by "any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife." *Id*. at 665. Numerous "behaviors" may be considered as evidence of the parties' intention, but none is determinative.

The Respondents cite *Employers Mutual Liability Insurance Co. of Wisconsin v. Industrial Commission,* 124 Colo. 68, 234 P.2d 901, 903 (Colo. 1951) for the proposition that evidence supporting the existence of a common law marriage should be "clear, consistent and convincing." They suggest that if the evidence regarding the existence of a common law marriage is "conflicting" that courts typically hold that no common law marriage existed.

However, in *People v. Lucero*, *supra*, our Supreme Court stated in footnote 6 that the cited language from the *Employers Mutual* case "was not chosen to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must present more than vague claims unsupported by competent evidence." *People v. Lucero*, 747 P.2d at

Ultimately the question of whether a party has established the existence of a common law marriage is one of fact for determination by the ALJ. *Sutphin v. Pinnacol Assurance*, WC 4-815-042-04 (ICAO September 9, 2014). Resolution of the issue turns on issues of fact and credibility. *People v. Lucero*, 747 P.2d at 667, n.6.

As determined in Findings of Fact 42 through 54, Claimant proved is more probably true than not that she was Decedent's common law spouse on the date of death. As found, the evidence establishes that Decedent and Claimant cohabited both before and after Claimant reached the age of 18. The parties' agreement to be married is supported by evidence of Claimant's and decedent's conduct. Decedent sought permission from Claimant's parents to marry Claimant and Claimant considered herself married to Decedent as early as January 2011. Decedent financially supported Claimant both before and after she reached the age of 18. Decedent and Claimant conceived a child together thereby evidencing their agreement to live as man and wife and to raise a family together. Decedent's referred to Claimant as his "lady" and his "old lady". As found, the ALJ concludes that use of these terms represents a colloquial acknowledgement by Decedent that he considered Claimant to be his "wife." The Decedent's death certificate constitutes credible evidence that he and Claimant were

holding themselves out to be married and that this status was acknowledged by family members including Decedent's own mother.

The ALJ acknowledges that the evidence concerning the existence of a common law marriage was conflicting. However, the weight of the credible and persuasive evidence establishes that a common law marriage existed between Decedent and Claimant after Claimant turned 18 and before Decedent's death. In light of this determination the AL need not consider Claimant's arguments concerning the applicability of the "putative spouse" statute.

## APPLICABILITY OF DEAD MAN'S STATUTE

Respondents argue that testimony by Claimant and her father concerning statements made to them by the Decedent is inadmissible under the dead man's statute. Specifically, Respondents object to Claimant's testimony insofar as she stated that the Decedent: (1) Talked to her parents about wanting to marry her; (2) Asked Claimant's mother's permission to marry her; (3) Told Claimant he thought they were married; (4) Told friends and family he thought they were married. Respondents also assert that Larza was an "interested person" within the meaning of the dead man's statute and therefore not competent to corroborate Claimant's testimony concerning Decedent's request to marry Claimant.

Section 13-90-102(1) C.R.S., provides in part that:

> Subject to the law of evidence, in any civil action or proceeding in which an oral statement of a person incapable of testifying is sought to be admitted into evidence, each party and person in interest with a party shall be allowed to testify regarding the oral statement if:
>
> (b) The testimony concerning the oral statement is corroborated by material evidence of a trustworthy nature;

Section 13-90-102 (3)(a), C.R.S., provides as follows:

> "Corroborated by material evidence" means corroborated by evidence that supports one or more of the material allegations or issues that are raised by the pleadings and to which the witness whose evidence must be corroborated will testify. Such evidence may come from any other competent witness or other admissible source, including trustworthy documentary evidence, and such evidence need not be sufficient standing alone to support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth.

Section 13-90-102 (3)(c), C.R.S., provides as follows:

> "Person in interest with a party" means a person having a direct financial interest in the outcome of the civil action or proceeding, or having any other significant and non-speculative financial interest that makes the person's testimony, standing alone, untrustworthy.

Respondents' arguments notwithstanding, the ALJ concludes that Claimant's testimony concerning statements made by Decedent to her, her parents and other persons was "corroborated" by "material evidence of a trustworthy nature" and is therefore admissible under § 13-90-102(1)(b). *Cf. Glover v. Innis,* 252 P.3d 1204 (Colo. App. 2011) (in case involving real estate conveyance matter remanded to trial court with instructions to determine whether defendants' statements concerning remarks made by deceased person were "sufficiently corroborated" by an affidavit of a disinterested third party). In this regard the ALJ notes that the dead man's statute does not require that a party's testimony concerning a statement made by a deceased person be "corroborated" by testimony of a disinterested witness that the witness personally heard the deceased person make the disputed statement. Rather, the dead man's statute requires only that the corroborating evidence be "material" to an underlying issue and tend to confirm, strengthen and show the probable truthfulness of the party's testimony concerning the incapable person's statement.

Claimant's testimony that Decedent spoke to her parents about wanting to get married and asked her mother for permission to marry is corroborated by Soto's testimony that Decedent met Claimant at a wedding in Mexico and that Claimant's parents brought her to the United States to live with the Decedent. The testimony is further corroborated by Romero's testimony that when Decedent returned from the funeral in Mexico Decedent stated that he had "met a girl." The testimony is also corroborated by Romero's testimony that Decedent told him that he was sending money to help out Claimant and her parents.

Claimant's testimony that Decedent told her he considered himself married to her and that Decedent held himself out as married to third parties is corroborated by the evidence cited in the previous paragraph. Claimant's testimony is also corroborated by competent evidence that Decedent cohabited with Claimant, fathered Claimant's child provided financial support to Claimant and gave Claimant a heart shaped ring on her 18th birthday. Claimant's testimony is further corroborated by the testimony of Arellano, Romero and Soto that Decedent variously referred to Claimant as his "lady" and his "old lady." The Claimant's testimony is also supported by the Death certificate which lists Claimant as Decedent's spouse and Soto as the "informant."

It follows that even if Larza is considered a "person in interest with a party" his testimony is not excluded under the dead man's statute. Larza testified that Decedent expressed his intention to marry Larza's daughter (Claimant). The ALJ concludes that Larza's testimony concerning Decedent's alleged statement is "corroborated by material

evidence" for most of the same reasons that Claimant's testimony is found to be corroborated.

Finally, even if the specific testimony that Respondents seek to exclude is inadmissible under the dead man's statute, the ALJ would still find that the remaining evidence set forth in Findings of Fact 42 through 54 is sufficient to establish that Claimant was Decedent's common law spouse after she turned 18 and before Decedent's death.

## ORDER

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

1. Claimant is Decedent's dependent for purposes of § 8-41-501(1)(a), C.R.S.

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

3. Claimant's counsel shall, after consultation with Respondents' counsel and the GAL, set a hearing to determine the remaining issues including allocation of death benefits between the dependents, proper safeguarding and disposition of the minor child's benefits and payment of the GAL's attorney fees. The hearing shall be set for one-half day on a non-trailing docket before the undersigned ALJ. The hearing shall be set to occur within 60 days of the date this order is served.

DATED: November 18, 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 issues presented for determination are as follows:

1. Whether Claimant suffered a compensable injury or occupational disease on or about October 19, 2014.

2. If Claimant suffered a compensable injury or occupational disease, whether right hip and lumbar symptoms are related to the injury.

## STIPULATIONS

The parties entered into the following stipulations should the claim be found compensable:

1. Claimant's average weekly wage is $478.20.

2. Claimant's authorized treating provider is HealthOne Occupational Clinic and Dr. Braden Reiter.

3. Respondents agree to reimburse Claimant for co-pays that Claimant incurred for claim-related treatment at Kaiser.

4. If and Kaiser seeks to collect from Claimant or Respondents the costs for reasonable, necessary, and claim-related medical treatment, Respondents will, subject to the fee schedule, pay the costs of reasonable, necessary, and claim-related medical treatment that Claimant incurred at Kaiser.

5. Claimant's last worked for the Employer on October 20, 2014.

## FINDINGS OF FACT

1. Claimant was 51 years old at the time of the hearing. He began working for the Employer as a ramp agent in June 2012.

2. Claimant is six feet two inches tall and weighs 285 pounds. Claimant has weighed about 285 pounds for the last five years.

3. Claimant's job duties include loading and unloading baggage from aircraft luggage bins. When loading aircraft luggage, Claimant lifts luggage from baggage carts onto the conveyor belts that carry baggage to aircraft luggage bins. Once baggage reaches the aircraft bin, Claimant's job duties include moving and stacking luggage at various points in the bin. When unloading luggage from aircraft bins, Claimant moves

stacked luggage to a conveyor belt leading from the luggage bin to baggage carts on the ground. In addition to baggage loading activities, Claimant's job duties include walking and climbing stairs.

4. Claimant's duties also require him to guide aircrafts in the gate area, unload bags and cargo from arriving flights, and load bags and cargo for departing flights.

5. The weight of the bags ranges from very light to 99 pounds. On an average flight, the Claimant loads and unloads an average of 100 bags. The job also requires the loading and unloading of cargo which often weighs more than the individual bags.

6. During one 8-hour shift, the Claimant services six to seven flights. However, due to changes in flight schedules and manpower, he sometimes services more. The Claimant is employed as a "zone assist" which he described as a floater assigned to work the heavier flights or when they are short staffed.

7. Claimant does most of his lifting from a kneeling position in the cargo bin. He must kneel because the ceiling is too low for him to stand. He has to bend over and lift the luggage with his arm out almost straight, and then swing it from right to left and try to toss it as close to the bin wall as possible. He has to lift the bags above his shoulders and stack them up to the top of the ceiling.

8. The Claimant calculated that during a shift, he does cumulative lifting of almost 100,000 pounds.

9. In early October 2014, the Claimant began experiencing symptoms, particularly pain, in his left hip/buttocks down his left leg to his foot while working. He described the symptoms as having a gradual onset over a two to three week period prior to October 19, 2014. He testified that it was a shooting, stabbing pain in the back of his buttocks going down the back of his leg and then from the front of the leg to the top of his foot.

10. The Claimant reported his injury/symptoms to his supervisor on October 19, 2014 at the end of his shift. Claimant's supervisor referred him to HealthOne in Aurora, where he saw Dr. Braden Reiter. Claimant filled out a pain diagram where he circled his left hip and indicated pain going down his left leg, and indicated his pain level was 8 out of 10. Dr. Reiter's report stated that Claimant "over the last 3 weeks has been getting increasing pain in his left hip" that got worse the previous day.

11. Dr. Reiter issued restrictions of no lifting over 20 pounds. The Employer could not accommodate Claimant's restrictions and he has returned to work since October 20, 2014.

12. On October 22, 2014, Claimant saw physical therapist, Cheryl Parent, at HealthOne. She noted that Claimant complained of left hip pain which has an unknown

etiology. She reported that Claimant's left hip pain was made worse by twisting, standing, sitting, lying on the left side, climbing, driving, pulling, "using it," and bending. Walking was listed as an activity that improved symptoms. He felt the pain was worse at night and in the afternoon depending on activity level. Ms. Parent's assessment included "positive signs and symptoms with left hip strain with potential lumbopelvic dysfunction and potential disc pathology at L4/5 and L5/S1. Treatment goals included restoring both Claimant's left hip and back to full strength.

13. Claimant returned to see Dr. Reiter on October 27, 2014. Claimant reported improvement in his pain levels to a 3-4 out of 10.

14. On October 30, 2014, Claimant, fell off of a ladder at home from a "waist high" height onto his left knee and knee cap. As a result of the incident, Claimant had to have fluid drained from his knee.

15. Claimant returned to see Dr. Reiter on November 3, 2014. Dr. Reiter reported that Claimant's left hip was getting better and that therapy was helping. Claimant reported pain with going up stairs, putting pressure on his left leg, and getting up from a seated position.

16. Dr. Reiter stated in his October 20, 2014 report that he believed the objective findings were consistent with the work-related mechanism of injury. He repeated this opinion on October 27 and November 3, 2014 and diagnosed a left hip strain.

17. On November 4, 2014, Claimant reported to his physical therapist that his left hip was "more stiff than anything" and he could not sit or stay in one position for a long period of time.

18. On November 5, 2014, the Respondents issued a Notice of Contest so Claimant pursued medical treatment under his personal health insurance through Kaiser Permanente.

19. On November 10, 2014, Kaiser physician, Dr. Erik Reite, evaluated the Claimant. Dr. Reite noted that Claimant had left hip and left leg pain that seemed to be worse when sitting for a long time and improved with moving around. Dr. Reite noted "no back pain." Regarding diagnostic films, Dr. Reite opined that imaging results showed "no acute abnormality" but that Claimant had "signs of mild arthritis in his hip." Dr. Reite diagnosed left piriformis syndrome. Dr. Reite continued work restrictions including no work until November 28, 2014.

20. A November 13, 2014 physical therapy note from Kaiser states that Claimant reported that he injured his low back at work in early October. Claimant complained of bilateral low back pain with radiation to the left posterior thigh, lower leg and foot.

21. On November 28, 2014, Dr. Reite noted that Claimant's BMI (body mass index) was 35-39.9 and that Claimant was suffering from obesity. Dr. Reite recommended that Claimant lose weight.

22. An MRI of Claimant's left hip done on December 15, 2014 revealed mild to moderate osteoarthritic change of the left hip with superior and posterior labral degeneration as well as a large paralabral cyst. The radiologist also noted "insertional tendinosis of the bilateral conjoint gluteal tendons."

23. On December 17, 2014, Dr. Reite reviewed Claimant's left-hip MRI results and opined that Claimant was suffering from moderate left hip arthritis and a "degeneration/cyst" of the labrum.

24. On December 29, 2014, Dr. Reite noted that Claimant continued to experience left hip pain and that he had an upcoming appointment with "ortho" for further evaluation and treatment of "moderate arthritic and left hip labral abnormalities on MRI . . ."

25. On January 20, 2015, Claimant had a lumbar MRI. Dr. Hari Reddy interpreted the MRI as evidencing "multilevel degenerative changes and developmentally small spinal canal causing mild spinal stenosis at L5-S1, L3-4, L2-3. Multilevel lateral recess stenosis as described above."

26. Claimant saw Dr. Rupert Galvez at Kaiser Permanente on January 29, 2015. Dr. Galvez issued a letter stating that Claimant has low back and hip issues and the he was restricted from lifting of more than 20 pounds with no stooping, bending, or twisting at the lumbar spine. Dr. Galvez diagnosed lumbar spondylosis, lumbosacral radiculopathy and osteoarthritis in the left hip. He recommended that Claimant try anti-inflammatory medications, and physical therapy for his low back; and weight loss, activity modifications and exercises and intermittent injection therapy for his left hip.

27. On February 4, 2015, Dr. Terri Baker evaluated the Claimant. Her report stated that Claimant's pain began in October of 2014 with "with pain into both legs that radiated into his feet." Dr. Baker noted that Claimant's pain was significantly worse with sitting for extended periods of time and that Claimant denied worsening of symptoms with walking. Dr. Baker diagnosed a lumbar disc herniation at L5-S1 with bilateral radiculopathy in the lower extremities.

28. Dr. Christopher Ryan performed an independent medical examination at the request of the Claimant. In his May 19, 2015 report, Dr. Ryan diagnosed the Claimant as having left hip arthritis aggravated by the work unloading and loading cargo compartments for the Employer. He also stated that the Claimant had probable aggravation of right hip osteoarthritis and probable aggravation of lumbar spondylosis. Dr. Ryan opined that loading and unloading aircraft is very heavy work and this work is certainly sufficient to have caused an aggravation of Claimant's bilateral hip osteoarthritis and low back.

29. During the hearing, Dr. Ryan testified that he considered Claimant's work heavy especially because Claimant had to work in awkward positions. Claimant reported to Dr. Ryan that he began experiencing worsening pain in his left hip, buttocks and groin which radiated down his leg into his foot.

30. Dr. Ryan explained that the MRI showed narrowing of the nerve canal in the upper lumbar region at L2-3, and L3-4 as well as right-sided narrowing at L4-5 and narrowing on both sides of L5-S1. He stated that the Claimant's symptoms are consistent with the MRI findings. He testified that someone can have this condition throughout his life without symptoms but that anything that puts pressure on discs that are less than healthy can cause inflammation, swelling and nerve root irritation. He said that within a reasonable degree of medical probability, the Claimant's pre-existing condition was aggravated by the heavy work that he was doing.

31. When asked about the onset of Claimant's low back and right leg symptoms approximately one month after Claimant stopped working, Dr. Ryan explained that once the disc condition was aggravated, the pain and symptoms could cascade with as little as an altered gate due to the hip symptoms. Dr. Ryan also stated that there was nothing in the medical records prior to the date of injury which showed the Claimant had any back problems or received any back treatment. He noted that the first mention of back complaints was with the first physical therapy appointment on October 31, 2014, which was 11 days after the Claimant left work It was also mentioned in a physical therapy note of November 10, 2014.

32. Dr. Fall examined the Claimant on May 28, 2015. Claimant described to Dr. Fall his job duties, medical treatment, and the chronology of his symptoms and treatment. Dr. Fall opined that Claimant had not suffered an occupational disease injury at work.

33. As support for her opinion that Claimant did not suffer an injury at work, Dr. Fall stated that Claimant did not attribute symptoms to a particular job activity and that Claimant's symptoms proliferated and worsened after Claimant was taken off of work and removed from workplace exposures. Further, Dr. Fall noted that Claimant's symptoms were made worse with sitting, which is not a job activity, and improved with walking, which is a job activity.

34. Claimant, however, reported to Dr. Fall that he began experiencing the pain in his left hip while performing his job duties.

35. Claimant testified that his initial symptoms were left hip and left lower-extremity pain beginning in October and that right hip and low-back pain did not arise until December 2014 or January 2015.

36. Dr. Fall testified that if Claimant's job activities injured or aggravated Claimant's left hip, Claimant would have, likely, been able to associate symptoms with a particular job activity, and the fact that Claimant did not make such an association argues against Claimant's work being the cause of symptoms.

37. As to the appearance of right hip and low-back symptoms after Claimant stopped working for the Employer, Dr. Fall testified that this argues against Claimant's job being the cause of symptoms.

38. Dr. Fall also stated that the pain down the Claimant's leg can be caused by a disc injury. She also admitted that the *Division of Workers Compensation Medical Treatment Guidelines* state that both osteoarthritis and back pain can be aggravated or caused by repeated heavy lifting over time. She also agreed that the Claimant complained of the pain down his legs on the first visit to the doctor.

39. On June 2, 2015, Dr. Larson examined Claimant and he opined that Claimant had not suffered an accidental injury or occupational disease injury at work. Dr. Larson concluded that symptoms and findings in Claimant's left hip, including a labral tear, are the result of degenerative arthritis and not an occupational injury or exposure.

40. Dr. Larson testified that Claimant's body mass index or BMI and age are risk factors for the development of arthritis in the hip.

41. Dr. Larson testified that the lifting Claimant performed for the Employer would be considered intermittent. He stated that such intermittent forces Claimant encountered at work have not been shown to be detrimental to joints or to cause or aggravate arthritis in joints**.** Dr. Larson opined that Claimant's left hip symptoms were consistent with the natural onset and progression of degenerative arthritis, and that for greater than 95% of the people with hip arthritis the cause of arthritis is idiopathic.

42. Regarding Claimant's right hip symptoms that arose after Claimant stopped working for the Employer, Dr. Larson testified that if Claimant's job activities caused right-hip symptoms, Claimant would have, likely, manifested symptoms while he was still working, and the emergence or right-hip symptoms after Claimant stopped working supports the opinion that Claimant had naturally progressing degenerative arthritis in his hips where the right hip was "just a bit behind the progression of degenerative arthritis in his left hip."

43. Dr. Larson testified that Claimant's lumbar MRI showed degenerative disc disease and some narrowing of the spinal canal, and that nothing in the lumbar MRI suggested that degenerative spinal conditions had been aggravated. Dr. Larson testified that if Claimant had suffered a lumbar injury at work, Claimant would have, likely, had symptoms while he was working and significant relief of symptoms when he was not working.

44. Dr. Larson, however, admitted that the *Guidelines*, state that arthritis can be aggravated by heavy lifting. Dr. Larson attempted to differentiate between heavy lifting mentioned in the *Guidelines,* and the lifting that the Claimant did on his job. He stated that the Claimant's job required intermittent heavy lifting rather than continuous heavy lifting, although the *Guidelines* do not state that the lifting had to be continuous. He also admitted that the *Guidelines* state that heavy lifting can cause back pain over

time when a worker is lifting 50 – 55 pounds 10 – 15 times per day over cumulative years of exposure.

45. It is essentially undisputed that the findings on Claimant's MRI scans are degenerative in nature and have been present for some time prior to Claimant experiencing symptoms in October 2014. Claimant attributes the onset of symptoms to the heavy lifting he does at work, and Dr. Ryan agrees that Claimant's job duties aggravated his underlying degenerative condition to produce the need for medical treatment. Drs. Larson and Fall have opined that Claimant would have experienced symptoms regardless of his job duties. The ALJ disagrees. Claimant engaged in heavy and prolonged lifting on a regular basis at his job with the Employer. No evidence refuted Claimant's description of his job duties, and he credibly testified. In addition, the *Guidelines* support Claimant's contention that heavy lifting can aggravate arthritis. As such, the Claimant has proven that the work he performed for the Employer aggravated his preexisting and previously asymptomatic degenerative conditions in his left hip and back. The ALJ acknowledges that Claimant's low back pain did not arise until after he discontinued working for the Employer, however, early medical records document radiating leg pain which the medical experts agree is stemming from Claimant's low back rather than his left hip. As such, it is apparent that Claimant was suffering from symptoms related to his low back much earlier than the time he started experiencing low back pain.

46. The Claimant has not proven a relationship to the onset of right hip symptoms to the work exposure. The hip symptoms manifested at least two months after Claimant discontinued working for the Employer and the ALJ is not persuaded by Dr. Ryan's opinions that any right hip symptom is a result of an altered gait. There is no evidence Claimant has had an altered gait due to his left leg or low back symptoms. Insofar as Claimant is suffering from right leg pain associated with his low back condition, such symptoms would be related to his work-related back condition. To the extent Claimant's right leg symptoms are associated with a right hip condition, such symptoms are specifically found not related to this claim.

47. No authorized treating provider has placed the Claimant at maximum medical improvement.

48. The occupational disease has resulted in work restrictions that have rendered the Claimant unable to perform his duties for the Employer from October 21, 2014 and ongoing.

## CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

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

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

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

*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 occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards

associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* 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.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

7. As found above, it is essentially undisputed that the Claimant had preexisting degenerative conditions in his spine and left hip. However, prior to October 2014, the Claimant had no symptoms from these conditions. Dr. Ryan testified that a degenerative condition could exist and never become symptomatic. This was true with the Clamant up until October 2014 when Claimant began to experience left hip and left leg symptoms while working.

8. Claimant attributes the onset of his symptoms to the heavy lifting he does at work. The Claimant provided uncontested and credible testimony that he lifted approximately 100,000 pounds per day at his job. While Dr. Larson called this intermittent lifting, Claimant's testimony seemed to indicate otherwise. Dr. Ryan characterized Claimant's job as "heavy" and the ALJ agrees. The lifting, throwing and stacking of luggage consistently throughout a work day is unique to Claimant's job as a ramp agent or baggage handler. Such activities are not encountered every day outside of Claimant's industry.

9. The *Medical Treatment Guidelines* state that repetitive heavy lifting can aggravate hip osteoarthritis and cause back pain. Dr. Ryan opined, and the ALJ agrees, that Claimant's job duties (consisting of fairly constant heavy lifting) aggravated his underlying degenerative condition in his left hip and low back to produce the need for medical treatment. The opinions of Drs. Larson and Fall are not as persuasive as those of Dr. Ryan. They both have opined that Claimant would have experienced symptoms regardless of his job duties. They both disregard the fact that Claimant engaged in heavy and prolonged lifting on a regular basis at his job with the Employer. Instead, they believe that genetics and Claimant's elevated BMI are the cause of his present condition. While it is true that Claimant had a high BMI and that his conditions pre-existed the onset of symptoms, the ALJ concludes that it is more probably true than not that it is the heavy lifting rather than genetics or BMI that brought on Claimant's symptoms.

10. Based on the foregoing, Claimant has proven that the work he performed for the Employer aggravated his preexisting and previously asymptomatic degenerative conditions in his left hip and back. The ALJ acknowledges that Claimant's low back

pain did not arise until after he discontinued working for the Employer, however, early medical records document radiating leg pain which both Dr. Fall and Dr. Ryan agree is stemming from Claimant's low back rather than his left hip. As such, it is apparent that Claimant was suffering from symptoms related to his low back much earlier than the time he started experiencing low back pain.

11. The Claimant, however, has not proven a relationship to the onset of right hip symptoms to the work exposure. The hip symptoms arose at least two months after Claimant discontinued working for the Employer and the ALJ is not persuaded by Dr. Ryan's opinions that any right hip symptom is a result of an altered gait. There is no persuasive evidence that Claimant has had an altered gait due to his left leg or low back symptoms. Insofar as Claimant is suffering from right leg pain associated with his low back condition, such symptoms would be related to his work-related back condition. To the extent Claimant's right leg symptoms are associated with a right hip condition, such symptoms are specifically found not related to this claim.

*Medical Benefits*

12. 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.

13. The parties have stipulated that HealthOne is the authorized facility for treatment of the Claimant's injuries. Therefore, the Claimant is entitled to treatment at HealthOne and at other clinics and doctors to whom HealthOne staff refers Claimant, to cure and relieve the effects of the Claimant's occupational disease to his left hip and low back.

*Temporary Total Disability Benefits*

14. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss which, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S.; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz, supra.*

15. In this case, the Claimant has been disabled from work since October 20, 2014. He has not reached maximum medical improvement, has not been released to full duty and the Employer has not offered the Claimant a job within his restrictions. Therefore he is entitled to temporary total disability at the rate of $318.80 per week, which is two-thirds of the stipulated average weekly wage.

## ORDER

It is therefore ordered that:

1. Respondents shall pay temporary total disability benefits from October 21, 2014 and ongoing at the rate of $318.80 per week until terminated by operation of law.

2. Respondents shall provide medical benefits to the Claimant to cure and relieve the effects of his occupational disease to his left hip and low back.

3. Claimant's claim regarding his right hip is denied and dismissed.

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

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: November 18, 2015

DIGITAL SIGNATURE:

L. Broniak

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

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## ISSUES

The issues addressed in this decision concern compensability and Claimant's entitlement to medical and temporary disability benefits. The specific questions answered are:

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable work related injury to his right ankle on October 22, 2014.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of TTD benefits from July 2, 2015 through September 7, 2015.

## STIPULATION

Prior to the commencement of hearing the parties stipulated that Claimant's average weekly wage (AWW) is $965.43. The stipulation is approved.

## FINDINGS OF FACT

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

1. Claimant is a long time employee of Respondent-Employer having worked for the college for 29 years. For the past 3-4 years, Claimant's job title has been that of Structural Trades III worker. In this position, Claimant's duties include supervising the custodial staff and performing general maintenance work such as building/grounds repair, weed-eating, lock repair/replacement and shoveling snow. Claimant works eight (8) hours per day and spends as much as 95% of this time on his feet. The duties associated with Claimant's position require frequent walking up and down hills, as well as over uneven terrain, in addition to frequent stair and ladder climbing. Based upon the evidence presented, the ALJ finds Claimant's job physically demanding.

2. Claimant has a history of prior injuries to his right ankle in the past. In 1995, Claimant had some table tops weighing approximately 300 pounds fall onto his right ankle at work. On April 15, 2004, Claimant sustained an eversion injury to his right ankle when his foot slipped while stepping off a ladder. Later on June 3, 2004, Claimant sustained additional injury after he sharply planter-flexed his right ankle after stepping

on a handicapped ramp. Following these injuries, Claimant developed instability in the right ankle, reporting to Dr. O'Brien that the ankle "occasionally [gave] out on him". Consequently, Dr. Timothy O'Brien performed a lateral ligament reconstruction of the right ankle on January 18, 2015.

3. According to a post surgical note from Dr. O'Brien's dated June 22, 2005, Claimant felt "quite good" 5.5 months post surgery. Claimant was placed at maximum medical improvement (MMI) for his April 15, 2004 injury on August 26, 2005. No permanent work restrictions were assigned at the time; however, Claimant was instructed to "use care with his activities and avoid overuse of the ankle".

4. Claimant testified that while his right ankle would hurt occasionally, he did not receive any ongoing treatment for his right ankle after being released from care in 2005. Furthermore, Claimant testified that he was able to perform his full range of work duties following his return to work.

5. Claimant testified that on October 22, 2014 he and a co-worker, identified as Dan Jolly were working on a project that required the application of wooden frames to the walls of a building on campus. Claimant testified that he had to cut the material for these frames in the shop and then transport the pieces to the designated building for final installation. Claimant explained that while he was carrying and loading 1"x 4" boards into his truck, he stepped onto an 8 inch drain, injuring his right ankle. According to Claimant's testimony, he was "BS'ing" with Dan Jolly as he was walking with what he estimated was five boards over his shoulder and not paying attention where he was walking. Claimant testified that he stepped onto the end of a drain cover which popped up causing him to roll his ankle.

6. Mr. Jolly testified that he and Claimant were carrying 1"x 4"x 8' pieces of wood out of the wood shop at the college. According to Mr. Jolly, he was directly behind Claimant, approximately 5 feet away when he observed Claimant step on a floor drain. Per Mr. Jolly's testimony, the drain cover "kicked out" causing Claimant to misstep. Mr. Jolly testified that he observed Claimant limping following this incident and he could tell that Claimant was in pain.

7. Mr. Jolly testified that he has known Claimant for 25 years. He has worked under Claimant for the past three (3) years and spends approximately seven hours per day with Claimant. Mr. Jolly testified that did not see Claimant exhibit any behavior indicative of right ankle pain in the days, weeks or months leading up to the October 22, 2014 incident.

8. Claimant reported his injury to Lorrie Velasquez, Director of Human Resources. A first report of injury was completed by Ms. Velasquez on October 23, 2014. Claimant admitted that he did not tell Ms. Velasquez anything about a floor drain causing his injury. Rather, Claimant testified that he recalled telling Ms. Velasquez that he "stepped wrong." Ms. Velasquez testified consistently with this, confirming that Claimant simply told her he was carrying some 1x4s when he stepped wrong twisting his right ankle. When asked if she told Claimant to be as detailed as possible concerning the cause of

his injury, Ms. Velasquez stated, "I cannot say that for sure." Ms. Velasquez does not know if she asked Claimant about whether or not he stepped on anything. She just knows that it was documented that Claimant "stepped wrong."

9. Claimant sought treatment from Mt. Caramel Health and Wellness Clinic on October 23, 2015. On this date, he was evaluated by Family Nurse Practitioner (FNP), Cindi McIntosh. The report generated from this visit documents that Claimant injured himself "yesterday at work" and that he injured his right ankle "[c]arrying 1x4s and stepped wrong (describes stepping straight, no turning of ankle, but felt pain on top of foot at ankle joint)…." Claimant admitted that he did not tell FNP McIntosh, that he stepped onto a floor drain causing his right ankle injury and FNP McIntosh did not include anything about a floor drain causing Claimant's injury in her report. X-rays were obtained on this date. The x-rays failed to reveal radiologic evidence suggestive of "acute injury" per the report of Dr. William Bufkin, the radiologist interpreting the images. FNP McIntosh simply reiterated the radiologic impression of Dr. Bufkin in her report (Exhibit G, bate stamp 27); however, she went on to provide her assessment concerning Claimant's ankle injury as: "arthritis (R) foot/ankle, intra-articular finding on x-ray, **acute injury**, elevated BP 2nd to pain and situation- need reeval". (Exhibit G, bate stamp page 29)(emphasis added).

10. Claimant provided a recorded statement to the adjuster administering his alleged workers' compensation claim. During cross examination, Claimant admitted that he did not tell the adjuster anything about a floor drain causing his injury. Rather, Claimant admitted that he told the adjuster he did not know what happened, that he just stepped wrong. He was carrying 1x4s to his truck and he just stepped wrong. He did not twist it, he just stepped wrong.

11. FNP McIntosh referred Claimant back to Dr. O'Brien for further evaluation and treatment. Claimant saw Dr. O'Brien on November 6, 2014. During this appointment, Dr. O'Brien noted that Claimant was carrying 1x4s when he placed his right foot on the ground and his ankle gave away. There is no mention of Claimant stepping on a drain causing injury in the November 6, 2014 report from Dr. O'Brien. Dr. O'Brien noted further that Claimant had been experiencing achy pain in the right ankle prior to the October 22, 2014 incident when something precipitously happened on October 22, 2014 to worsen that pain. According to the November 6, 2014 note, Claimant reported that he was walking with lumber on his shoulder when he "nearly went to the ground" after which he had pain like he had never had before. Dr. O'Brien diagnosed Claimant with "posttraumatic postsurgical degenerative joint disease with large kissing lesions anteriorly". Dr. O'Brien specifically noted that he was unable to render an opinion on causation as he did not have a full set of medical records in his possession. Dr. O'Brien referred Claimant to Dr. Michael Simpson for further evaluation.

12. Claimant saw Dr. Simpson on November 24, 2014. Dr. Simpson documented that Claimant was recently carrying 1x4s when he stepped on the ground and his ankle gave away giving rise to increasing pain like her never had before; however, Dr. Simpson also noted that Claimant had been experiencing increasing pain prior to the October 22, 2014 incident. Regarding causality, Dr. Simpson opined that while

Claimant did not have a significant traumatic injury at that time of the October 22, 2014 incident, he exacerbated an underlying pre-existing arthritic condition in the right ankle. Specifically, Dr. Simpson documented the following: "[T]his injury does appear causally related to his work place exposure." Dr. Simpson explained that Claimant had a prior injury to his ankle 10 years ago that required surgery. He stated that the surgery 10 years ago caused Claimant to develop "posttraumatic changes in his arthritis with anterior osteophytes and a dorsal talar osteophyte". Dr. Simpson elaborated further indicating: "This represents progression of arthritic changes in his ankle from his prior work related injury now with an acute exacerbation on top of it. Therefore, whether this is treated as an acute exacerbation of preexisting condition or whether it is treated as chronic progression of his prior work place injury, this appears causally related to his employment and therefore it is compensable. . ." Following an MRI, Dr. Simpson recommended surgery and sought authorization to perform the same from Respondent.

13. Respondent contested liability for the injury and denied authorization for further care to Claimant's right ankle. Consequently, Claimant's private insurance paid for his right ankle surgery which was performed by Dr. Simpson on July 2, 2015. Claimant underwent a second surgery on July 23, 2015 to remove additional loose bodies. Claimant testified that he missed work from July 2, 2015 through September 7, 2015 following his surgeries. Claimant returned to work on September 8, 2015.

14. Claimant underwent an independent medical examination (IME) at the request of Respondent with Dr. Douglas Scott on September 17, 2015. Claimant reported to Dr. Scott that he stepped into a floor drain while carrying 1x4s at work. This history represents the first report by Claimant to anyone connected with this claim that he accidentally stepped onto a drain and twisted his right ankle. As noted above, there is no documentation in any of the records that the floor drain popped up as Claimant testified to at hearing. Dr. Scott noted that Claimant's report to him of stepping into a floor drain was substantially different than his descriptions to his employer, Ms. McIntosh, Dr. O'Brien, and Dr. Simpson. Consequently, Respondent argues that Claimant's testimony about stepping on an unsecured drain cover which popped up and caused him to twist his ankle should be rejected as incredible. The ALJ is not persuaded.

15. Based upon the evidence presented, the ALJ finds that Claimant consistently reported to his employer, the adjuster and his medical providers that he simply stepped wrong. Claimant admitted as much and Ms. Velasquez, the employer representative admitted that she was not familiar with what a "ubiquitous condition" is and had no reason to inquire further as to whether Claimant stepped on anything in particular or if his ankle simply gave out while walking. The totality of the evidence presented persuades the ALJ that the difference in the history obtained by Dr. Scott is likely explained by the fact that Dr. Scott, during completion of an IME to address causality, asked Claimant to be specific in what he believed caused his injuries. Consequently, the ALJ credits Claimants testimony that he had no reason to think he needed to elaborate on the specifics of how he stepped wrong, to find that his simple report of

"stepping wrong" likely meant the more descriptive statement that he stepped onto an unsecured drain cover which popped up causing a twisting injury to his right ankle.

16. Based upon the evidence presented, including Mr. Jolly's eye witness account, the ALJ finds that Claimant's right ankle pain, more likely than not, was proximately caused by an acute sprain after stepping onto an unsecured drain cover, which "kicked out", i.e. popped up causing him to roll his right ankle. In so finding, the ALJ rejects, as speculative, Dr. Scott's conclusions that Claimant's injury was not compensable because the injury "could have happened by stepping at home" and "would have happened regardless of his being at work at that time carrying 1x4 boards". Consequently, Claimant has proven by a preponderance of the evidence that he sustained a work related injury to his right ankle on October 22, 2014. Accordingly, the questions of whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits and an award of TTD benefits from July 2, 2015 through September 7, 2015 must be addressed.

17. Based upon the evidence presented, the ALJ finds that the conservative care provided by FNP McIntosh, as well as her referral to Dr. O'Brien and his subsequent referral to Dr. Simpson for evaluation, was reasonable, necessary and occasioned by the acute right ankle sprain Claimant sustained on October 22, 2014.

18. Regarding Claimant's July 2, 2015 surgery, Dr. Scott opined that the procedure performed by Dr. Simpson was necessitated by and related to the effects of progressive and chronic osteoarthritis in the right ankle. (Exhibit 11, bate stamp page 79). Careful review of Dr. Simpson's pre-surgical admission history and physical report dated July 2, 2015 indicates that Claimant had undergone a lateral ligament reconstruction procedure following a work related injury over ten years prior and had done well following that procedure. Nonetheless, the history also indicates that Claimant reported increasing pain "over the past couple of years" prior to October 22, 2014 and July 2, 2015. Following physical examination, Dr. Simpson provided the following assessment: "Posttraumatic arthritis of the right ankle with multiple loose bodies".

19. The July 2, 2015 "Report of Operation" indicates that Claimant's pre and post-operative diagnosis were "anterior ankle impingement with anterior compartment arthritis, right ankle, loose body medial gutter, and partial thickness tear of the posterior tibial tendon". For these conditions, Dr. Simpson preformed an arthroscopy consisting of extensive debridement, loose body removal and a tenosynovectomy and debridement of the posterior tibial tendon endoscopically.

20. Based on the evidence presented, the ALJ finds Claimant's July 2, 2015 surgery, while reasonable, unrelated to his October 22, 2014 ankle injury. Rather, the evidence presented persuades the ALJ that while the Claimant likely suffered an acute right ankle sprain on October 22, 2014, his right ankle was already symptomatic and those symptoms were progressively worsening before October 22, 2014 when he stepped on a floor drain rolling his right ankle. More likely than not, Claimant's pre October 22, 2014 symptoms were associated with the natural progression of his pre-

existing degenerative ankle arthritis. Thus, while Claimant sustained an acute ankle sprain resulting in increased pain and the need for conservative care, the ALJ is not persuaded that the October 22, 2014 injury caused Claimant's subsequent need for surgery. Rather, the ALJ credits the opinions of Dr's. Scott and O'Brien to find that the July 2, 2015 athroscopy was performed to "temporize", i.e. delay the symptoms related to Claimant's "incurable and relentlessly progressive" pre-existing degenerative right ankle arthritis. Simply put, the October 22, 2014 work injury did not cause, aggravate or accelerate Claimant's underlying pre-existing ankle arthritis leading to his July 2, 2015 surgery. The contrary opinions of Dr. Simpson regarding causality and Claimant's need for treatment, including surgery, are unconvincing when the medical record is considered as a whole.

21. Based upon the evidence presented, the ALJ finds that Claimant was completely unable to perform the duties associated with his regular work following his July 2, 2015 arthroscopic surgery performed by Dr. Simpson. Thus, Claimant established that he was temporarily totally disabled from July 2, 2015 through September 7, 2015. Although Claimant established that he was disabled within the meaning of section C.R.S. § 8-42-105, the evidence presented persuades the ALJ that Claimant failed to prove that his need for surgery was related to his October 22, 2014 ankle sprain, as found above. Consequently, the ALJ finds that Claimant's "disability" is not causally connected to his October 22, 2014 right ankle injury.

## CONCLUSIONS OF LAW

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

*General Legal Principals*

A. The purpose of the Workers' Compensation Act of Colorado 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 this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. 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 testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

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

*Compensability*

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant produced sufficient evidence to support a conclusion that his symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant sustained an injury to his right ankle "arising out of" his employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the*

*decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

G. Nonetheless, the totality of the evidence presented in this case persuades the ALJ that Claimant has established the requisite causal connection between his work duties and his right ankle injury. In concluding as much, the ALJ agrees with Claimant that Respondent's compensability defense rests largely on semantics and speculation. As found above, the only individuals present at the time of the injury testified under oath that Claimant stepped on a floor drain while carrying a stack of boards, the drain cover "popped up" i.e. "kicked out" on Claimant, and that he rolled his ankle and had severe right ankle pain immediately thereafter necessitating his visit to Mt. Caramel Health and Wellness Clinic on October 23, 2015. Claimant does not recall stating anything other than that he "stepped wrong" at the time of the incident. As he testified, he had no reason to think he needed to elaborate and discuss the specifics of exactly how he stepped wrong, i.e., stepping onto a unsecured floor drain cover. Additionally, Ms. Velasquez acknowledged that she could not recall whether she advised Claimant to be as detailed as possible in his reporting of the incident. She readily acknowledged that she did not know what a ubiquitous condition is and therefore had no reason to inquire further of Claimant as to the *exact* mechanism of his injury. Consequently, the discrepancy between the mechanism of injury reported to Ms. Velasquez and Dr. Scott is likely explained by the fact that Dr. Scott asked Claimant to be specific in what he believed caused his injuries during Dr. Scott's IME.

H. Moreover, as found above, Dr. Scott's conclusions that Claimant's injury is not compensable because it "could have happened by stepping at home" and "would have happened regardless of his being at work at that time carrying 1x4 boards" is unpersuasive. Merely because Claimant was engaged in activity, specifically walking which is performed many times a day outside of work does not compel a finding that his subsequent injuries are not work-related. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v.*

*Faulk,* 158 Colo. 441, 407 P.2d 348 (1965). Here, the evidence presented persuades the ALJ that Claimant's employment caused him to suffer an acute ankle sprain because it obligated him to carry cut material across a floor possessing a hidden defect, i.e. an unsecured floor drain cover. Contrary to Respondent's suggestion, such defect is not a "ubiquitous condition" encountered everywhere. In keeping with the decision announced in *City of Brighton*, the ALJ concludes that Claimant's ankle sprain would not have occurred "but for" the conditions and obligations of Claimant's employment. Accordingly, the ALJ finds that Claimant has established that his injury arose out of his employment. As Claimant has established the requisite causal connection between his injuries and his work duties, the injury is compensable.

*Medical Benefits*

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

J. As found here, the evidence demonstrates that Claimant's initial care from FNP McIntosh and her referrals, including the evaluations performed by Dr. O'Brien and Dr. Simpson was reasonable, necessary and related to his acute ankle sprain Claimant sustained on October 22, 2014. FNP McIntosh's care and treatment was necessary to assess and treat, i.e. relieve Claimant from the acute effects of the sprain. Additionally, the specialist referrals were reasonable and necessary to determine an exact diagnosis and future treatment plan in light of Claimant's prior surgical history. Nonetheless, Claimant failed to meet his burden to establish that the October 22, 2014 work injury proximately caused his need for the arthroscopy performed by Dr. Simpson on July 2, 2015. Specifically, Claimant failed to prove that the industrial injury aggravated, accelerated or combined with his preexisting degenerative arthritis so as to cause the

need for surgery. In this case, the persuasive evidence establishes that Claimant's right ankle was symptomatic prior to October 22, 2014 as a consequence of his pre-existing arthritis. More importantly, the evidence presented persuades the ALJ that Claimant's July 2, 2015 surgery was necessary to delay the worsening symptoms caused by the natural progression of Claimant's relentless degenerative right ankle arthritis and not to treat any condition related to the October 22, 2014 industrial injury. Consequently, Claimant failed to establish a causal relationship between his compensable work injury and his need for a right ankle arthroscopy. Because Claimant failed to prove by a preponderance of the evidence that his July 2, 2015 surgery was causally related to his industrial injury, Respondents' were not obligated to provide or pay for it.

*Temporary Total Disability (TTD)*

K. To receive temporary disability benefits, Claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). The question of whether Claimant proved disability, including proof that the injury impaired his ability to perform his pre-injury employment is one of fact for determination by the ALJ. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. APP. 1997)( claimant need not produce medical evidence to prove disability). While the ALJ is persuaded that Claimant proved he was disabled as a consequence of his arthroscopic surgery, from July 2, 2015 through September 7, 2015, the ALJ concludes that that disability was not proximately caused by Claimant's compensable right ankle sprain. Rather, the convincing evidence establishes that Claimant's "disability" flows directly from a medical condition and subsequent operation that Claimant failed to connect to his October 22, 2014 work injury. Consequently, Claimant's claim for TTD benefits must be denied and dismissed.

## ORDER

It is therefore ordered that:

1. Claimant's October 22, 2014 right ankle injury is compensable.

2. Respondent shall pay for all authorized reasonable and necessary medical treatment, resulting from the Claimants October 22, 2014 right ankle injury including but not limited to the care provided by FNP McIntosh, all diagnostic treatment, i.e. x-rays provided under the direction of FNP McIntosh and the evaluations by Dr. O'Brien and Dr. Simpson.

3. Claimant's request for provision of and payment for his right ankle arthroscopy performed by Dr. Simpson on July 2, 2015 is denied and dismissed as the need for surgery was not causally related to Claimant's October 22, 2014 industrial injury.

4. Claimant's claim for TTD benefits from July 2, 2015 through September 7, 2015 is denied and dismissed.

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: November 16, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

## ISSUES

I. Whether Claimant established by preponderance of the evidence that he sustained a compensable low back injury on or about October 29, 2014 and/or October 31, 2014, and if so;

II. Whether Claimant demonstrated by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits to cure or relieve him from the effects of this industrial injury, and;

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary total disability (TTD) benefits for the period of November 4, 2014 through and including February 24, 2015.

Because the ALJ finds that Claimant failed to establish that he sustained a compensable injury, this order does not address his claims for medical and temporary disability benefits.

## STIPULATION

At the outset of hearing, the parties stipulated to an average weekly wage (AWW) of $792.13.

## FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Rauzzino, the ALJ enters the following findings of fact:

*Claimant's Job Duties & Prior Medical History*

1. Claimant is employed by Respondent-Employer as a transportation maintenance worker. His job duties consist of general highway maintenance, including maintaining guardrails; signage and fences, filling pot holes and plowing snow. The work associated with Claimant's position is physically demanding requiring long hours driving a snowplow and heavy lifting.

2. Around October 20, 2011, Claimant sustained a low back injury while replacing a bent highway fence post. Claimant was pulling on the post to remove it from the ground when he suddenly developed sharp pain in his low back. Claimant presented to Rio Grande Hospital on October 24, 2011. The hand written notes from this visit are difficult to decipher; however, the emergency nursing triage note reflects that Claimant developed pain acutely in the face of injury. In addition to stiffness,

Claimant complained of sharp pinching low back pain extending down his right leg which would come and go following this incident. According to the report, by the time Claimant's presented to the emergency room, he had been in pain for 4 days.

3. Following this injury Claimant, undertook a lengthy course of conservative treatment at Rio Grande Hospital Clinic under the care of Olixn Adams, D.O. On October, 25, 2011, Dr. Adams assessed a mild to moderate low back strain. He recommended "continued supportive care" including initiation of naproxyn which had been prescribed in the emergency room the day before.

4. Claimant subsequently developed persistent centralized low back pain. Consequently, on November 21, 2011, Dr. Adams referred him to physical therapy (PT).

5. Claimant initiated PT on December 7, 2015 under the direction of Ron Muhlhauser, PT. Mr. Muhlhauser documented complaints of symptoms in the "center of low back above the belt line as well as associated symptoms into [the] right and left buttock which [Claimant] described as sore sometimes sharp, intermittent and superficial". Claimant's pain symptoms varied from a 7/10 at its worst to 0/10 at its best.

6. Claimant continued his PT making progress to approximately 80% of his pre-injury baseline; however, by January 30, 2012, Claimant reported feeling about the same as he had for the "past several weeks". He reported "several good days each week, then a few days of mild discomfort" without "true pain" only "mild discomfort".

7. Claimant returned to Dr. Adams for a follow-up visit on February 17, 2012 with continued complaints of back pain. He had finished his course of PT by this visit, reporting that he was "not better". Although Claimant had returned to approximately 80% of his pre-injury baseline, Dr. Adams documented that he had not made "any significant progress over the past 6-8 weeks". Because Claimant continued to express "mild intermittent pain at least half of the days out of the week" which was "exacerbated by flexion or being in awkward positions when working on equipment", Dr. Adams recommended x-rays and an MRI of the lumbar spine.

8. X-ray views obtained February 17, 2012 were interpreted as negative. An MRI of the lumbar spine obtained 2/29/2012 revealed "minimal degenerative changes, degenerative disk disease at L5-5 and L5-S1. In addition, a "trace disk bulge/small herniation/small protrusion" was present at the L5-S1 level.

9. On March 5, 2012 Claimant returned to Dr. Adams who commented on the results of Claimant's MRI, noting the study to be "unremarkable". As Claimant continued to complain of 4/10, on again off again pain with bending and "twisting-type motions", Dr. Adams recommended chiropractic treatment.

10. Claimant initiated chiropractic treatment with Aaron Polzin, D.C. on May 15, 2012. Dr. Polzin performed a physical examination during which he tested Claimant's facet joints. He also commented on Claimant's 2/17/2012 x-ray, noted that it

demonstrated a “pars interarticularis defect”. According to Dr. Polzin, Claimant’s clinical symptoms were consistent with “mechanical lower back pain” caused by a “multitude” of elements including the par defect, the disc bulging, Claimant’s increased facet loading and his poor core strength, all of which were being aggravated by repetitive use situations. Dr. Polzin proposed a 4-6 week treatment plan consisting of approximately one visit per week to focus on manipulative procedures of the lumbar facet joints, the SI joint and Claimant’s poor core strength. Given the objective condition of Claimant’s lumbar spine, Dr. Polzin was optimistic that Claimant’s symptoms would resolve but that he may have “intermittent functional aggravations in the future.”

11. Claimant made modest progress regarding his symptoms with chiropractic care; however, on June 1, 2012 he suffered a setback. On this date, Claimant reported to Dr. Adams that he had been pain free until he worked in the front end loader which he felt may have “aggravated his back”. With additional chiropractic care, Claimant’s symptoms returned to base-line and he was placed at maximum medical improvement (MMI) without permanent impairment on June 18, 2012.

12. Claimant continued his chiropractic care on a maintence basis and returned to Dr. Polzin for a “routine adjustment” on October 22, 2012. On this date Claimant described increased stiffness and soreness in the lower lumbar, mid thoracic and radial lumbar areas. Claimant attributed his increased stiffness and soreness to hunting the previous week. Claimant was adjusted and instructed to return to the office on an “as-needed basis”.

13. Claimant returned to Dr. Polzin on March 8, 2013, with complaints of tightness in the lower back and mid and upper thoracic area. Claimant associated his increased symptoms to his 12-14 hour shifts operating a snowplow. Claimant was assessed as having a “flareup of segmental dysfunction with resulting decreased range of motion and mild spasm activity.” Claimant’s exacerbation was treated with spinal manipulation of the lumbar spine and instructed to return on a PRN basis.

14. Claimant changed chiropractors and began treating with Terry L. Wiley, D.C. beginning April 2013. On April 2, 2013 Claimant is seen by Dr. Wiley for 3/10 visual analogue scale (VAS) pain in the lower, mid, and upper back. No precipitating cause for Claimant to seek treatment with Dr. Wiley is documented. Dr. Wiley scheduled Claimant for additional treatment two times per week for three months.

15. Over the 16 month period in between April 2013 and October 2014 Claimant had 14 visits with Dr. Wiley. Claimant pursued these visits with Dr. Wiley because he felt it alleviated the back pain he would feel. Claimant noted there were definitely times when his work activities would cause his back pain to increase. For instance, in Dr. Wiley’s note of May 1, 2013 Claimant reported that he low back was sore from “fencing”. Furthermore, Dr. Wiley noted on December 6, 2013, that Claimant complained that he was spending long hours on the pass snowplowing. Again on January 13, 2014 Claimant noted that his low back hurt from driving long shifts.

Similarly, on February 10, 2014 and April 16, 2014 Dr. Wiley's notes reflect that Claimant's back was hurting from long shifts driving the snowplow.

16. Dr. Wiley's records also reflect during 3 office visits that Claimant's back became more painful from non-work related activities. On September 19, 2013 Claimant had been moving firewood prior to his back hurting. Also, on August 27, 2014 Claimant complained of neck and low back pain from spending long hours at the hospital waiting for his babies to be born.

17. The aforementioned notes reflect low back pain levels on a visual analog scale (VAS) ranging from 3/10 to 6/10. The records also reflect that Claimant received chiropractic treatment outside of the low back to include his neck, upper back, pelvis, scarum, elbows and forearms.

*Claimant's Alleged October 29, 2014 Injury*

18. On October 29, 2014 Claimant was working with 2 other CDOT employees. They were moving sign trailers at the top shop of Wolf Creek Pass. Claimant testified that he sustained an injury to his low back "when disconnecting a trailer" with Jay Brush on October 29, 2014. He further testified that he felt a sharp pain in his low back when they "lifted tongue up to move it over to side four inches."

19. Claimant continued to work Thursday, October 30, 2014 and Friday, October 31, 2014. On the morning of the 31st Claimant was moving multiple stacks of traffic cones to a different location for lane diversion and traffic control. In order to do this he had to bend over and pick up a stack of traffic cones, straighten up, walk with the pile of cones over his shoulder, then bend down and place the cones on the ground. The repetitive leaning over and placing the stack of traffic cones on the ground exacerbated the low back pain Claimant developed on October 29, 2014. Claimant reported his injury to his supervisor, George Hudran, on October 31, 2014 at approximately noon when Mr. Hudran returned to the worksite.

20. Claimant then completed an Employee Incident Statement on October 31, 2014 noting the date of the incident with the trailer on October 29, 2014 as the cause of his injury. Claimant's incident statement reflects that he was lifting and removing a trailer at the time he felt pain in his low back. However, a witness statement obtained from Mr. Brush regarding the incident includes the following passage:

> Brett, Brandon & myself pulled up to top shop in Tweener to hook up arrow trailer. Brandon & myself got out and backed up Brett to trailer. Brandon and me lifted up tongue of trailer to put on hitch. After we placed on hitch Brandon commented "that lifting that trailer kind of hurt." I asked what? and he said he tweeked his back.

21. The witness statement from Jay Brush, directly contradicts the testimony of Claimant. Mr. Brush's statement specifically notes that they were connecting, or putting the arrow board trailer "on (the) hitch". The testimony of the claimant indicated that they were "disconnecting" the trailer and "lifted tongue up to move it over". The ALJ finds this inconsistency immaterial in light of the fact that both Claimant and Mr. Brush have indicated that they were lifting the trailer tongue when Claimant reportedly developed low back pain.

22. On October 31, 2015 Mr. Hudran asked Claimant if he wanted to see a doctor concerning his back. Claimant informed Mr. Hudran that it was only a twinge and that he thought it would get better. George Hudran told Claimant that if he didn't go to the doctor, he couldn't use his back as an excuse as to why he couldn't work.

23. Through October 31, 2014 Claimant was on the "summer schedule". His work schedule was Monday through Friday, approximately 8 AM to 5 PM. On Saturday, November 1, 2014 Claimant was switched to the "winter schedule" which required him to work Monday through Friday, approximately 2:30 PM to 11 PM.

24. Claimant was not scheduled to work Saturday, November 1, 2014 or Sunday, November 2, 2014. However, because of snow, Claimant was on call. He came in to work on Sunday, November 2, 2014 and plowed snow on Wolf Creek Pass from 4 PM to midnight.

25. On November 3, 2014 Claimant went into work in the afternoon a little bit before his shift was scheduled to start. At that time, he spoke with George Hudran. Claimant told Mr. Hudran that he wanted to seek medical help for his low back pain because plowing for 8 hours on Sunday made it worse than it had been the prior few days at work. Claimant was provided with a list of authorized treating physicians. Claimant selected Rio Grande Hospital Clinic where he has received most of his treatment under the direction of Tiffany Ward, M.D. Claimant's first visit with Dr. Ward was November 3, 2014. At that time, Dr. Ward diagnosed Claimant with a low back strain and provided restrictions including no lifting greater than 20 pounds, no bending forward or backward.

26. Claimant returned to work following his appointment with Dr. Ward to speak with George Hudran. Claimant was told that his position could not be accommodated given the aforementioned restrictions. Mr. Hudran sent Claimant home. Claimant did not return to his position until he received a full duty release to return to work on February 25, 2015. Claimant's first day back at work was February 26, 2016. Claimant was not yet been placed at maximum medical improvement.

27. Nine days prior to the trailer lifting incident (October 20, 2014), Claimant saw Dr. Wiley for arm pain and low back pain. Dr. Wiley's record reflects that Claimant's lower back was sore from gathering firewood. (Claimant's Exhibit 1, page 30). Claimant reported 5/10 pain in the low back, elbows and forearms. When questioned about this chiropractic visit, Claimant testified that it was mainly with respect to his elbows. Based

upon the evidence presented, the ALJ finds record support for this testimony. The pain diagram from this visit contains markings on the elbows and forearms only. There is no indication on the pain diagram of complaints in the low back or any indication that treatment was specifically directed to that area, although the report indicates that "subluxations were addressed with chiropractic adjustment in the cervical, thoracic, lumbar and pelvic areas of the spine". Review of Dr. Wiley's records reflects this notation or ones similar to it are common throughout his records. Based upon the evidence presented, the ALJ finds that this statement probably reflects that these spinal areas are routinely adjusted by Dr. Wiley when Claimant presents to his clinic.

28. George Hudran, testified by telephone. Mr. Hudran and Claimant concurred that in the middle of October, 2014, about 2 weeks prior to the trailer lifting incident, Claimant requested time off from work from November 1 through November 5. Both Mr. Hudran and Claimant testified that the request was denied as there were already two other employees scheduled to be out that weekend.[1] Claimant testified that he had family coming into town, including a brother who was going hunting. Claimant testified that he did not go "hunting" in 2014.

29. Mr. Hudran testified that Claimant specifically requested to take November 1-5 off for "hunting season". According to Mr. Hudran, Claimant informed him that he had a license and there was a discussion between Mr. Hudran and Claimant about whether or not Claimant was going to turn his license back in due to the fact that his time off request was denied. Mr. Hudran reportedly instructed Claimant on how to turn in his hunting license. Claimant denies that he requested time off to go hunting and that he had a license to do so. Mr. Hudran testified that when Claimant returned from Dr. Ward's office on November 3, 2014 with his work restrictions, Claimant told him that he "did some spotting" for his brother. Mr. Hudran further testified that he has hunted all his life and that the Claimant specifically mentioned "spotting" concerning his brother's hunting. According to Mr. Hudran, Claimant appeared to be upset that he couldn't have the requested time off.

30. As noted above, Claimant denies that he had a license to go hunting. Careful review of the evidence persuades the ALJ that Claimant never held a hunting license for 2014. A notarized copy of the Claimant Colorado Parks and Wildlife Records reflecting all applications and licenses purchased by Claimant since 1993 reflects that the only license Claimant applied for and purchased in 2014 was an annual fishing license issued on May 9, 2014. There is no indication in the Colorado Parks and Wildlife record that Claimant ever held a hunting license for the fall of 2014, or that such a license was surrendered.

31. While Mr. Hudran implied that Claimant falsified his injury of October 29, 2014 in order to go hunting, that allegation is not supported by the record. Rather, Mr. Hudran confirmed that Claimant not only worked all shifts as scheduled, he came in and worked an unscheduled 8 hour shift on Sunday, November 2, 2014. Mr. Hudran stated

[1] As November 1st marks the beginning of the winter schedule and snow plowing season, no more than two persons from the crew can be off at the same time.

that Claimant fulfilled all of his work duties. Mr. Hudran's suggestion is also not supported by the Colorado Parks and Wildlife records. Rather, those records support Claimant's statement that he did not have a hunting license at all in 2014. The only time Claimant left work during the November 1 through November 5, 2014 for which he had earlier requested time off was at the direction of George Hudran after receiving modified duty work restrictions. Based upon the evidence presented, the ALJ finds Mr. Hudran's testimony regarding Claimant's motivation to take time off work and his indication that Claimant reported spotting for his brother unpersuasive.

32. At his November 3, 2014 appointment with Dr. Ward, Claimant reported feeling immediate sharp pain in his low back as well as tingling and numbness into his buttocks during the incident in question. During neurologic physical exam, Dr. Ward documented complaints of numbness both in Claimant's low back and buttocks, greater on the right side. The ALJ finds these new symptoms, previously unrecorded in the prior treatment records following Claimant's 2011 injury, including the October 20, 2014 report of Dr. Wiley, nine days before the incident with the trailer on October 29, 2014.

33. Based on Dr. Ward's referral, Claimant underwent a second MRI of the lumbar spine on December 16, 2014. This MRI revealed a circumferential disc bulge with left-sided predominance and tiny left foraminal protrusion at L4 – 5 and a very small broad-based posterior disc bulge with annular tearing at L5 – S1.

34. At the request of Respondents, Claimant attended an independent medical exam with Dr. Michael Rauzzino of Front Range Spine and Neurology. Dr. Rauzzino opined that Claimant did not suffer a new injury to his lumbar spine outside perhaps a temporary exacerbation of his chronic back pain on October 29, 2014. Dr. Rauzzino went on to state that Claimant's symptoms were no different on October 20, 2014 after moving firewood than they were on November 3, 2014 after the work injury. In the final paragraph of his report, Dr. Rauzzino states the above as follows: "given that there was no structural injury to his spine and he has had chronic back pain all along, I do not see anything different about the character of his back pain or the location of his back pain from what he reported before the injury. I therefore do not believe that there is a new work-related claim here."

35. Dr. Rauzzino testified by deposition on August 31, 2015. Dr. Rauzzino testified that he personally reviewed both the February 29, 2012 and December 16, 2014 lumbar MRIs indicating: "I would tell you as a board-certified, fellowship-trained neurosurgeon who reviewed both films directly myself, I felt that the findings were very similar…I would say there was no significant difference in the x-rays (MRIs) that would account for any new symptoms that he would have except - - and you also have to account for the fact that the x-rays are different in two years in time. So he has time for his spine to degenerate also in time. There is some time for some changes. But I don't see an acute new structural difference to his spine." (Rauzzino, p. 50, l. 5-24) The ALJ infers from this testimony that Dr. Rauzzino assumes that any differences between the February 29, 2012 and December 16, 2014 MRI's are subtle and explained as additional degenerative changes occurring over the ensuing 34 months.

36. Dr. Rauzzino, when discussing the two MRIs, noted that the films were taken at two separate facilities. "There is always going to be slight variance in the way the machine takes the pictures. So if I had a patient that I put through an MRI today at one of the machines at one of the hospitals, and I had to come back and take an MRI a week later at a different machine in a different hospital, depending on how they took the cuts, how the machine was reading, they may look slightly different, but they will be the same overall appearance. And that's what I was trying to get to with the report, that in my mind, having looked at the pictures directly, I did not see a significant difference in the two studies. I did not see an acute injury on either study." (Rauzzino, pp. 54-55, l. 23-10)

37. The ALJ has considered the totality of the evidence and finds the opinions expressed by Dr. Michael Rauzzino credible and persuasive. Based upon the evidence presented, the ALJ finds that Dr. Rauzzino is the only physician who has had the opportunity to review the entirety of Claimant's medical treatment, including Claimant's extensive chiropractic treatment over the years prior to his alleged October 29, 2014 and October 31, 2014 incidents. Dr. Rauzzino's testimony and opinions are consistent with the record of evidence concerning Claimant's pre-existing low back injury and chronic low back condition.

38. To the contrary, Dr. Tiffany Ward, who saw the claimant on November 3, 2014 noted no prior history of any back complaints prior to October 29, 2014 and therefore, did not have a complete medical history or information in which to provide an informed causation analysis. Dr. Ward's November 3, 2014 report is void of any history or information that pre-existed the alleged event of October 29, 2014.

39. Based upon the totality of the evidence, including the chiropractic records the ALJ finds that Claimant has been treated repeatedly and aggressively for complaints of low back pain, since his 2011 industrial injury; sometimes due to an occupational trigger sometimes not. Despite this and as predicted by Dr. Polzin, Claimant has continued to suffer from "intermittent functional aggravations" likely caused by further degeneration of his lumbar facets and discs resulting in frequent episodes of low back pain only partially alleviated by chiropractic treatment. Consequently, the ALJ finds that Claimant's current symptoms likely represent the natural progression of his degenerative disc disease. Furthermore, the ALJ is persuaded that the subtle differences between Claimant's MRI's are attributable to this degenerative process and the progression of this degeneration accounts for Claimant's current numbness and tingling. Simply put, the ALJ is not convinced that Claimant suffers from new "neurologic and/or radicular" symptoms caused by an injury occurring October 29, 2014 when he lifted the trailer tongue or moved traffic cones as he claims. Consequently, the ALJ finds that Claimant's need for treatment following the October 29, 2014 incident was, more probably than not, directly caused by the natural progression of his degenerative lumbar spine and disc disease and not the October 29, 2014 lifting incident involving a trailer tongue or the October 31, 2014 incident involving the relocation of traffic cones as described by Claimant.

40. The ALJ finds that although Claimant had an "accident" while performing his work duties, he failed to prove that he suffered a compensable "injury" resulting in disability or the need for treatment.

## CONCLUSIONS OF LAW

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

*Generally*

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

*Compensability*

D. As noted, Claimant bears the burden to prove that he suffered a compensable injury. To sustain that burden, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); §8-41-301(I)(c), C.R.S. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

E. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id.*; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

F. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found above, the ALJ is not persuaded that Claimant's need for low back treatment was caused by his lifting a trailer tongue on October 29, 2014 or relocating traffic cones on October, 31, 2014. To the contrary, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms, including his numbness and tingling are a consequence of the natural progression of his multi-level degenerative disc and lumbar spine disease. Accordingly, the ALJ is not convinced that Claimant sustained a new injury resulting in new or different "neurologic or radicular" symptoms attributable to lifting the trailer tongue of moving traffic cones. Consequently, Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting condition for which medical

treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim is dismissed. Accordingly, his claims for medical and temporary disability benefits need not be addressed.

## ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

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

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

DATED: November 2, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-967-006-01**

## ISSUES

- Whether the Claimant's permanent partial impairment shall be paid based on an extremity or whole person rating.

## FINDINGS OF FACT

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

1. Claimant is 63 years of age and works for Employer as a construction field inspector.

2. On January 23, 2014, Claimant suffered a compensable and admitted on-the-job injury to his right shoulder when he slipped and fell while walking across ice.

3. Claimant tried to work through the pain in the hopes that it would get better, but when the pain persisted, he sought care for his injury. On October 15, 2014, he reported neck pain, among other things, to Candice Sandiski, M.D.

4. Claimant received conservative treatment which included physical therapy and anti-inflammatory medication. During his treatment at Concentra, Claimant was diagnosed with a trapezius strain.

5. When Claimant failed to improve, he was referred to Dr. John Papillion for an orthopedic evaluation.

6. Dr. Papillion diagnosed Claimant as having a rotator cuff tear, and a type 4 SLAP tear.

7. On November 24, 2014, Dr. Papillion performed a distal clavicle resection and repaired Claimant's torn rotator cuff.

8. Claimant missed one week of work after the surgery and was paid temporary total disability benefits from November 27, 2014 through November 30, 2014.

9. On January 13, 2015, Claimant physical therapist observed Claimant exhibited moderate right shoulder elevation and "tenderness to palpation of the superior, anterior, and lateral shoulder," and "tender right upper trapezius." Soft tissue manipulation was performed to those areas and Claimant relief of symptoms as a result. On January 27, 2015, soft tissue manipulation was also performed on Claimant's right pectoralis muscles.

10. On March 17, 2015, a physical therapist noted tightness in Claimant's right scapular elevators and right trapezius into the neck. On March 26, 2015 and April 1, 2015, a physical therapist performed manual therapy on Claimant's thoracic region and scapula with Claimant noting a decrease in his overall pain.

11. On April 22, 2015, Dr. John Aschberger placed Claimant at maximum medical improvement. His notes provide that Claimant had "tightness at the trapezius and into the neck." Dr. Aschberger assigned an impairment rating of 24% of the right upper extremity which he converted to 14% as a whole person. Dr. Aschberger prescribed massage therapy for maintenance medical treatment.

12. Also on April 22, 2015, Scott Richardson, M.D., of Concentra also noted tenderness in Claimant's rhomboid and trapezius muscles.

13. On May 15, 2015, Respondents filed a final admission admitting for permanent partial disability benefits based upon the 24% extremity rating. A number of massages were ordered post MMI.

14. On May 18, 2015, Matthew G. Miller, M.D. filed a Physician's Report of Workers' Compensation Injury. The report indicates that Claimant's impairment rating is 14% whole person.

15. On June 19, 2015, Claimant continued to complain of pain at 3-4/10. The massage therapist noted hypertonicity, tenderness, tightness, and guarding to Claimant's right shoulder and periscapular area. Claimant's massage covered several muscles extending towards his torso and back beyond the glenohumeral joint. Four additional massage therapy sessions were ordered.

16. Claimant has continued to have symptoms from his injury since returning to work one week after the surgery. He testified credibly that he has pain in his shoulder which radiates into his neck. He has stiffness in his neck and has a hard time turning his neck from left to right. He also has difficulty looking up for more than a short period. He testified that he has stiffness on the back of his shoulder between his neck and his arm and down his back.

17. To compensate for the stiffness in his neck, Claimant has glued convex mirrors on both the right and left rearview mirrors in his car and his truck. This allows Claimant to see behind him without having to turn his head too far.

18. As part of his duties as an inspector, Claimant is required look up at the ceiling at a construction site. However, he no longer looks up for long periods but just glances up repeatedly for a few seconds at a time. This has allowed him to continue to work for Employer at his pre-injury job.

19. Claimant was involved in an auto accident in approximately 1995 while working for the City of El Paso. He testified that he was in a neck brace for about a week and recovered completely from that injury with no permanent restrictions. At the time of the January 23, 2014 fall, he was having no symptoms from the prior accident.

20. Dr. Aschberger performed an examination when he placed the Claimant at MMI. He stated that Claimant had restrictions for cervical extension and lateral flexion. He also found that Claimant had a prominent right trapezius which is tender to palpitation and with radiation into the neck. This is consistent with Claimant's testimony regarding his neck symptoms.

21. Dr. Christopher Ryan performed a Claimant's IME. Claimant reported having pain throughout his right upper quarter and into his neck since the date of injury. Dr. Ryan stated in his report of July 30, 2015 that Claimant had significant tightness of the right much more than the left scapular elevators and the paraspinous muscles in the cervical and thoracic spines. During the interview portion of the evaluation, Claimant reported, "difficulty with neck motion, and this impacts any activity that he has to use his neck for, including driving, looking upward for more than a few seconds, repetitive turning, and moving his head into awkward positions, and static head positioning." Dr. Ryan opined that the functional impact of this on Claimant's daily life "includes limitation of cervical range of motion." He concluded that Claimant's function limitation "clearly extends into the torso." He opined that the impact of the injury on Claimant included a loss of cervical range of motion.

22. Dr. John Burris examined Claimant at Respondents' request. In his July 27, 2015 report, Dr. Burris stated that Claimant reported pain along the superior aspect of his right shoulder which extends into the neck region. The pain was described as from pins and needles to stabbing in nature.

23. In spite of these findings, Dr. Burris found no functional impairment that extended beyond the right upper extremity and concluded that the impairment should be scheduled and not a whole person.

24. Respondents called Dr. Burris as a witness at the hearing. On direct examination he reiterated his position that Claimant should receive an extremity rating only. His reasoning was that the injury was to Claimant's shoulder and not his torso or neck.

25. On cross-examination, Dr. Burris acknowledged that it is common for someone with this injury and surgery to have pain and stiffness in his or her trapezius. He testified that the trapezius muscle runs from the base of the neck to the shoulder joint and also down the back. He also conceded that Claimant had pain and stiffness in the trapezius muscle as a result of his injury.

26. Dr. Burris stated on cross-examination that pain and stiffness in the trapezius muscle can cause pain and a loss of range of motion in the neck and that Claimant did have pain in his neck accompanied by a loss of range of motion as a result of the injury.

27. Dr. Ryan's conclusions and opinions to be more persuasive than those of Dr. Burris. Dr. Ryan's findings of cervical pain and stiffness were supported by Dr. Aschberger who was an authorized treating physician, and even by Dr. Burris who

performed Respondents' IME. Dr. Burris' conclusions and opinions that the extremity rating should apply and that no functional impairment extends beyond the arm is inconsistent with Claimant's credible testimony and pain complaints, and also the findings of Dr. Aschberger and Dr. Ryan. Dr. Burris' conclusions and opinions that the extremity rating should apply is also inconsistent with Dr. Burris' own testimony that Claimant's trapezius is inflamed and stiff as a result of the injury and that this has caused pain and a loss of range of motion in the Claimant's neck.

28. Based on the totality of the evidence, the ALJ finds that Claimant has established by a preponderance of the evidence that he is entitled to a whole person impairment of 14% due to ongoing pain and stiffness in Claimant's trapezius and neck and that this is the appropriate measure of the Claimant's impairment.

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

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' 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). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

**Permanent Impairment**

The law concerning the conversion of upper extremity ratings to whole person ratings in cases of shoulder injuries is well established. 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 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 question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ.

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). Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *See Langton v. Rocky Mountain Healthcare Corp.,* supra*; Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996).

Claimant has proven by a preponderance of the evidence that the situs of his functional impairment extends beyond the "arm at the shoulder." Claimant has problems with his neck range of motion as a result of the injury. This is confirmed by his treating physician, Dr. Aschberger, and also by Claimant's IME physician, Dr. Ryan, and by Respondents' IME physician, Dr. Burris. Claimant testified credibly to this point and put convex mirrors on his vehicles so he does no't have to turn his head so far to see what is behind him.

Based upon the situs of Claimant's impairment being in the neck, evidenced by pain and a loss or range of motion, the ALJ concludes that Claimant should receive permanent disability benefits based upon a whole person rating pursuant to §8-42-107(8) C.R.S.

## ORDER

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

1. Respondents shall pay permanent partial disability benefits based upon the 14% whole person rating given by Dr. Aschberger in his MMI report of April 17, 2015.

2. Respondents shall receive credit for any permanent disability previously paid.

3. Interest at the rate of 8% shall be paid on all compensatory benefits not paid when due.

4. Any issues not decided by this order are reserved for future determination if necessary.

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: November 23, 2015

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

## ISSUES

Whether the claimant established by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on September 21, 2014 in an incident arising out of and in the course of her employment with the respondent-employer.

## FINDINGS OF FACT

1. The claimant was employed by the respondent-employer department store on September 21, 2014. On that date she was assigned to the customer service area of the store where returns of merchandise were made. On that date the claimant picked up a box containing a mattress pad weighing approximately 10 pounds. The claimant asserts that she injured her right shoulder while doing so. The claimant's shift concluded at approximately 2:00 p.m. that afternoon.

2. The claimant went to the emergency room at Penrose St. Francis on September 21, 2014. The intake form lists arrival time as 16:58 (4:58 pm) and states that she injured her arm lifting a box. The location of the incident is identified as "home." The hand written notes indicate the claimant was seen at 19:15 (7:15 pm). She reported she was lifting a box when she felt a "pop." The report does not indicate that this occurred during a work related event.

3. In discussing the alleged incident with her medical providers, the claimant initially reported that she lifted the box from the countertop of the customer service area. Surveillance video of the store work area on September 21, 2014, commencing at 12:18 p.m., shows the claimant working. During this timeframe, from approximately 12:18-12:27, an interaction with a customer that appears to be returning a Serta mattress topper can be seen wherein the claimant picks up a mattress topper box from the floor at approximately 12:27 and carries it off screen.

4. Dr. Eric Ridings reviewed the surveillance video in its totality and the video was also admitted into evidence. Dr. Ridings indicated that from 12:18-2:04 the claimant can be seen working without any apparent discomfort, using her upper extremities normally, and not displaying any difficulties or non-verbal indications of discomfort.

5. The claimant's supervisor, Marie Hutchins, worked with the claimant in the customer service department on September 21, 2014. The claimant was adamant that she specifically told Ms. Hutchins "ouch that hurt" when she picked up the mattress topper box. Ms. Hutchins testified the she recalled the claimant making a comment that the box was "heavy" but that the claimant did not use the words "ouch" or "hurt" or give any indication that she had injured herself by lifting the box. Ms. Hutchins testified that as a supervisor, had the claimant reported the box injured her, even in passing, she would have insisted an incident report be filled out. Ms. Hutchins testified that she worked in the customer service area with the claimant for the remainder of her shift and that the claimant never displayed any difficulty in performing her work functions or complained about her right shoulder.

6. Mr. Lindberg testified that she spoke with the claimant during a store opening meeting on the morning of September 22, 2014. The claimant presented that morning wearing a sling on her right arm. Mr. Lindberg asked the claimant what happened to her shoulder and the claimant made statements to him that she had injured the right shoulder during an altercation with a bar patron while watching the Broncos game. Mr. Lindberg testified he did not believe that the claimant meant these statements in a joking manner. Mr. Lindberg also testified that the claimant did not mention any incident concerning lifting the mattress pad topper box to him during this conversation on the morning on September 22, 2014.

7. Ronda Romero testified that she also spoke with the claimant the morning of September 22, 2014 when the claimant walked by Ms. Romero's desk with the sling on her right shoulder visible. Mr. Romero testified that the claimant also told her that she injured the right shoulder while watching the Broncos game.

8. Dr. Eric Ridings performed an independent medical examination of the claimant on August 12, 2015. He also provided testimony at the hearing. In Dr. Riding's medical opinion, lifting a 10-pound box in the manner in which the claimant described during her hearing testimony, bending down and lifting with both hands, is an insufficient causal mechanism to cause, aggravate, or accelerate any injury to the right shoulder. Dr. Ridings testified that biomechanically one cannot cause injury to the shoulder with the body positioning that the claimant, by her own self report, utilized in the lifting of a 10-pound box. Dr. Ridings opined that a 10-pound box, lifted with two hands, is simply insufficient to cause any objective injury to the right shoulder. Dr. Ridings further opined that the current diagnosis of frozen shoulder on the right is not caused, aggravated, or accelerated by the alleged incident of September 21, 2014.

9. Dr. Ridings testified that wearing a sling during the period of time that the claimant described (limiting the sling to working hours, removing it at home and for sleep) is insufficient to cause frozen shoulder/adhesive capsulitis. Dr. Ridings also testified that the claimant has a history of a frozen shoulder diagnosis on the left hand side.

10. The claimant denied any prior right arm or shoulder symptoms. However, medical records from November 14, 2012 document a fall with a diagnosis of contusion and right sided chest wall bruising. The claimant reported intermittent right arm numbness and tingling. The claimant also reported radiating pain into the right arm during an evaluation on February 26, 2014 at Peak Vista.

11. The MRI findings of October 11, 2014 documented mild thickening of the synovium most consistent with adhesive capsulitis. Mild bursitis, mild tendonitis of the biceps and infraspinatus were also noted. The MRI was negative for rotator cuff tear. Dr. Ridings testified that the findings on the MRI were degenerative in nature and could not reasonably be related to the alleged incident of lifting a 10-pound box on September 21, 2014.

12. The claimant reportedly experienced immediate onset of pain and a tearing/popping sensation in her right shoulder, yet she continued to work the remainder of her shift without any indication of pain or physical distress.

13. The ALJ finds Dr. Ridings' testimony credible and persuasive. Dr. Ridings testified that biomechanically lifting a 10-pound box in the manner the claimant described is insufficient to cause, aggravate, or accelerate any injury to the claimant's right shoulder. This medical testimony was not contradicted by any expert witness on behalf of the claimant. As explained by Dr. Ridings, the claimant's report of experiencing a pop or tearing sensation when lifting the box is inconsistent with the objective MRI findings that indicate no rotator cuff or labral tears.

14. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury on September 21m, 2014 arising out of and in the course of her employment with the respondent-employer.

## CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the 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 worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

5. A preexisting condition does not disqualify a claimant from receiving worker's compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App.1990). The mere experience of

symptoms at work does not necessarily require a finding that the employment aggravated or accelerated the preexisting condition. Resolution of that issue is also one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

6. The claimant testified that she experienced a pop and tearing sensation with immediate onset of right shoulder pain on September 21, 2014, however she is shown on surveillance video to lift the box in question with no visible evidence of discomfort. She continued to work the remainder of her shift in a similar fashion. She had a supervisor, Marie Hutchins, working with her at the time of the incident.

7. The medical testimony of Dr. Eric Ridings supports a conclusion that lifting a 10-pound box from either the counter or the floor with two hands is insufficient to cause, aggravate, or accelerate any injury to the right shoulder. Dr. Ridings was the only medical provider to perform a causation assessment in this matter and it appears that he was the only medical provider who was told the "heavy" box in question actually weighed 10 pounds. The ALJ finds Dr. Ridings' testimony credible and persuasive on the issue of causation.

8. Based on the preceding findings of fact, the ALJ concludes that the claimant has failed to sustain her burden of proof to demonstrate by a preponderance of the evidence that she sustained any injury to her right shoulder on September 21, 2014.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: November 25, 2015

/s/ original signed by:

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

## ISSUES

- Did Claimant prove by a preponderance of the evidence that the need for a total shoulder arthroplasty was proximately caused by the admitted industrial injury of November 22, 2014?

## FINDINGS OF FACT

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

1. Claimant's Exhibits 1 through 5 were admitted into evidence. Respondent's Exhibits A through O were admitted into evidence.

2. Claimant was employed as a police officer. He sustained an admitted injury on November 22, 2014.

3. On Saturday, November 22, 2014 Claimant was the supervisor of the police "mounted unit." As part of his duties Claimant lifted bales of hay that weighed approximately 70 pounds. He also lifted saddles that weighed 35 to 40 pounds. During a shift Claimant mounted and dismounted his horse roughly 10 to 15 times and used both arms to pull himself into the saddle.

4. Claimant credibly testified as follows concerning the events of November 22, 2014. As part of his duties he was cleaning a horse run. A horse charged at him and Claimant attempted to climb over a 6 to 7 foot fence in order to escape. Claimant got both of his hands on top of the fence but the horse struck him from behind and pushed him against the fence. Claimant lost his footing at the bottom of the fence and was left dangling by both arms. He then fell into the run on "all fours."

5. On Monday November 24, 2014 Claimant reported the injury to Employer. Claimant reported he suffered from right shoulder pain, right rib pain and right hip pain. Employer referred Claimant to Concentra Medical Centers (Concentra) for treatment.

6. Claimant previously injured his right shoulder while working for Employer in 1997. As a result of the 1997 injury Claimant underwent surgical repair of the right rotator cuff. Approximately 1 year and 9 months after the 1997 injury Claimant was released to return to work at full duty. He also testified that after he was released for the 1997 injury and prior to the November 22, 2014 injury he experienced a "pinching" sensation in the front of the right shoulder once every "couple of months." Claimant testified he did not seek medical treatment for his right shoulder between the date he was released and November 22, 2014. Claimant testified that after he was released he was not limited in performing any of his usual activities that included martial arts, lifting

weights and playing softball. Claimant further testified that after he was released to return to work he was able to perform strenuous job-related activities such as arresting combative persons, taking and teaching classes in arrest control and taking and teaching classes in a specialized fighting technique.

7. Claimant testified that since the November 22, 2014 injury he has experienced new symptoms in his right upper extremity which are different than the "pinching" he felt previously. These new symptoms include pain in the "cap area" of the right shoulder that radiates from the shoulder down his right arm. The pain is "constant" rather than intermittent. Claimant also stated that he now experiences numbness and tingling down his arm to the hand and constant pain. Claimant testified that since the November 22, 2014 injury he has had to curtail strenuous physical activities such as martial arts, lifting weights, arresting persons and taking and teaching classes in fighting technique.

8. On November 24, 2014 PA-C Elizabeth Palmer examined Claimant at Concentra. Claimant reported pain in the right side of his ribs and hip as well as pain in both shoulders. Claimant stated he was having a "hard time sleeping" because of pain in his "right scapula/AC joint." PA-C Palmer assessed right shoulder pain, injury of the right scapular region and contusions of the ribs and right hip. She referred Claimant for x-rays of the right shoulder and a CT scan of the right scapular region to rule out "scapular fracture." PA-C Palmer also prescribed medications.

9. On November 24, 2014 Claimant underwent x-rays of the right shoulder. The radiologist noted no acute fracture or dislocation. The radiologist also noted marked narrowing of the glenohumeral joint with associated bony ebumation of the humeral head and glenoid. Prominent marginal osteophytes were observed around the humeral head and glenoid. There was slight superior subluxation of the humeral head with associated narrowing of the acromiohumeral distance. The radiologist noted that this type of subluxation "can be seen with chronic rotator cuff tear."

10. On November 24, 2014 Claimant underwent a CT scan of the right scapula. Audrey Krosnowski, M.D., read the scan and found no fracturing of the scapula. Dr. Krosnowski wrote that the "most significant findings" were "rather advanced chronic-appearing glenohumeral degenerative changes" with "mild to moderate degree of posterior subluxation."

11. On November 26, 2014 PA-C Palmer referred Claimant for physical therapy (PT) and to an "orthopedic specialist." PA-C Palmer placed Claimant on a "no work" status.

12. On December 3, 2014 PA-C Chelsea Rasis examined Claimant at Concentra for a complaint of right shoulder pain that he rated 6 on a scale of 10 (6/10). Claimant gave a history of a "previous" right shoulder injury that required "repair." PA-C Rasis noted that Claimant stated that he "does live with some pain in the R shoulder normally, but has no limitations." PA-C Rasis assessed right shoulder pain and injury to the right scapular region. She referred Claimant for an MR arthrogram. PA-C Rasis

restricted Claimant to no lifting in excess of 5 pounds, and pushing and pulling up to 5 pounds with the right arm. Claimant was prohibited from reaching above the shoulder with the right arm.

13. On December 5, 2014 Claimant underwent a right shoulder MR arthrogram. The radiologist's impressions included the following: (1) Advanced glenohumeral joint arthritis with multiple large intra-articular bodies; (2) Bony glenoid retroversion and significant glenoid wear, with mild posterior subluxation of the humeral head; (3) Attenuated and tendinotic rotator cuff tendons without evidence of significant partial or full-thickness rotator cuff tear; (4) Postoperative changes of rotator cuff repair and acromioplasty.

14. Upon referral from PA-C Rasis, orthopedic surgeon Michael Hewitt, M.D., examined Claimant on December 8, 2014. Claimant reported that after a horse struck him on November 22, 2014 he fell to the ground and experienced the immediate onset of right shoulder pain. Claimant gave a history of a prior work-related right shoulder injury that resulted in a rotator cuff repair in "2001." Claimant reported "persistent" shoulder discomfort after the 2001 surgery but he was able to return to work at full duty. Dr. Hewitt performed a physical examination and reviewed the December 5, 2014 MRI. According to Dr. Hewitt the MRI demonstrates evidence of a prior rotator cuff repair without significant rotator cuff atrophy. There was no evidence of a recurrent rotator cuff tear. Dr. Hewitt opined the MRI reveals "advanced glenohumeral arthritis with multiple large loose bodies." Dr. Hewitt assessed a "significant fall with increased right shoulder pain" and physical examination and MRI results "consistent with advanced glenohumeral arthritis." Dr. Hewitt wrote that Claimant understood he had advanced arthritis that "would most likely require a hemiarthroplasty to address the significant deformation." Dr. Hewitt further advised Claimant that the "findings of advanced arthritis or [sic] more likely related to his previous shoulder surgery which is also work-related."

15. Concentra physician Stephen Danahey, M.D., referred Claimant to Armodios Hatzidakis, M.D., for the purpose of obtaining a second opinion and surgical evaluation.

16. Dr. Hatzidakis examined Claimant on January 22, 2015. Dr. Hatzidakis took a history from Claimant. Claimant attributed the onset of his right shoulder "pain and dysfunction" to the incident on November 22, 2014 when a horse "squashed" him against a fence and "he started to fall and caught his weight with his arm." Claimant admitted to a prior right shoulder surgery in 1998 or 1999. Claimant advised Dr. Hatzidakis that after he had surgery his shoulder "returned to normal with occasional pain since then but nothing like he has had since" the November 22, 2014 incident. Dr. Hatzidakis reviewed the December 5, 2014 MRI and opined that is showed "glenohumeral degenerative joint disease with some loose bodies along with posterior glenoid bone loss." He also took x-rays that showed "severe end-stage osteoarthritis with a change in the shape of the humeral head and large inferior osteophyte formation of the humeral head with no joint space visible on the AP view or the axillary view."

17. Dr. Hatzidakis assessed right shoulder "end-stage degenerative joint disease of the glenohumeral joint with traumatic onset of pain from work-related injury, with possible low-grade infection from previous surgery." After discussing various treatment options Claimant expressed an interest in surgery described as a "total shoulder arthroplasty" (TSA).

18. On January 22, 2015 Dr. Hatzidakis authored a letter to Dr. Danahey. Dr. Hatzidakis wrote that causality "often comes up in cases such as" Claimant's. Dr. Hatzidakis opined that Claimant did not develop osteoarthritis of the right shoulder since the November 22, 2014 injury. However, Dr. Hatzidakis noted that according to the history Claimant was "dealing well with his glenohumeral osteoarthritis until he had" the work-related injury of November 22, 2014. Consequently Dr. Hatzidakis opined that it is "more likely than not this recent injury is directly causal for his current symptoms and requirement of additional surgical treatment to address those symptoms."

19. Following Dr. Hatzidakis's recommendation for surgery Respondent provided Claimant's medical records to orthopedic surgeon John McBride Jr., M.D. Dr. McBride reviewed medical records for treatment of Claimant's work-related right shoulder injury that occurred on October 28, 1997. Dr. McBride also reviewed medical records concerning the treatment provided for Claimant's November 22, 2014 injury.

20. Dr. McBride issued a report dated February 4, 2015 in which he made numerous observations concerning Claimant's medical records. Dr. McBride noted that radiographs of Claimant's right shoulder dated October 29, 1997 showed significant osteoarthritis with an inferior humeral head osteophyte and cartilage that had been worn down to about half the normal cartilage depth. In August 1998 Claimant underwent arthroscopic debridement of a partial rotator cuff. The operative report noted significant degenerative changes and grade III chondral changes of the entire humeral head and glenoid. Dr. McBride compared this information to Claimant's records and imaging studies developed after the November 22, 2014 industrial injury. Dr. McBride wrote that Claimant's arthritis is not related to the November 22, 2014 injury. Instead, Dr. McBride opined Claimant's arthritis is a "congenital process" that has progressed over time and was "well identified" on radiographs taken the day after the October 28, 1997 injury. Dr. McBride further opined that the 2014 "scout" CT scan shows both of Claimant's shoulders and both shoulders exhibit "significant degenerative arthritis."

21. Dr. McBride also cited the Shoulder Injury Medical Treatment Guidelines (MTG) WCRP 17, Exhibit 4, for the proposition that TSA is "indicated" for "posttraumatic arthritis or for trauma resulting from a severe humeral head fracture." However, Dr. McBride opined Claimant had "degenerative arthritis" in the shoulder in 1997 and that condition has "continued to progress until 2014."

22. On April 1, 2015 Dr. McBride performed an independent medical examination (IME) of Claimant at the request of Respondent. Dr. McBride again reviewed medical records and imaging studies and he performed a physical examination. Dr. McBride diagnosed bilateral osteoarthritis of the shoulders "right greater than left." Dr. McBride opined Claimant is a candidate for TSA "based on his

exam and loss of motion." However, Dr. McBride stated the need for surgery "is not related" to the November 22, 2014 injury. Rather, Dr. McBride again opined that the condition of Claimant's right shoulder is the result of a "congenital abnormality" of the glenoid and "wear and tear of his shoulder over the past 17" years. Dr. McBride stated that the November 22 injury was a mere contusion of the shoulder "which may have aggravated [Claimant's] pre-existing arthritis briefly." Dr. McBride opined that the condition of Claimant's right shoulder is not related to the 1997 injury and consequent surgery because the "rotator cuff is still intact according to the MRI."

23. On May 13, 2015 Dr. Hatzidakis authored a letter answering questions posed in writing by Claimant's counsel. Dr. Hatzidakis wrote that he could not "state with certainty" that Claimant has "nothing more than a worn out shoulder" as argued by Dr. McBride. Dr. Hatzidakis explained that Claimant does not have a "type C glenoid" but instead a "type B2 glenoid" that is not the result of a "congenital condition." Dr. Hatzidakis disagreed with Dr. McBride that the November 22, 2014 injury "caused noting more than a temporary aggravation" of Claimant's pre-existing arthritis. Dr. Hatzidakis inferred a causal relationship between the November 22 injury and Claimant's need for surgery based on the Claimant's history of doing well before November 22 and experiencing "markedly exacerbated" symptoms after November 22. Dr. Hatzidakis emphasized that before the November 22 injury Claimant was "functionally doing well and he had not sought significant medical treatment for any right shoulder problem" before the November 22 injury. Dr. Hatzidakis agreed with Dr. McBride that the "scout" CT scans show osteoarthritis in Claimant's left shoulder but opined this is of "no relevance." Dr. Hatzidakis agreed with Dr. McBride that the recent radiographic studies do not demonstrate evidence of "an acute injury." However, Dr. Hatzidakis reiterated that he believes the Claimant had a "significant exacerbation" of his shoulder condition because of the November 22, 2014 injury.

24. On June 10, 2015 Dr. Danahey examined Claimant. Claimant reported "no changes" in the condition of his shoulder. Dr. Danahey assessed "right shoulder pain." He imposed restrictions of occasional lifting up to 5 pounds and occasional pushing and pulling up to 5 pounds occasionally.

25. Dr. McBride testified at the hearing. His testimony was generally consistent with the opinions he expressed in his written reports. Dr. McBride reiterated that based on his review of the medical records and imaging studies the Claimant has long-standing congenital osteoarthritis of the right shoulder.

26. Dr. McBride reiterated his opinion that the November 22, 2014 did not cause the degenerative or "wear and tear" arthritis in Claimant's shoulder. Dr. McBride further testified that based on his interpretation of the MTG the November 22, 2014 injury did not "aggravate" or "accelerate" Claimant's pre-existing arthritis so as to cause the need for a TSA. Dr. McBride explained that the shoulder MTG do not address the circumstances under which "aggravation" of pre-existing shoulder arthritis may be considered the cause of a need for TSA. However, Dr. McBride stated that the Lower Extremity Injury MTG address the circumstances under which "aggravation" of pre-existing arthritis may be considered a compensable consequence of an industrial injury.

Dr. McBride testified that the lower extremity MTG provide that a work-related injury "aggravates" pre-existing arthritis if radiographs show a significant change that occurs at least 2 years after the date of injury. Dr. McBride opined that the lower extremity MTG analysis should apply when the question is whether an industrial injury caused an aggravation pre-existing "wear and tear" arthritis of the shoulder joint.

27. On cross-examination Dr. McBride was asked to explain that portion of his April 1, 2015 report stating that the November 22, 2014 "may have aggravated [Claimant's] pre-existing arthritis briefly." Dr. McBride explained that the November 22 accident may have aggravated the arthritis by causing pain. Dr. McBride asked when the pain from the aggravation stopped. He replied that if the Claimant had undergone a corticosteroid injection it may have reduced "inflammation" and returned Claimant to his pre-injury "baseline."

28. Respondents' Exhibit M is a copy of certain provisions of the Shoulder Injury MTG (Effective February 1, 2015). Incorporated within this exhibit is WCRP 17, Exhibit 4, (G) (6) (b), p. 159, concerning the "Occupational Relationship" of work and the need for TSA. This section provides as follows: "Usually from post-traumatic arthritis, or from trauma resulting in severe humeral head fractures."

29. Respondents' Exhibit N is a copy of certain provisions of the Lower Extremity Injury MTG (Effective September 1, 2009). Incorporated within this exhibit is WCRP 17, Exhibit 6, (E) (2) (a) (i) and (ii), p. 47, concerning the "Occupational Relationship" between work and "Aggravated Osteoarthritis" of the knee. These sections provide as follows:

> Description/Definition: Swelling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint. Age greater than 50 and morning stiffness lasting less than 30 minutes are frequently associated. The lifetime risk for symptomatic knee arthritis is probably around 45% and is higher among obese persons.
>
> Occupational Relationship: The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling, crawling, squatting and climbing, or heavy lifting.
>
> Other causative factors to consider- Previous meniscus or AC: damage may predispose a joint to degenerative changes. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: menisectomy, hemarthrosis at the time of the

> original injury; or evidence of MRI or arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints and there should be a significant increase of pathology on the affected side in comparison to the original imaging or operative reports and/or the opposite un-injured side or extremity.

30. Claimant proved it is more probably true than not that his need for TSA was proximately caused by the November 22, 2014 work-related injury. Specifically, Claimant proved it is more probably true than not that the November 22 injury aggravated pre-existing right shoulder osteoarthritis so as to cause the need for surgery.

31. The ALJ is persuaded that prior to both the November 22, 2014 injury and the 1997 injury Claimant's right shoulder exhibited significant degenerative osteoarthritis. Dr. Hatzidakis and Dr. McBride agree that Claimant suffered right shoulder osteoarthritis that pre-dated the November 22, 2014 injury. Dr. Hatzidakis acknowledged the pre-existing nature of the osteoarthritis when he commented that Claimant was "dealing well with his glenohumeral osteoarthritis until" the November 22 injury. Dr. McBride credibly opined that the pre-existing nature of the arthritis is documented by the October 29, 1997 radiograph showing "significant osteoarthritis" and the 1998 operative report that documented grade III changes of the glenoid and humeral head. Dr. McBride credibly opined that this 1997 x-ray showed "significant osteoarthritis with an inferior humeral head osteophyte and cartilage that had been worn down to about half the normal cartilage depth."

32. Claimant credibly testified concerning his activity level after he was released for the 1997 injury. Claimant was able to perform strenuous activities including martial arts and weight lifting. He was also able to perform strenuous job-related activities including arresting combative persons and taking and teaching classes in fighting technique. Claimant credibly testified that since the November 22, 2014 right shoulder injury he has not been able to perform these strenuous activities.

33. Claimant also credibly testified that after he was released for the 1997 injury his right shoulder symptoms were limited to an occasional "pinching" sensation. He credibly testified that after he was released for the 1997 injury he did not seek treatment for the right shoulder until November 22, 2014. However, after the November 2014 injury he experiences constant pain that radiates into his right shoulder into the upper extremity. He also experiences numbness and tingling in the right upper extremity.

34. Claimant's testimony concerning the scope and timing of his symptoms is generally corroborated by the medical records introduced into evidence. There are no credible medical records showing that Claimant sought treatment for right shoulder symptoms between the time he was released for the 1997 injury and November 22, 2014. Moreover, after the November 22, 2014 injury Claimant did not attempt to

conceal the 1997 shoulder injury and consequent rotator cuff repair surgery. Claimant disclosed the prior injury and surgery to PAC-Rasis on December 3, 2014, Dr. Hewitt on December 8, 2014 and Dr. Hatzidakis on January 22, 2015. Moreover, the medical records document that after November 22, 2014 Claimant reported persistent pain in the right shoulder and sought ongoing treatment for the shoulder. Also, Claimant was placed under rather severe restrictions regarding use of the right arm.

35. Dr. Hatzidakis credibly and persuasively opines that the November 22, 2014 injury is more likely than not "causal for [Claimant's] current symptoms and requirement of additional surgical treatment to address those symptoms." Dr. Hatzidakis acknowledges Claimant suffered from right shoulder osteoarthritis prior to the November 22 injury. However, Dr. Hatzidakis persuasively opined that Claimant's medical history argues for finding a causal link between the November 22, 2014 injury and the subsequent need for TSA. Dr. Hatzidakis correctly noted that prior to November 22 Claimant was "functionally doing well and he had not sought significant medical treatment for any right shoulder problem." Dr. Hatzidakis persuasively argues the Claimant's symptoms were "markedly exacerbated" by the November 22 injury this evidences a "significant exacerbation" of the injury.

36. As found, Dr. Hatzidakis's opinion concerning the cause of the need for the TSA is both logical and supported by the medical evidence. For this reason the ALJ rejects the Respondent's assertion that Dr. Hatzidakis's opinion is not credible because it is motivated by his financial interest in performing the recommended TSA.

37. Dr. McBride's opinions that the November 22, 2014 injury is not a cause of Claimant's need for TSA, and that the November 22 injury did not aggravate Claimant's pre-existing osteoarthritis are not persuasive. Dr. McBride did not persuasively refute Dr. Hatzidakis's argument that a review of Claimant's history of symptoms and activity levels supports the conclusion that the pre-existing osteoarthritis was aggravated by the November 22 injury. Even Dr. McBride acknowledged in his April 1, 2015 report that the November 22 incident could have caused a "brief" aggravation of the osteoarthritis. During his testimony Dr. McBride acknowledged that this aggravation would have been evidenced by increased pain in the shoulder. Moreover, Dr. McBride did not persuasively explain when the pain from the "brief" aggravation ended and the pain caused by the pre-existing osteoarthritis became so predominant that it became the cause of the need for TSA.

38. The ALJ is not persuaded by Dr. McBride's opinions insofar as he states that the MTG prohibit finding a causal relationship between a work-related injury and the need for TSA unless there is evidence of posttraumatic arthritis or severe fracturing of the humeral head. Dr. McBride's interpretation of the MTG notwithstanding, the Shoulder Injury MTG state that a causal relationship between work and the need for TSA is "usually" established by posttraumatic arthritis or fracturing of the humeral head. (See Finding of Fact 28). The ALJ infers that use of the word "usually" posits that there are some circumstances other than posttraumatic arthritis and fracturing of the humeral head that will support a finding that work has caused a need of TSA.

39. Neither is the ALJ persuaded by Dr. McBride's opinion that a work-related "aggravation" of pre-existing osteoarthritis may not be found unless radiographs show a deterioration of the arthritis occurring over two years after the date of injury. As noted in Finding of Fact 29, the Lower Extremity MTG define "aggravated osteoarthritis" as "swelling and/or pain" in the knee due to an "aggravating activity in a patient with pre-existing degenerative change in a joint." Thus, to the extent the Lower Extremity MTG may be applied to the shoulder, they define "pain" as one of the primary symptomatic features of "aggravated osteoarthritis." Here, Claimant argues that increased pain in his right shoulder evidences the "aggravation" of the pre-existing osteoarthritis caused by the November 22, 2014 injury. Thus, contrary to Dr. McBride's interpretation, Claimant's allegation that the November 22 injury aggravated the pre-existing osteoarthritis by causing pain is consistent with the Lower Extremity MTG. Moreover, this provision of the MTG supports Dr. Hatzidakis's opinion that a change in pain levels associated with a work-related event (November 22, 2014 injury) is a factor to be considered when determining the cause of an "aggravation" of pre-existing osteoarthritis.

40. Further, the Lower Extremity MTG indicate that an "occupational relationship" between work and "aggravated osteoarthritis" must be established by a "change in baseline condition" and a "relationship to work activities including but not limited to physical activities." This section does not require that the "change in baseline condition" be evidenced by radiographs showing changes that occurred during the two years after the date of injury. Rather, the Lower Extremity MTG reference to a change in radiographs appears in the section that addresses "other factors" which may have caused aggravation of osteoarthritis. The "other factors" section refers to "previous injury" of the knee and requires that radiographs show a change over 2 years before such a previous injury may be considered the cause of an aggravation of pre-existing osteoarthritis of the knee.

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

## CONCLUSIONS OF LAW

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

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

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

CAUSE OF NEED FOR TOTAL SHOULDER ARTHROPLASTY

Claimant seeks an order determining that Respondent is obligated to pay for the TSA recommended by Dr. Hatzidakis. Claimant argues the credible and persuasive evidence establishes that the November 22, 2014 has caused symptoms and shoulder dysfunction which is a legal cause of his need for surgery. Respondent does not dispute that Claimant sustained a compensable injury on November 22, 2014. Neither does Respondent dispute that TSA constitutes reasonable and necessary medical treatment for the Claimant's right shoulder condition. However, Respondent contends Claimant failed to prove that his need for TSA is causally related to the November 2014 injury. Relying principally on the opinions expressed by Dr. McBride, Respondent argues the "unequivocal" weight of the evidence establishes that the Claimant's need for TSA was caused by pre-existing osteoarthritis, not the November 14, 2014 industrial injury. The ALJ agrees with Claimant.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying pre-existing condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

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. 1985); *Breeds v. North Suburban Medical Center,* WC 4-727-439

(ICAO August 10, 2010). 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).

When evaluating whether or not the need for medical treatment is causally related to an industrial injury the ALJ may consider the provisions of the MTG. However, the ALJ is not required to utilize the MTG as the sole basis for determining causation. Section 8-43-201(3), C.R.S. Rather the ALJ may weigh the MTG and give them only so much weight as he determines they are entitled in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined in Findings of Fact 30 through 40, Claimant proved it is more probably true than not that the need for the TSA was proximately caused by the November 22, 2014 industrial injury. As found, Claimant had osteoarthritis of the right shoulder that significantly pre-dated the November 22, 2014 injury. However, after the November 22 injury the Claimant experienced new right shoulder symptoms and an increase in the frequency and severity of right shoulder symptoms. The effects of the November 22, 2014 injury led to a decline in Claimant's ability to perform personal and work-related functions. As determined in Findings of Fact 35 and 36, Dr. Hatzidakis credibly and persuasively opined that it is more likely than not the November 22, 2014 injury caused the Claimant's current symptoms and therefore the need for TSA. The contrary opinions of Dr. McBride are not persuasive for the reasons stated in Findings of Fact 37 through 40.

The Respondent concedes that the proposed TSA constitutes reasonable and necessary treatment for the Claimant's shoulder condition. The ALJ finds that the need for the surgery is causally related to the admitted industrial injury of November 22, 2014. For this reason the Respondent is liable to pay for the TSA surgery recommended by Dr. Hatzidakis.

## ORDER

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

1. Respondent shall pay for the total shoulder arthroplasty procedure recommended by Dr. Hatzidakis.

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: November 6, 2015

DIGITAL SIGNATURE:

David P. Cain

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

## ISSUES

1. Whether the claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment, with the respondent-employer;

2. If so, whether the claimant has established by a preponderance of the evidence that he is entitled to reasonably necessary and related medical benefits;

3. If so, whether the claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits; and,

4. If so, whether the respondents have established by a preponderance of the evidence that the claimant was properly terminated for cause.

## FINDINGS OF FACT

1. The claimant was employed with the respondent-employer on September 24, 2014 as a laborer who was responsible for watching a machine sort material, when he had to clear clay off the machine with a shovel.

2. This machine was a rather large piece of machinery that lacked any scaffolding or ways for him to safely climb up the machine when he was required to tend to the machine.

3. On September 24, 2014, the claimant climbed up the machine by climbing up I-beams.

4. After clearing the chute, the claimant began his descent, where he stepped from a top I-beam, to a lower I-beam which was high off the ground.

5. After standing on the second I-beam, the claimant jumped off, where he landed on a rock, twisting his ankle and injuring his low back.

6. Immediately after this incident, the claimant began limping towards the location of his supervisor, Mike Emmick, who was located approximately a half a

city block away from where the claimant was instructed to work.

7. The claimant testified that the policies of his employer were not to immediately report to a medical provider, but rather to call an emergency number where they would essentially provide first aid assistance.

8. The claimant contacted this number, and he was sent home because he was unable to finish his shift.

9. The next day, the claimant self-reported to the emergency room complaining of low back pain.

10. The claimant has never had any prior low back injuries or symptoms similar to what he was feeling now after jumping off the I-beam. The claimant was now experiencing severe pain in his low back with numbness and tingling that radiated down his leg.

11. The next day, September 26, 2015, the claimant followed up with CCOM, the designated provider for the respondent-employer. That physician placed the claimant on a five pound lifting restriction; however, the claimant was returned to full duty.

12. The claimant was given medications and referred for physical therapy.

13. The claimant had a follow-up at CCOM on September 30, 2015 where he was again placed on full duty.

14. The next follow-up at CCOM occurred on October 21, 2015 where the claimant was put at maximum medical improvement with no permanent restrictions and returned to full duty.

15. The CCOM physician opined that the claimant did not require any further medical treatment other than completing previously prescribed physical therapy.

16. The claimant did attend physical therapy appointments, which were helpful, but ultimately the claimant was still symptomatic by the time he returned back to work in late October.

17. The claimant was seen by Dr. Anjmun Sharma for an Independent Medical Exam on July 2, 2014.

18. Dr. Sharma reported that there is no doubt that he had a fall, but he was

unable to determine how high based off the medical records. However, Dr. Sharma did testify that it would be reasonable for the claimant to receive the medical treatment he did, such as the medications, and the physical therapy.

19. Dr. Sharma concluded that the claimant had reached MMI, had suffered no permanent impairment, did not require any permanent work restrictions, and did not need any further medical treatment.

20. The respondent-employer paid the claimant full wages after the injury up until the point of his termination, even though the claimant did not show up for work despite having been released to full duty.

21. The claimant did not dispute the fact that the respondent-employer paid him after the injury.

22. The claimant returned to work and on October 27, 2015 violated instructions from his supervisor and was terminated from his employment.

23. Mr. Emmick testified that on the day the claimant returned to work, he and his boss met with the claimant and informed him that they had built a walkway with handrails, a "catwalk," to access the piece of machinery.

24. Mr. Emmick testified that he specifically told the claimant not to climb onto the I-beams.

25. Two or three hours after Mr. Emmick told the claimant to use the catwalk and not the I-beams, he saw the claimant climbing on the I-beams.

26. The respondent-employer terminated the claimant's employment for "insubordination, failing to follow direct orders by supervisor, [for taking] action [which] could result in injury."

27. The ALJ finds that the claimant has established that it is more likely than not that he suffered an injury arising out of and in the course of his employment with the respondent-employer.

28. The ALJ finds that the respondent established that it is more likely than not that the claimant's compensable injury resulted in a medical-only claim.

29. The ALJ finds that the respondent established that it is more likely than not that the claimant was responsible for his termination from employment with the respondent-employer.

## CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions;

the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

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

6. A claimant in a workers' compensation claim bears the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201 (2015).

7. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

8. As found above, the ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he suffered any wage loss directly attributable to his industrial injury; therefore, the claimant is not entitled to TTD benefits.

9. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

10. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

11. The ALJ concludes, as found above, that the claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical care to cure or relieve him from the effects of his industrial injury.

12. A claimant who is terminated from the employer is not entitled to temporary indemnity benefits for time lost if he is responsible for his own termination. C.R.S. §8-42-105(4)(a).

13. The respondent bears the burden of showing by a preponderance of the evidence that the claimant was responsible for his employment termination.

14. The respondents have met their burden of proof in showing that the claimant was responsible for his termination. Mr. Emmick testified that he specifically told the claimant not to climb on the I-beams of the piece of machinery, and shortly afterward, the claimant climbed onto the I-beams of the piece of machinery in contravention of his supervisor's direction.

15. In determining whether the claimant was responsible for his termination, an ALJ will consider whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination. See *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

16. The claimant acted volitionally when he chose to climb onto the beams of the piece of machinery instead of climbing onto the catwalk as he had been instructed to do.

17. The ALJ concludes that the claimant has established by a preponderance of the evidence that he suffered a compensable medical-only claim as a result of his industrial injury of September 24, 2015.

18. The ALJ concludes that the claimant has established by a preponderance of the evidence that he is entitled reasonable, necessary, and related medical care to cure or relieve him from the effects of his industrial injury.

19. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he is entitled to temporary indemnity benefits.

20. The ALJ concludes that the respondents have established by a preponderance of the evidence that the claimant was properly terminated for cause and was responsible for his termination.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The claimant's claim is compensable under the Workers' Compensation Act of Colorado.

2. The respondent-insurer is responsible for the payment of the claimant's reasonable, necessary, and related medical care for his industrial injury of September 24, 2014.

3. The claimant's request for temporary disability benefits is denied and dismissed.

4. The claimant is responsible for his termination from employment with the respondent-employer.

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

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

DATE: November 24, 2015

/s/ original signed by:

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

## ISSUES

1. Whether the claimant has established by a preponderance of the evidence that on December 23, 2014 she sustained an injury arising out of and in the course of her employment with the respondent-employer;

2. If so, whether the claimant is entitled to a general award of any and all reasonable and necessary medical benefits for the December 23, 2014 injury;

3. If so, whether the respondent is liable for the medical care provided at CCOM on December 24, 2014, and January 7, 2015, as reasonable and necessary medical care related to the date of loss; and,

4. If so, whether the right of selection of an authorized treating physician has passed to the claimant.

## FINDINGS OF FACT

1. The claimant was employed by the respondent-employer as a medical records director at a veteran's residential living facility, at Florence, Colorado.

2. On December 23, 2014, around nine in the morning, the claimant was standing in the doorway of the office of a co-worker, Vickie Gallegos, engaged in a conversation with Ms. Gallegos. Another co-worker, Anita Schumacher, approached the claimant from behind and as a greeting, bopped the claimant on the top of her head with a paper file.

3. The claimant's back was turned to Ms. Schumacher at the time of this incident. The claimant was not aware of Ms. Schumacher's approach and was surprised. The claimant felt "burning" on the top of her head but no pain in her neck or other symptoms.

4. The claimant and Ms. Schumacher exchanged a few words. Ms. Schumacher stated that she just wanted to "harass" the claimant because she did not get to see her very often. Ms. Schumacher asked the claimant how she was doing. Ms. Schumacher was very excited because she had just received good news about the sale of her home in Wisconsin. At the time of this incident, Ms. Schumacher did not realize the claimant was in a deep conversation with Ms. Gallegos. She then realized

that she was intruding so she went on her way. The claimant expected an immediate apology (per Mr. Cole's testimony), but Ms. Schumacher was unaware that she had caused offense. She "honestly didn't think much of the situation" at that time.

5. The claimant testified that she was upset, so she sat down in Ms. Gallegos' office, prayed and tried to calm herself down, and continued her conversation with Ms. Gallegos. She said she was initially scared and "it kind of bothered" her. She was also angry and considered the incident to be an instance of violence in the workplace.

6. Immediately after this incident, the claimant did not tell Ms. Gallegos that she was injured or upset, and the claimant did not indicate there was any problem. Ms. Gallegos did not comment on what had just transpired because the claimant did not say anything about it and she did not know that the claimant was upset. The claimant and Ms. Gallegos simply carried on their conversation.

*7.* The claimant worked her entire shift on December 23, 2014. Later that day, the claimant reported the incident to David McCartney and she discussed it with Barbara Moore, who is the home's administrator, by telephone. The claimant also discussed the incident later that day with Mary Hughes, who is the assistant nursing director, Vickie Gallegos, and claimant's colleagues Carol Kindsfater and Al Cole. The claimant was upset by the incident itself, but she did not report an injury to any of these people on that day. In fact, Mr. Cole stated that she specifically denied any injury or pain to him. She did not seek medical treatment that day because she did not feel she had been injured. Mr. Cole testified that he and the claimant were more focused on documenting the incident and on whether the employer's code of conduct had been violated by Ms. Schumacher. Mr. Cole said that the claimant "exercised (her) right to wait" on seeking medical treatment.

8. When the claimant complained to Ms. Hughes about this incident, she was visibly upset. Ms. Hughes advised Ms. Schumacher that the claimant was upset, so Ms. Schumacher attempted to apologize that same day. Ms. Schumacher told the claimant she was really sorry and had not meant to offend her. However, the claimant felt the apology was not sincere. Ms. Schumacher testified that the claimant never told her she had been injured while she was apologizing.

9. Contrary to Ms. Schumacher's testimony that she apologized to the claimant on the day of the incident, the claimant told Dr. Gary Gutterman, an independent psychiatric examiner, that Ms. Schumacher did not apologize until a week

later via a written letter, and she was puzzled why Ms. Schumacher did not apologize right away.

10. The claimant also told Dr. Gutterman she was disappointed with some of the responses by the employer's staff to the incident.

11. When the claimant initially reported this event to her employer, she contended that the file was between one and two inches thick. The claimant reported to Ms. Hughes that the chart with which she was struck was a "patient chart" which Ms. Hughes took to mean a hard plastic "4 inch ring" chart, but this proved to be incorrect. When the claimant reported to Dave McCartney that the incident had caused an injury, she told him the file was 1-1/2 inches thick. The claimant told Barbara Moore that the file was 1 ½ inches thick, and the claimant likewise told Al Cole in their initial conversation about the incident that the file was 1½ inches thick. In her answers to interrogatories, the claimant continued to report that the file was 1 ½ inches thick.

12. In a second conversation the claimant had with Al Cole about this incident, she told him that the file was one-inch thick. However, when he asked her to draw a line to demonstrate the thickness of the file, the line she drew measured 5/8 inches thick.

13. The claimant subsequently reported to Barbara Moore on December 29, 2014, that she had looked at a ruler and felt that she misstated the size the folder. She stated it was not 1½ inches thick but probably ¼ - ½ inch thick.

14. At hearing the claimant indicated that she never possessed the file, never inspected the file, never measured it, and "never got a really good look at it." She only saw it for a "brief moment." Further she testified, she "never told anyone that a large file is what hurt me" – it was "the assault" that hurt her.

15. Ms. Schumacher's job is MDS coordinator. Her job requires her to assess residents at the home for Medicare and to coordinate their care. Ms. Schumacher testified that the file in her hand contained "MDS" sheets or "cheat sheets," which were forms containing data about individual residents in the home. She testified that there was one sheet for each resident that she was monitoring, and that the file probably contained 17-18 sheets of paper, and no more than twenty papers. The papers were contained in a lightweight manila folder approximately 8 ½ by 11 inches.

16. Ms. Gallegos, who witnessed the December 23rd incident, estimated that the file was 1/8 inch thick.

17. The claimant testified that the file was large enough that Ms. Schumacher "needed to hold it with two hands," but Ms. Schumacher and Ms. Gallegos testified that Ms. Schumacher held the file with only one hand. The ALJ finds that Ms. Schumacher's and Ms. Gallegos' testimony is more credible because the claimant's back was turned to Ms. Schumacher at the time of the incident and she did not see Ms. Schumacher wield the file.

18. The claimant testified that she did not experience any pain until the evening of December 23, 2014, at which time she not only had burning her neck, but also low back pain.

19. The claimant reported to her employer the next day that she was injured, so she went to Centura Center for Occupational Medicine (CCOM).

20. The claimant was examined by Dr. Daniel Olson. The claimant told Dr. Olson that she was struck with a 1-2" paper chart by another employee.

21. Dr. Olson diagnosed strain of the cervical spine and pain in the lumbar spine. On examination, he noted, not only tenderness in the cervical spine area but also "tightness and discomfort across her left lower lumbosacral region, and some pain with right lateral flexion. He released the claimant to full duties with no restrictions.

The claimant continued to work her regular job.

22. Ms. Moore, the living center's administrator, testified that on December 29, 2014, the claimant seemed to be feeling comfortable with treatment being provided. She did not complain of pain and she did not appear to be in pain. However, the claimant was still very angry and her emotions were still very strong regarding the incident with Ms. Schumacher. The claimant's focus was on Ms. Schumacher's action rather than her medical condition.

23. The claimant returned to Dr. Olson on January 7, 2015. She filled out a pain diagram that showed 0% pain, and she told Dr. Olson she was feeling much better and her pain level was zero. Dr. Olson placed her maximum medical improvement with no restrictions and no permanent medical.

24. On Friday, January 9, 2015, the claimant met with Linda Thompson, the HR and Safety Coordinator, at the claimant's request. The claimant was still upset about the December 23 incident and repeatedly asked "why did Anita do that to me?" She was highly emotional, upset and crying. At least three times Ms. Thompson asked the claimant whether she was okay physically and the claimant responded yes, "but I

don't understand why she did this to me." Ms. Thompson commented that the incident was horseplay and inappropriate but concluded that the important thing was that the claimant was okay physically, and the claimant agreed that she was.

25. Likewise, Mr. Cole testified that the claimant could not understand why Ms. Schumacher hit her on the head with the file. She raised this concern on three or four different occasions with him.

26. The claimant testified that she asked Ms. Thompson on January 9, 2015, a Friday, to be sent back to CCOM for additional treatment, but Ms. Thompson stated that this request was not made until Monday, January 12th. On Friday, the claimant denied that she had any physical problems, but the following Monday, the claimant looked exhausted and reported that over the weekend she started having burning in her neck. She wanted to go back to Dr. Olson. Ms. Thompson relayed this request to the adjuster, but the request was denied because the claimant had been placed at maximum medical improvement and the claimant had not yet provided requested medical information.

27. The claimant went to her family medical provider, Eagleridge Family Medicine, who referred her first for a CT scan and then a MRI. Although the claimant denied at hearing that she initiated request for a MRI, Physician's Assistant Brooke DeWeese's 1/28/15 chart note states: "She is requesting to have an MRI of her C-spine today due to her persistent symptoms." Ms. DeWeese's assessment was, in relevant part, "Pain – Etiology unclear." The assessment remains the same on March 2, 2015 when Ms. DeWeese wrote "Back pain – etiology unclear."

28. The January 15, 2015 CT scan report indicated no acute fracture, but there was degenerative disc disease at C5-6, and minimal grade 1 retrolisthesis of C5 on C6. Ms. DeWeese characterized these results as "unremarkable except for DJD in C5-C6."

29. The January 31, 2015 MRI report identified degenerative disc disease at C5-6 with mild grade 1 retrolisthesis of C5 resulting in moderate central spinal stenosis and mild left neuroforaminal stenosis, but no evidence of cord or nerve root compression.

30. On June 5, 2015, Dr. Jade Norton stated: "CT and MRI of the C-spine have not shown pathology." Dr. Norton also wrote that the assessment was: "Chronic Cervical Spine Pain – Etiology unclear. MRI and CT both reveal DDD at C5-C6 and a mild retrolisthesis of C5 on C6. Not clear if this is contributing to her symptoms. This

initially was a work comp case but apparently they said she reached 100% MMI and dismissed her. She has hired an attorney due to the fact she thinks her symptoms are due to an injury that occurred at work and she thinks WC should be responsible. Nevertheless it is not a WC now…"

31. Ms. Moore testified that the claimant appeared to be in pain around January 12-13, 2015 when she asked to be reevaluated by the doctor. The claimant was worried there was something wrong with her. After the claimant was advised that the scans showed no significant pathology, she was more relaxed and never again complained of pain to Ms. Moore.

32. The claimant resigned from her job as of June 15, 2015. She testified that she had been thinking about quitting for quite some time. She resigned because of the "toxic, cancerous work environment" which included employees who were disrespectful, unprofessional, and did not want to be there. This situation existed from the first day she started working at the living center, the claimant said. She testified that she was trained for one hour on the first day of her job by her predecessor, and then the "state survey team walked in." Employee turnover increased her workload. She also complained of the "witch hunt" and "everything just compounded on me."

33. Dr. Kathy McCranie conducted an independent medical examination on May 14, 2015. She also attended the hearing and heard all of the lay testimony, including testimony about the size of the file ant the force of the slap on the claimant's head.

34. Dr. McCranie stated that the claimant was uncooperative at times during the interview, refusing to answer questions. Dr. McCranie testified that this interfered with her ability to assess the claimant's condition and its potential causes.

35. Dr. McCranie noted some inconsistencies in the claimant's physical examination. For example, she testified as follows regarding her assessment of the claimant's strength:

> The claimant demonstrated "slight breakaway to weakness in her motor examination of the upper extremities, and this was seen especially in shoulder abduction intermittently.... so instead of getting a smooth resistance to the -- essentially to testing muscle strength, what I've seen is more of a jerky type movement. That's an indication of lack of full effort, rather than a true neurological condition… so I wanted to find out whether or not she truly had any weakness in those areas. When she was distracted, I tested her in a different fashion and found that she had full strength, again, an indication that when she

was – knew that she was being tested, she wasn't giving the full strength." This indicated that the claimant was manipulated this testing.

36. Dr. McCranie testified that it was anatomically impossible for the injury as described by the claimant to have caused low back pain, which was initially reported by the claimant in addition to her neck pain. In fact, Dr. McCranie testified, one of the Waddell's signs that identify a psychological component to pain or symptom magnification is when a patient reports low back pain caused by axial loading, which consists of placing pressure on the top of the patient's head. If low back pain is reported, this is indicative of non-anatomic symptoms. Dr. McCranie saw this case in a similar way. "She had a minor slap, essentially, on the top of her head which would not cause forces to go into the lumbar spine, and the fact that she would complain of low back pain essentially makes one think that there may be psychological component to her condition."

37. Dr. McCranie testified that the flimsy file of the size described by Ms. Schumacher and Ms. Gallegos would be incapable of causing a cervical spine injury no matter how forcefully it was wielded. A feather, no matter how forcefully wielded, will not cause an injury, she said.

38. Dr. McCranie could not find an objective basis for injury related to the December 33, 2014 incident. Although Dr. Olson had diagnosed a cervical strain, which implies that there has been tendon or muscle damage and which is identified by a decrease in range of motion and muscle spasms, those things were not seen on either Dr. Olson's or Dr. McCranie's examination. Further, the claimant reported no symptoms initially.

39. The neurological examination conducted by Dr. McCranie was within normal limits and the examination did not show any evidence of cervical facet involvement.

40. Even though the CT scan and the MRI showed evidence of degenerative changes at the C5-6 level of the spine, they did not identify any trauma such as a fracture or herniated disc. It was not medically probable that the degenerative changes were caused or aggravated by the December 23, 2014 incident. Furthermore, it was unlikely that the degenerative changes in the claimant's cervical spine were causing the pain of which she complains.

41. Dr. McCranie's impression of the claimant's condition was cervicalgia, chronic daily headaches, and degenerative disc disease at C5-6, none of which are work-related.

42. The ALJ finds the medical analyses and opinions of Dr. McCranie to be credible and more persuasive than medical analyses and opinions to the contrary.

43. The ALJ finds that the claimant has failed to establish that it is more likely than not that she sustained an injury arising out of and in the course of her employment with the respondent-employer.

## CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

3. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

4. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

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

6. The ALJ concludes, as found above, that the medical analyses and opinions of Dr. McCranie are more persuasive than medical analyses and opinions to the contrary.

7. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant suffered an injury arising out of and in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

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

DATE: November 2, 2015

/s/ original signed by:

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

## ISSUES

The issue presented for determination is whether the Claimant is entitled to medical benefits, specifically whether the surgery recommended by Dr. Garth Nelson is reasonable, necessary and related to Claimant's admitted workers' compensation claim.

## FINDINGS OF FACT

1. The Claimant is a 30-year old woman. She suffered an admitted work related injury to her left shoulder on April 7, 2014 while lifting a suitcase containing supplies related to her health screening job duties.

2. On April 10, 2014, Claimant began receiving medical treatment with Garth Nelson, M.D. The Claimant described her injury to Dr. Nelson as follows: She was lifting a box weighing approximately 75 pounds into a Chevrolet Suburban when she felt a pop accompanied by pain in her left shoulder. Dr. Nelson recommended Claimant undergo physical therapy.

3. On May 19, 2014, Dr. Nelson's report indicates that Claimant is "improving" and engaging in physical therapy one time per week due to her work travel schedule.

4. On June 5, 2014, Dr. Nelson noted that Claimant is "improving." He also noted a slight left labral grind compared with the right shoulder. She had tenderness in the IT groove. Dr. Nelson's diagnosis was "left impingement, longhead biceps tendinosis."

5. On June 23, 2014, Claimant returned to Dr. Nelson. She reported "anterior left shoulder sore with moderate L hook in boxing." Dr. Nelson's exam noted slight bilateral labral grind and tenderness in the left IT groove. He diagnosed improving left impingement and long head biceps tendinosis.

6. On August 26, 2014, Dr. Nelson noted that Claimant can lift 35 pounds without pain, but he diagnosed, "L impingement, longhead biceps tendinosis. Pec major strain improving." He recommended that Claimant avoid "hook punches in boxing."

7. On October 13, 2014, Dr. Nelson recommended that Claimant have an MRI of her left shoulder. He noted moderate left labral grind compared with the right and severe tenderness in the left long head biceps in IT groove. He diagnosed, "L impingement, long head biceps tendinosis/SLAP II."

8. Claimant returned to see Dr. Nelson on October 20, 2014. Dr. Nelson noted that Claimant continues to have left anterior shoulder pain/weakness. He stated that if Claimant does too much activity, her shoulder worsens; and that she cannot perform her regular job duties, specifically lifting. Dr. Nelson reviewed Claimant's MRI and noted that it showed severe anterolateral impingement; no AC spur: No DJD; moderate supraspinatus tendinosis in the anterior one half; and a SLAP II/biceps base tendinosis. He noted that a motion artifact obscures the detail.

9. Dr. Nelson recommended surgery on Claimant's left shoulder because Claimant had failed to improve after six months of physical therapy and based on her MRI results. Specifically, Dr. Nelson wishes to perform an outpatient scope debridement, acromioplasty, and extraarticular longhead biceps tenodesis.

10. Claimant's work restrictions improved to a 40-pound weight limit as of September 22, 2014, and have never changed since then. Claimant's job duties require her to lift 65-75 pounds.

11. The request for surgery was denied by the Insurer based on a WCRP 16 review performed by Scott Primack, D.O. Dr. Primack felt Claimant's left shoulder problems were related to boxing rather to her work activities.

12. On November 20, 2014, Dr. Nelson expressed his disagreement with Dr. Primack's decision. Dr. Nelson stated that Claimant had no problem sport boxing prior to her work injury, and since her injury she cannot box at the same intensity. Claimant also cannot lift the heavier boxes she could lift prior to her work injury. Dr. Nelson concluded that Claimant's MRI and exam are consistent with a "posttraumatic impingement, supraspinatus tendinosis and a SLAP II/biceps base tear."

13. Dr. Nelson reiterated his opinions on December 18, 2014, when he stated that he "would not expect her to improve without a scope decompression, biceps tenodesis." He reiterated his opinions again on February 26, 2015, and on June 15, 2015.

14. Dr. Primack testified by deposition on September 15, 2015. He stated that Claimant made fairly significant functional gains from physical therapy; however, none of Claimant's physical therapy records were offered into evidence.

15. Dr. Primack's said that he did not see any evidence of any type of SLAP lesion on the MRI.

16. Dr. Primack stated that Claimant had been boxing since her work related injury. Based on Dr. Primack's personal experience engaging in boxing, he opined that there is a considerable amount of load which goes into the shoulder. Dr. Primack testified that boxing in and of itself can cause subacromial/subdeltoid bursal fluid.

17. Dr. Primack did not comment on his understanding of the type of boxing Claimant had been engaging in. During his deposition, Dr. Primack made a comment

about Claimant possibly engaging in “more formal boxing” making it apparent that he did not know.

18. Dr. Primack stated that Claimant may have required an acromioplasty at one time, in the lateral aspect of the acromion, and that there is some impingement at that level. However, he does not feel that the impingement is related to her work injury.

19. At his deposition, Dr. Primack testified that when boxing, there is a lot of repetitive motion in the shoulders. There is one tendon gliding over another when hitting a bag or hitting gloves, and there is a higher probability of creating a bursitis or an overuse phenomena when boxing than when lifting a weight.

20. Dr. Primack also testified that impingement is considered an encroachment of soft tissue, which is the tendinosis of the supraspinatus, as well as the bursitis, which does not occur from a one-time lift. It most often occurs from repetition, and most of the time from repetition on a continuum. Dr. Primack did not explain in which situations impingement could occurs without repetition.

21. Dr. Primack was aware of the mechanism of injury, as described by Claimant at Hearing, and he maintained his opinion that any need for surgery was not related to this matter.

22. Dr. Primack believes that Dr. Nelson’s records actually show an improvement in Claimant’s subjective complaints and a decrease in her work restrictions. The ALJ acknowledges that Claimant made some gains in physical therapy and that her restrictions lessened over time, but she has not returned to her pre-injury status.

23. Dr. Primack never examined the Claimant. He testified that he could not diagnose impingement because he had never examined the Claimant and such a diagnosis is based on clinical findings.

24. Dr. Primack admitted that Claimant could have injured herself in the way she described, by lifting a case, but he testified that she did not significantly injure herself in that manner.

25. Claimant admitted at hearing that she continued boxing at Title Boxing after her work related injury and that she was there on average 3-4 times a week after November 2014.

26. Claimant credibly testified that she modified her boxing activities to avoid hard left hook punches or left hook punches entirely as needed.

27. In August 2015, Claimant participated in a ‘Rugged Maniac’ 5K Obstacle Race. The event involved many obstacles which involved extensive use of both arms and shoulders, including carrying heavy sandbags, crawling on her belly on hands and knees through a mud pit, climbing hand over hand up a cargo rope ladder, getting

pulled up and over a large inclined ramp by her hands and walking across a balance beam with her arms outstretched for balance.

28. Claimant credibly testified that she modified her activities during the Rugged Maniac to avoid use of her left arm or to minimize use of her left arm.

29. The Claimant had no left shoulder symptoms prior to April 7, 2014. Claimant engaged in sport boxing for fitness for seven months prior to April 7, 2014 without symptoms in her left shoulder. Claimant then sustained an admitted injury to her left shoulder on April 7, 2014, and has been symptomatic ever since. The fact that she continued to engage in physical activity following her injury does not negate the injury or its effects.

30. Dr. Nelson's opinion is credible and persuasive. He has had the opportunity to evaluate the Claimant multiple times and to monitor her progress and condition. Dr. Nelson has made it very clear that he feels Claimant's condition could be improved with surgery and that he relates the need for surgery to the admitted work injury.

31. Dr. Primack's opinions are unpersuasive. He did not examine the Claimant yet he maintains the opinion that any impingement (which he could not diagnose) is unrelated to her injury. He also stresses that he could see nothing on the MRI regarding the biceps tendon, but Dr. Nelson apparently did see something on the MRI regarding the biceps tendon. Dr. Primack's opinions also seem to assume that Claimant has been boxing for a significant period of time when she had only been boxing for seven months prior to the work injury, and not on a daily basis.

32. Assuming Dr. Primack's opinions that Claimant's left shoulder problems are degenerative in nature are correct, Claimant was asymptomatic until April 7, 2014 when sustained the work injury. As such, the work injury caused an aggravation or exacerbation of the degenerative condition to produce the need for medical treatment.

33. Claimant has proven that the surgery recommended by Dr. Nelson is reasonable, necessary and related to the admitted work injury she sustained on April 7, 2014.

## CONCLUSIONS OF LAW

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

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

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

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

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

6. In this case, the Respondents dispute the medical necessity and relatedness of the surgical procedure recommended by Dr. Nelson. The Respondents rely upon the opinions of Dr. Primack in support of the surgery denial. As found above, the ALJ relies upon the opinions of Dr. Nelson as more persuasive than those of Dr. Primack. Dr. Nelson has had ample opportunity to examine the Claimant and gain a full understanding of her symptoms. Dr. Primack did not examine the Claimant yet he maintains the opinion that any impingement (which he could not diagnose) is unrelated to her injury. He also stresses that he could see nothing on the MRI regarding the biceps tendon, but Dr. Nelson apparently did see something on the MRI regarding the biceps tendon. This constitutes a mere difference of medical opinion and the ALJ gives Dr. Nelson's opinion more weight. Dr. Primack's opinions also seem to assume that Claimant has been boxing for a significant period of time when she had only been boxing for seven months prior to the work injury, and not on a daily basis. Assuming Dr. Primack's opinions that Claimant's left shoulder problems are degenerative in nature are true, Claimant was asymptomatic until April 7, 2014 when sustained the work injury. As such, the work injury caused an aggravation or exacerbation of the degenerative condition to produce the need for medical treatment.

## ORDER

It is therefore ordered that:

1. The Respondents are liable for the left shoulder surgery recommended by Dr. Garth Nelson.

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: November 23, 2015

DIGITAL SIGNATURE:

L. Broniak

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

## ISSUES

Whether the claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Romero is reasonable, necessary and casually related for treatment of the claimant's admitted industrial injuries.

## FINDINGS OF FACT

1. On October 8, 2014, the claimant, a security guard, was called by a co-worker to open a personal locker because she locked her keys inside the locker. The claimant had to use a bolt cutter to cut the lock and open the locker. When the lock gave way, the claimant fell about one to two feet to his knees. The claimant did not seek treatment on the date of injury.

2. The claimant first sought treatment with CCOM two days later, on October 10, 2014. The examination of his right knee established that there was no pain on motion, no abrasions, no bruising, no erythema, no swelling, and normal range of motion. The claimant was diagnosed with a right knee contusion and released to work full duties.

3. Two days later, the claimant was evaluated at St. Mary Corwin Hospital. Again, no swelling was noted. The examiner also noted that there was no locking or giving out of the knee during physical exam.

4. Although the claimant had symptoms of swelling during the initial course of his treatment, his complaints were not seen or documented by his ATP. Rather, the claimant's ATP documented that there was no swelling, bruising, pain on motion, or range of motion difficulties with the right knee throughout October, November and December. The ATP even noted that the examination of the claimant's right knee was unremarkable.

5. An MRI was performed on November 24, 2014 and established diffuse degenerative intra-articular changes. Specifically, the study established patellofemoral degenerative changes with chondromalacia, soft tissue swelling of above the knee, and a chronic osteochondral lesion.

6. Dr. Daniel Olson, an ATP in this case, testified that "most of the stuff on the MRI scan is preexisting" and that the only acute finding was the soft tissue swelling.

7. Dr. Lawrence Lesnak performed an IME in this case on April 7, 2015. He opined that the claimant's MRI did not show any abnormalities that could be related to the October 8, 2014 industrial injury other than potentially the patellar swelling.

8. Dr. Lesnak testified that the MRI showed "some degenerative changes, signal changes in the posterior horn of the medial meniscus, [which is] a very common place that gets degenerated over time. There was some edema or swelling of the kneecap, which the radiologist remarked appeared to be degenerative in nature. And there was a bone lesion on the non-weight bearing surface of the posterior...lateral distal end of the thigh bone."

9. Dr. Lesnak also testified that the MRI, which was taken only six weeks after the industrial injury, did not show evidence of joint effusion that one would expect in an acute trauma to the knee. He testified that a joint effusion is reactive swelling and increased fluid inside the joint itself. He credibly testified that an MRI is very sensitive to these types of findings. Dr. Lesnak persuasively testified that the absence of a joint effusion on the MRI scan is evidence that there had been no acute intra-articular trauma within the right knee joint within the past three months.

10. Dr. Lesnak, as part of his IME, performed a physical examination. In addition to the absence of a joint effusion on MRI, Dr. Lesnak testified that his physical exam of the claimant's right knee was essentially unremarkable without any evidence of joint effusion. Dr. Lesnak further testified that his examination did not show any evidence of symptomatic meniscus, ligamentous pathology or instability of the joint.

11. Dr. Lesnak opined that one would expect joint effusions where there is an intra-articular abnormality. He observed that the only documentation of the presence of any joint effusion was on October 12, 2014 where a "hint of a joint effusion" was documented in the physical examination portion of the emergency room records. However, Dr. Lesnak credibly testified that it would be impossible to detect joint effusion on October 12, 2014 because of the reported soft tissue swelling of the knee generally and that he doubted that finding. Specifically, Dr. Lesnak testified "you would have to have literally no edema of the soft tissues to identify any joint effusions. Because the joint effusion that would [be] coming from structures under the soft tissues."

12. Dr. Lesnak persuasively testified that if a joint effusion was truly detected during the October 12, 2014 physical examination, it would have been visible on the

MRI performed on November 24, 2014, six weeks after the injury. Specifically, Dr. Lesnak testified that, while joint effusions can get better if you address the pathology causing the effusion, "effusions from intra-articular trauma will never be better in six weeks." Because of this, Dr. Lesnak testified that the absence of a joint effusion on the MRI performed six weeks after the injury establishes that there was no intra-articular trauma to the knee joint. No other doctor documented the presence of any joint effusion.

13. On November 26, 2014, the claimant was evaluated at St. Mary Corwin Hospital. As part of the physical examination of the right knee, it is noted that the claimant has "decreased thigh muscle mass and tone." Dr. Lesnak testified that this physical finding was evidence of a long-standing lower extremity problem. Specifically, Dr. Lesnak testified that this finding was evidence of muscle atrophy in the right leg, which in this case, would have arisen from relative disuse bilaterally. Dr. Lesnak testified that this finding would only arise with disuse of the leg over many years, not just two months.

14. On March 31, 2015, the claimant received a cortisone injection of his right knee. According to the claimant, this injection made his symptoms worse. Dr. Lesnak credibly opined that this physical finding – a worsening of symptoms post-injection – was evidence that the intra-articular portion of the knee was not the problem. Specifically, Dr. Lesnak observed that because joints are "not used to" having fluid in it, if one injects a joint that does not have intra-articular symptoms, the joint becomes painful because of the fluid introduced to it. Dr. Lesnak later testified that this physical finding established there were no symptoms in the intra-articular knee that needed to be surgically addressed.

15. The ATPs and Dr. Lesnak agree that the claimant has significant underlying and pre-existing degeneration in his right knee. Dr. Alex Romero, a surgeon, opined that the claimant had a right knee injury with osteoarthritis and mechanical symptoms.

16. Dr. Olson opined that the October 8, 2014 knee contusion resulted in an aggravation of a pre-existing knee condition "that was not overly symptomatic before [the claimant] fell onto his knees."

17. Dr. Lesnak testified, however, that even if the incident in question was an aggravation, a joint effusion would need to be present to prove such an aggravation. However, the MRI conclusively established that there was no joint effusion. Further, Dr. Lesnak testified that there was insufficient evidence that there was any joint effusion

present on physical examination. He additionally indicated that the non-diagnostic response to the cortisone injection was evidence that there was no aggravation to the claimant's underlying degenerative condition. This was because, if there was an acute problem, one would have expected an anesthetic result which would have resulted in a significant temporary alleviation of pain rather than, as reported, a worsening. As such, Dr. Lesnak opined that the industrial injury of October 8, 2014 – a contusion – did not result in an aggravation of the claimant's pre-existing degenerative conditions.

18. Dr. Lesnak opined that the incident of October 8, 2014 in no way changed the intra-articular structures of the claimant's knee. Specifically, Dr. Lesnak observed that while the claimant experienced a contusion of the soft tissues of his knee on October 8, 2014, there was no aggravation, acceleration, or contribution to the underlying degenerative changes in the claimant's knee as a result of the admitted knee contusion.

19. The ALJ finds the analyses, opinions, and testimony of Dr. Lesnak to be more persuasive and credible than medical analyses, opinions, and testimony to the contrary. The ALJ finds that the incident of October 8, 2014 did not aggravate, accelerate, or contribute to the pre-existing degenerative changes within the claimant's knee.

20. Dr. Olson testified that Dr. Romero's proposed surgery was aimed at addressing mechanical findings in the claimant's knee. He clarified that the mechanical findings that required surgery were the claimant's pre-existing problems – a patellofemoral problem or a loose body. Dr. Olson further testified that the only acute finding related to the October 8, 2014 incident as seen on MRI was soft tissue swelling and that the surgery was not aimed at correcting that soft tissue issue.

21. Dr. Lesnak agreed that Dr. Romero's proposed surgery was directed at pre-existing intra-articular joint issues. However, because of the lack of joint effusion and other acute and sub-acute findings on MRI indicative of an acute trauma, Dr. Lesnak persuasively opined that the MRI findings were not causally related to the work injury and were not the result of an aggravation, acceleration, or contribution to the degenerative changes. Dr. Lesnak persuasively opined that the need for surgery to allegedly repair those issues, therefore, was not causally related to a work injury.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that the need for surgery as proposed by Dr. Romero was causally related to the October 8, 2014 industrial injury.

## CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act, §§ 8-40-101, *et seq.*, C.R.S. (2015), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. § 8-43-201, C.R.S.

2. The ALJ must assess the credibility of the witnesses and the probative value of the evidence to determine whether the claimant has met his burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 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 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. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

4. Regardless of the filing of an admission for medical benefits or an order containing a general award of medical benefits, respondents retain the right to dispute liability for medical treatment on grounds that the treatment is not authorized or reasonably necessary. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Indus. Comm'n*, 723 P.2d 749 (Colo. App. 1986). The filing of an admission does not prevent respondents from contesting whether a claimant is in need of any continued medical treatment as a result of the compensable injury. *Ford v. Regional Transp. Dist.*, W.C. No. 4-309-217 (I.C.A.O., Feb. 12, 2009). Respondents remain free to dispute the cause of the need for medical treatment, and respondents' election to do so does not shift the burden of proof away from the claimant. *See Snyder, supra*; *Velarde v. Sunland Construction*, W.C. No. 4-412-975 (I.C.A.O., Dec. 4, 2001). This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *Cf. HLJ Mgmt. Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (filing

of admission does not vitiate respondents' right to litigate disputed issues on a prospective basis).

5. A claimant must prove a causal relationship between the work injury and the medical treatment for which he is seeking benefits. *Snyder,* 942 P.2d at 1339. 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). The claimant shoulder this burden and must establish his entitlement to benefits by a preponderance of the evidence. *Snyder*, 942 P.2d at 1339. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is *more* probably true than not. *Page v. Clark*, 592 P.2d 792 (1979).

6. As found, the claimant failed to establish by a preponderance of the evidence that the proposed right knee surgery recommended by Dr. Romero was causally related to the admitted work injury.

[The Order continues on the following page.]

## ORDER

It is therefore ordered that:

1. The claimant's request for surgery as recommended by Dr. Romero 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: November 25, 2015

/s/ original signed by:

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

## ISSUES

The issues to be determined by this decision are:

I. Whether claimant has proven by a preponderance of the evidence entitlement to temporary disability benefits from October 21, 2014 ongoing.

II. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment.

## FINDINGS OF FACT

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

1. Claimant is a formerly employed food service worker. She last worked for Employer in December 2014 at La Junta Intermediate School. Claimant's employment contract ran for the academic school year, i.e. from August through May.

2. Claimant testified that she informed her supervisor, Amanda Cobb that she planned on resigning her position at the end of the first school term in December 2014 to take care of her grandchildren. Claimant testified that the last school day for the first semester was either December 18 or 19, 2014. Claimant informed Ms. Cobb about her intention of resigning at the start of the school year, i.e. in August 2014. (Hrg. 27:40; 29:12; 31:05).

3. Claimant testified that she changed her mind about resigning her position and therefore did not quit her job. (Hrg. 28:21). Claimant testified that she had decided that she wanted to work on an on-call basis. Claimant admitted that she did not inform her employer that she changed her mind about resigning. (Hrg. 31:28-38).

4. On October 21, 2014, Claimant stepped on a cardboard tube and fell, injuring her right shoulder. A medical only General Admission of Liability was filed on October 14, 2015.

5. Claimant has a prior history of right shoulder injuries and has had three prior surgeries to the right shoulder. Consequently, she was presented to Arkansas Valley Regional Medical Center (AVRMC) where she was evaluation by Dr. William Jurgens within thirty minutes of her fall. Dr. Jergens imposed restrictions, provided medications, including Narco and instructed Claimant to follow-up with the work comp provider.

6. On October 28, 2014, Claimant was seen at AVRMC by Family Nurse Practioner (FNP) Veronica Bartlett for the initial workers compensation medical appointment. FNP Bartlett completed a physical examination and assessed "derangement of the right shoulder". She ordered an MRI and referred Claimant to Dr. Bruce Taylor for an orthopedic evaluation. During her encounter with FNP Bartlett, Claimant insisted that she be removed from work. (Resp. Ex. A, pg. 1). When Ms. Bartlett declined, noting that Claimant had been off of work for almost a full week. Claimant then requested she be removed from work until the following week so she "could start fresh". (Resp. Ex. A, pg. 1-2). Despite Claimant's repeated requests to be removed from work, FNP Bartlett imposed work restrictions and returned Claimant to modified duty. (Resp. Ex. A, pg. 2).

7. Claimant was placed her on light duty and Employer was able to accommodate her restrictions by placing her in the office shredding paper and completing other office tasks. However, Claimant testified that she missed some days from work in October and November due to her injury, but she did not recall how many days she missed, and was unable to recall if she was paid for her time off. (Hrg. 24:16-24:30; 25:03).

8. Although Claimant testified that she missed days from work in October and November, she did not provide, as noted above, any evidence substantiating the number of days she missed. (Hrg. 24:30-24:39). Similarly, Claimant provided general testimony that she worked fewer hours in October and November, but she failed to provide evidence establishing the number of hours she worked before the injury compared with the number of hours she worked after October 21, 2014. (Hrg. 25:05). Based upon the evidence presented, the ALJ finds that Claimant failed to prove her entitlement to temporary disability benefits during the time period from October 21, 2014 through December 2, 2014.

9. Claimant returned for follow-up evaluation with FNP Bartlett on November 11, 2014. During this encounter, Claimant reported having "a lot of pain" and requested an MRI "as soon as possible". Claimant's husband accompanied her to this visit. Claimant husband was frustrated with the pace at which the MRI was being done and confronted FNP Bartlett regarding Claimant's work status, stating the returning Claimant to work was a "waste of time, that all she does is sit there, and that she could just sit at home". Claimant's husband later informed FNP Bartlett that Claimant should not be returned to work because she only had one hand and that she could slip and fall sustaining additional injury. He then pointedly reiterated that should Claimant slip and fall again, that they would sue. (Resp. Ex. A, pg. 3). Claimant's husband then reported to FNP Bartlett that Claimant was continuing to work in the kitchen. Claimant failed to correct this misleading report and inform FNP Bartlett that she was no longer working there. To verify Claimant's work status, FNP Bartlett contacted Employer. During a conversation with Claimant's supervisor, FNP Bartlett was able to confirm that Claimant was actually performing office work, in a seated position, and not working the in kitchen as Claimant's husband had reported. (Resp. Ex. A, pg. 3). FNP Bartlett noted that

Claimant's husband was very threatening, aggressive, and confrontational about Claimant being returned to work. He also questioned FNP Bartlett's decision to perform a physical examination of the shoulder, "yelling at FNP Bartlett not to touch Claimant because an MRI had not been completed. (Resp. Ex. A, pg 4). Despite these repeated threats, FNP completed her examination and returned Claimant to modified duty work. As Dr. Taylor had relocated out of state, FNP had sent a referral for orthopedic evaluation to Dr. Michael Morley.

10. Claimant was evaluated by Dr. Morley on November 24, 2014. As the requested MRI had not been done, Dr. Morley set a follow-up appointment for Claimant after her MRI.

11. Claimant's MRI was performed on November 28, 2014 and compared to a prior study from March 6, 2012. After comparison, the radiologist felt that Claimant had suffered an acute "focal full thickness tear of the supraspinatus tendon near the insertion with undersurface delamination but no retraction".

12. On December 3, 2014, Dr. Morley removed Claimant from work pending further evaluation of Claimant by Dr. Rickland Likes, her prior surgeon. (Resp. Ex. B, pg. 5). After her appointment on December 3, 2014, Claimant returned to work and provided Ms. Cobb with her restrictions- that she would be off work until further notice.

13. At some point after December, Claimant testified that she called Employer and spoke to another supervisor, Erin (last name unknown). Erin told Claimant that she was no longer on the payroll. Claimant took this to mean that she no longer had a job and that she had been let go or fired. Claimant's assumption that she had been fired contradicts her testimony that she was not fired.

14. On February 4, 2015, Claimant presented to Dr. Likes for an evaluation. At this appointment, Claimant reported to Dr. Likes she was still working in the kitchen. During questioning at hearing Claimant admitted that she told Dr. Likes that she was working in the kitchen even though she had not worked there since her October 21, 2014 injury. (Hrg. 34:36-41).

15. Dr. Likes indicated that Claimant should discontinue her work in the kitchen. However, Dr. Likes stated that she could work light duty or office work. (Resp. Ex. C, pg. 6-7). In fact, Dr. Likes completed a letter for Claimant's employer, outlining her return to office work. (Resp. Ex. C, pg. 8).

16. Claimant acknowledged that Dr. Likes returned her to office work as of February 4, 2015. (Hrg. 35:17 – 33:33) (Resp. Ex. C, pg. 8). Yet, Claimant admitted she did not take her new work restrictions from Dr. Likes to Ms. Cobb or her employer as she had previously done when she had been returned to modified duty and placed on the schedule. (Hrg. 35:55-36:03). The ALJ finds that Claimant's admitted failure to provide the new restrictions to her employer and return to work some evidence that Claimant had resigned her position as of December 3, 2014.

17. Claimant testified that if she had not been removed from work by Dr. Morley on December 3, 2014 that she would have returned to work in January 2015 because she had changed her mind about quitting. (Hrg. 29:24-39). Claimant admitted that she never returned to work after her December 3, 2014.

18. Ms. Cobb testified that it is the employer's policy to accommodate work restrictions in order to eliminate lost time. (Hrg. 44:40) Claimant testified that after her injury in October, she returned to work and presented her work restrictions to Ms. Cobb. (Hrg. 31:44-32:12). Claimant conceded that Employer accommodated her restrictions and she returned to work after her October 21, 2014 injury. (Hrg. 31:48-53).

19. Ms. Cobb testified that Claimant never informed her that she had changed her mind about quitting. Rather, Ms. Cobb testified that Claimant informed her that she would not be returning to employment after Dr. Morley removed her from work on December 3, 2014. (Hrg. 47:14-39). This testimony was confirmed by Claimant. (Hrg. 28:04-14).

20. Despite conceding she told her employer that she would not be returning to employment after December 3, 2014, Claimant denied that she quit her job. (Hrg. 36:18-36). However, when Claimant was allegedly informed later by "Erin" that she was no longer on the payroll, Claimant did not contact Ms. Cobb to inquire why she was no longer employed. (Hrg. 37:17-46). Instead, Claimant testified that she just assumed she had been terminated which, as noted above, contradicts her earlier testimony that she had not been fired. Claimant's explanation for her lack of contact with her employer, namely her assumption that she had been fired is not credible.

21. The ALJ finds Claimant's testimony that she intended to return to work after the semester break incredible for the following reasons: First, Claimant never informed Employer of her alleged change of mind about quitting her job at any time up to and including the time period after December 3, 2014 when she was taken out of work by Dr. Morley. In fact, the evidence persuades the ALJ that Claimant confirmed with Ms. Cobb that her resignation would be effective December 3, 2014. Furthermore, Claimant admitted that she did not take her new work restrictions from Dr. Likes to Ms. Cobb or her employer as she had previously done when she had been returned to modified duty and placed on the schedule. Finally, after Claimant was allegedly informed by "Erin" that she was no longer on the payroll, Claimant did not contact Employer to inquire as to why she was no longer employed, since she had not quit or been fired. The ALJ finds these actions inconsistent with Claimant's testimony that she intended to return to work after the semester break. Claimant's professed intention is not supported by the weight of the opposing evidence establishing that she, of her own volition, resigned from further employment effective December 3, 2014 to care for her grandchildren. Based upon the evidence presented, the ALJ finds that Claimant's resignation was not compelled by the natural consequences of her work injury, but rather her conscious and voluntary choice to quit.

22. Based upon the evidence presented, the ALJ finds that Respondents have proven, by a preponderance of the evidence, that Claimant is responsible for her termination of employment and the resulting wage loss beginning December 3, 2014 and ongoing.

## CONCLUSIONS OF LAW

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

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

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004); See also *Ackerman v. Hilton's Mechanical Men, Inc.,* 914 P.2d 524 (Colo. App. 1996)(ALJ's findings may be based on reasonable inferences from circumstantial evidence). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, Claimant's testimony is inconsistent with her actions and contradicted by the testimony of Ms. Cobb. Based upon the evidence presented, the ALJ determines Claimant's testimony to be unreliable and unpursuasive.

D. To prove entitlement to TTD benefits, 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); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires the

Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). If the period of disability lasts longer than two weeks from the day the injured employee leaves work as the result of the injury, disability indemnity shall be recoverable from the day the injured employee leaves work. § 8-42-103(1)(b), C.R.S. TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*, namely:

- The employee reaches maximum medical improvement;
- The employee returns to regular or modified employment;
- The attending physician gives the employee a written release to return to regular employment; or
- the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

As found at paragraphs 7-8 of the Findings of Fact above, Claimant failed to establish her entitlement to temporary disability benefits from October 21, 2014 through December 2, 2014. Indeed, Claimant did not establish any specific time period for her claim for lost wage benefits nor did she establish an actual wage loss, testifying instead that she did not recall if she had been paid for any lost time from work between October 21, 2014 and December 2, 2014. Consequently, Claimant's claim for temporary disability benefits for this time period must be denied and dismissed.

E. Claimant's injury in this case was after July 1, 1999. Consequently, §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S., collectively referred to as the "termination statutes", apply to assertions that Claimant is responsible for her wage loss. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, a claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for the termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004). As a result, the claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994).

F. Because the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office, 20 P.3d 1209 (Colo. App. 2000).*

G. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" for their termination if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act which led to his/her termination. *Gleason v. Southland Corp.*, W.C. No. 4-149-631 (ICAO, June 13, 1994). Thus, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, Respondents assert that Claimant is responsible for her wage loss after December 3, 2014 because she voluntarily resigned her employment effective that date. Nevertheless, *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (Industrial Claim Appeals Office, November 3, 2003), held that a claimant's voluntary resignation is not dispositive of the issue of whether he was responsible for termination of his employment. Rather, *Blair,* held that the pertinent issue is the reason the claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO April 24, 2002). According to *Blair, "*if the claimant was compelled to resign from this employment such that it can be said the termination was a necessary and natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination." Based upon the totality of the evidence presented in the instant case, the ALJ agrees with Respondents that Claimant is responsible for her wage loss beginning December 3, 2014.

H. As found here, Claimant's actions following her removal from work on December 3, 2014 persuades the ALJ that it was Claimant's subjective choice to resign rather than the effects of her injury that lead to her wage loss. Simply put, the ALJ concludes that Claimant was not compelled to resign as a necessary and natural consequence of the work injury. Rather, Claimant had decided to resign from her position as far back as August 2014 to take care of her grandchildren. The evidence presented convinces the ALJ that Claimant simply followed through with that plan early by reporting to Ms. Cobb on December 3, 2014 that she was quitting and would not be returning to work. Accordingly, the ALJ concludes that Claimant committed a volitional act and otherwise

exercised a degree of control over the circumstances resulting in her termination of employment. by voluntarily resigning her position effective December 3, 2014. As such, she is "responsible" for her termination of employment and her claim for TTD benefits is barred. *Longmont Toyota, Inc.*, *supra*.

## ORDER

It is therefore ordered that:

1. Claimant's claim for disability indemnity benefits is denied and dismissed.

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

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

DATED: November 23, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

## ISSUES

- Whether Claimant established by a preponderance of the evidence that she sustained an occupational disease arising out of and in the course of her employment.

## FINDINGS OF FACT

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

1. Claimant was employed as a bilingual claims adjustor for Employer in its call center from June 2008 until she was terminated on April 7, 2015.

2. Claimant is 60 years old and is 4'11" tall. She is right hand dominant. She was diagnosed with hypothyroidism in June 2014.

3. In 2004, while working for a prior employer, Claimant experienced pain in her arms and hands. A Concentra doctor evaluated her and gave her a left elbow injection. That employer also provided Claimant with a drop-down, adjustable keyboard tray. Her symptoms resolved after minimal treatment and ergonomic modifications to her workstation.

4. While at Employer, Claimant worked a 7 hour, 20 minute shift with a 45 minute lunch break and two other breaks totaling 25 minutes. Claimant worked almost exclusively at her computer station, which featured two screens, a keyboard, and a mouse. Although she occasionally retrieved faxes and made copies, Claimant could not be away from her station for more than two minutes at a time. Claimant testified that she "typed all the time" because she took notes on every claim, and she took calls regarding claims all day. She operated her mouse with her right hand only.

5. In 2010, Claimant's hand pain returned. Her symptoms resolved when Employer installed an adjustable keyboard tray and changed in her chair.

6. In February 2014, Employer replaced the call center desks and computer stations with ones that were higher than Claimant's elbow level. Employer provided Claimant a new chair, but she was unable to raise it high enough to fit the new desk and the armrests could not fit under the desk.

7. The new desks could be used in a sitting or standing position. Claimant testified that she could raise the desk and work in the standing position without experiencing any problems with her wrists. She raised her desk to stand while working for "a few hours" a day, and only experienced problems when sitting which she claimed

caused her to have awkward posturing with her wrists. Claimant reported to Dr. Carlos Cebrian in a later Respondents' independent medical evaluation that "she would stand up to four or five hours per day, and when she was standing she would not have difficulty with her arms."

8. Soon after the new desks were installed, Claimant reported to Employer pain in her fingers and elbows, her hands became numb, and she developed a needling feeling in her fingers.

9. Claimant reported to Dr. Cebrian that she reported her symptoms to Employer again in June and July of 2014 because "she states that she was in terrible pain." However, although she reported a worsening of symptoms, Claimant waited until February, 2015 to make a formal complaint and seek treatment.

10. On January 26, 2015, Jennifer Arnold, M.D., Claimant's primary care physician (PCP), evaluated Claimant for hypertension and GERD. On review of symptoms, Claimant was positive for headaches, vertigo, anxiety, feelings of stress, and insomnia. However, Claimant did not report any symptoms of pain, tingling, or numbness in her bilateral wrists, hands, or fingers.

11. On or about February 11, 2015, Claimant reported numbness and tingling in both of her hands lasting more than four hours. After several conversations with her manager, Claimant again requested an ergonomic workplace evaluation. Employer determined that the new desks could not accommodate a retractable keyboard tray as Claimant requested, and told her to see a doctor.

12. On February 13, 2015, Karen Matusik, PA-C, at Arbor Occupational Medicine, evaluated Claimant and diagnosed her with symptoms of carpal tunnel versus cervical radiculopathy. Ms. Matusik ordered message and physical therapy. Ms. Matusik found that "[t]here is a greater than 51% causality that her current workplace setting is the etiology of the bilateral hand numbness in that after they had given her the retractable keyboard, ergonomic mouse and her old desk, she was totally fine. The new changed [sic]." Ms. Matusik did not document any opinion as to causality or analysis of Claimant's job duties under Rule 17 of the AMA Guides.

13. On February 19, 2015, PCP Dr. Arnold reexamined Claimant and noted Claimant's problems included hypertension, classic migraine, chronic daily headaches, anxiety, and insomnia. Dr. Arnold noted that Claimant asked her to complete FMLA forms. Claimant stated that she could not focus on her job and her boss told her to apply for FMLA in case Claimant needed to leave work early or call out sick. Claimant did not report, nor did Dr. Arnold note, any symptoms of pain, tingling, or numbness in her bilateral wrists, hands, or fingers.

14. Later in February 2015, Employer filed a workers' compensation claim on Claimant's behalf.

15. Claimant's job duties did not include common activities associated with carpel tunnel syndrome such as lifting over 10 pounds, using handheld tools, or using vibrating tools.

16. Claimant has hypothyroidism and a family history of diabetes; both factors are associated with carpal tunnel diagnosis.

17. On March 2, 2015, Joseph Blythe performed a vocational evaluation of Claimant's worksite. Mr. Blythe observed Claimant for three-and-a-half hours. Based upon his observations, he extrapolated that Claimant used a keyboard for 1.52 hours per day (12.66 minutes per hour), and a mouse for 2.8 hours a day (22.8 minutes per hour). Thus, he determined that Claimant's job duties involved no primary or secondary risk factors as outlined in the Cumulative Trauma Conditions Medical Treatment Guidelines, found at WCRP 17, Exhibit 5. Mr. Blythe found that the risk factors of awkward posture and repetition/duration also were not present.

18. Also on March 2, 2015, Alisa Koval, M.D. (Ms. Matusik's supervising physician) evaluated Claimant. Claimant indicated her symptoms remained the same. Dr. Koval provided Claimant with wrist braces and told her to take five minute breaks for every 20-30 minutes of work. Dr. Koval diagnosed symptoms of carpal tunnel versus cervical radiculopathy. Dr. Koval did not document her opinion as to causality or analysis of Claimant's job duties under Rule 17.

19. On April 8, 2015, Ms. Matusik reevaluated Claimant for persistent numbness and tingling in both hands. Claimant stated that her symptoms remained essentially unchanged. Ms. Matusik diagnosed symptoms of carpal tunnel syndrome, but again did not document her opinion as to causality or analysis of Claimant's job duties under Rule 17. Additionally, Ms. Matusik is not a physician, and therefore is not Level II accredited per the Colorado Division of Workers' Compensation.

20. On April 14, 2015, Dr. Koval and Ms. Matusik opined that Claimant's current symptoms were related to her job activities. Dr. Koval stated that "[e]ven though [Claimant] may not meet all the criteria for Rule 17, the past history of a similar complaint which was easily remedied by the lower retractable keyboard tray and chair warranted a request for both of those and an ergonomic workplace evaluation."

21. On April 21, 2015, John Hughes, M.D. performed a Claimant's independent medical examination. Dr. Hughes diagnosed diffuse myofascial pain with clinical findings consistent with left greater than right carpal tunnel and cubital tunnel syndrome. Dr. Hughes noted that his preliminary opinion was that Claimant's bilateral upper extremity symptoms reflected the work related onset of diffuse myofascial pain and early entrapment neuropathies of the ulnar and median nerves secondary to abnormal workplace posture. However, Dr. Hughes did not perform a causality analysis of Claimant's job duties under Rule 17 because Claimant had not yet been finally diagnosed with carpal tunnel which required electrodiagnostic testing.

22. Dr. Hughes commented that Mr. Blythe's report did not document any job site ergonomic risk factors such as an elevated desktop. However, Mr. Blythe did evaluate for awkward posture and reported none rose to the level of a primary or secondary risk factor. In addition, Dr. Cebrian testified that an elevated desktop would not affect Claimant's wrists, hands, and fingers; it would affect her shoulders.

23. On May 5, 2015, Dr. Jonathan Sollender reviewed Claimant's medical records at Respondents' request. Relying on the vocational evaluation findings, Dr. Sollender opined that Claimant's medical conditions were not causally related to her occupational activities.

24. On June 2, 2015, PCP Dr. Arnold reexamined Claimant for dizziness, anxiety, and hypertension. Claimant also stated that she had carpal tunnel due to work, reporting that in February 2015, she felt numbness in her fingers. This was Claimant's first mention to her PCP that she had carpal tunnel syndrome.

25. On June 9 2015, Claimant underwent occupational therapy. The therapist noted that Claimant reported that the onset of her symptoms was about 2 years ago, but her symptoms had gradually worsened. Based on this record, Claimant's onset of symptoms would be in June 2013, before Employer changed the call center desks and work stations. Claimant testified at hearing that this report was in error.

26. On July 6, 2015, Dr. Hughes reviewed Dr. Sollender's report and repeated his opinion that Claimant's pain was work-related.

27. On July 9, 2015, Dr. Jack Sylman performed an EMG and diagnosed Claimant with "mild to moderate right median neuropathy at the wrist (carpal tunnel syndrome)" and "mild left median neuropathy at the wrist (carpel tunnel syndrome.)" Dr. Hughes testified that based upon this EMG, he agreed with and adopted this diagnosis.

28. On September 17, 2015, Dr. Carlos Cebrian performed a Respondents' independent medical examination of Claimant. Dr. Cebrian noted Claimant reported that she worked in a standing position between four and five hours a day. Dr. Cebrian noted that Claimant's treatment providers had not performed causality assessments, and after performing his own assessment, he concluded it was not medically probable that Claimant's bilateral carpel tunnel syndrome was directly or indirectly related to or caused by her work activities. Like Dr. Sollender, Dr. Cebrian relied principally upon the findings contained in Mr. Blythe's vocational report. Dr. Cebrian testified that Claimant did not meet any of the primary or secondary risk factors and therefore there was no causal relationship between Claimant's carpel tunnel syndrome and her job duties.

29. At the time Dr. Cebrian examined Claimant, she understood that surgery was the only treatment for her condition but stated that she did not want surgery because she was changing careers. At hearing, Claimant explained she would like to proceed with surgery because she plans to pursue a master's degree.

30. Dr. Cebrian opined that the absence of any non work related risk factor, association, or activity does not establish a causal relationship between work and the diagnosis. Dr. Cebrian noted that for a causal relationship to be established between work and the diagnosis, the causal analysis provided by the Division in Rule 17 must be followed. Dr. Cebrian opined that based on the information available, it was not medically probable that Claimant's bilateral carpal tunnel syndrome was directly or indirectly related to her work activities at the Employer nor was it the proximate result of her work activities.

31. Dr. Cebrian testified that females, older individuals, people with hypothyroidism, people with a family history of diabetes mellitus, people with arthritis, and people who are obese are at an increased risk to developing carpal tunnel syndrome. Dr. Cebrian testified that Claimant has some of the risk factors, including being female, increased age, history of hypothyroidism, and familial history of diabetes mellitus.

32. Dr. Cebrian persuasively testified that a physician must apply Rule 17 to determine the work relatedness of the injury because the Guidelines are based on evidence-based medicine. Dr. Cebrian testified that if a physician is going to deviate from the Guidelines there should be a very good reason why the physician failed to apply the Guidelines and the reason should be documented as to why the physician felt he or she could ignore all the medical literature and do something else.

33. During his testimony, Dr. Hughes addressed the fact that he did not perform a causality assessment, noting first that there had not been a diagnosis when he evaluated Claimant. Second, Dr. Hughes testified that Claimant's history of complaints suggests that there existed a strong "dose relationship" between injurious exposure, which includes repetition and posture, and the onset of symptoms that ultimately came to be diagnosed as stemming from carpal tunnel syndrome. Dr. Hughes described this relationship as follows: when the dose or exposure is high, symptoms are high; when exposure is decreased, symptoms are decreased. This relationship exists until the exposure causes irreversible nerve damage. He opined that the evidence showed when the work station was not modified after her complaints in February 2014; Claimant had a fifteen-month period of working at an ergonomically incorrect workstation. This, he opined, explained why Claimant's symptoms had not improved after she stopped working. Dr. Hughes also noted that his causality determination was supported by the fact that Claimant, being right hand dominant, used her right hand more than left doing her job duties, and, unsurprisingly, the neuro-diagnostic tests showed worse pathology on the right as compared to the left. However, the testing results were opposite of Dr. Hughes' exam in which he diagnosed diffuse myofascial pain with clinical findings consistent with left greater than right carpal tunnel syndrome.

34. Dr. Hughes concluded that Claimant had a predilection for developing carpel tunnel because of her gender, age, and, in particular, hypothyroidism; and that her pathology was accelerated by work at a faster degree due to these factors. In short,

Claimant was vulnerable to job tasks that, although they fell well below the Guideline's causation threshold, still caused her occupational disease.

35. Dr. Hughes acknowledged that Claimant did not meet any of the risk factors pursuant to the March 2, 2015 job demands analysis report. He testified that hypothyroidism, a familial history of diabetes, and gender are independent risk factors for the development of carpal tunnel syndrome. Dr. Hughes also testified that hypothetically, a woman who is 60 and has hypothyroidism could develop carpal tunnel syndrome without performing any job duties.

36. Based on the totality of the evidence the ALJ finds and determines that Claimant did not experience symptoms and her work station was not ergonomically incorrect when she worked in a standing position which she did between three and five hours per day.

37. Based on the totality of the evidence the ALJ finds and determines that none of Claimant's treating physicians documented any causation analysis as required by Rule 17 prior to issuing their opinions of work relatedness. The ALJ further finds that Dr. Hughes did not perform a causation analysis as required by Rule 17 prior to issuing his opinion on work relatedness. Moreover, Dr. Hughes ultimately agreed that Claimant did not have any work-related risk factors to cause her condition, and that Claimant's gender, age, hypothyroidism, and a familial history of diabetes could independently cause carpal tunnel syndrome.

38. Based on the totality of the evidence the ALJ finds Dr. Cebrian's testimony on the issue of causation to be to be more persuasive than that of the other doctors. The ALJ further finds that Claimant's job duties, as analyzed under Rule 17, did not accelerate, cause, or aggravate the bilateral carpal tunnel syndrome. The ALJ finds Dr. Cebrian's testimony to be more persuasive and credible than the testimony of Dr. Hughes in that Claimant did not sustain a work related cumulative trauma condition. The ALJ also credits the testimony of Dr. Cebrian and Dr. Hughes that females, older individuals, people with hypothyroidism, people with a family history of diabetes mellitus, people with arthritis, and people who are obese, are at an increased risk at developing carpal tunnel syndrome. The ALJ finds Claimant has some of the risk factors to develop carpal tunnel syndrome, including, being female, increased age, history of hypothyroidism, and familial history of diabetes mellitus.

39. Based on the totality of the evidence the ALJ also finds that the alleged ergonomic mismatch of Claimant's desk height and lack of adjustable keyboard tray did not cause Claimant's carpal tunnel syndrome because there were no identifiable primary or secondary risk factors and no risk factors related to awkward posture. The ALJ finds that the evidence regarding Claimant's varied work duties does not establish causation or relatedness of her condition to her job duties pursuant to the risk factors set forth in Rule 17.

40. Based on the totality of the evidence the ALJ also credits Dr. Sollender's report, in which Dr. Sollender performed a Rule 17 analysis and found that Claimant did not meet any of the risk factors under Rule 17.

41. Based on the totality of the evidence the ALJ finds that Claimant has not proven by a preponderance of the evidence that her bilateral carpal tunnel syndrome is a compensable work injury.

## CONCLUSIONS OF LAW

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

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

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

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.

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*.

W.C.R.P. Rule 17, Exhibit 5 sets forth the treatment guidelines for Cumulative Trauma Conditions. Rule 17 sets 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.

The credible and persuasive evidence presented at hearing established that there is not a causal relationship between Claimant's alleged conditions and her work exposure. Accordingly, Claimant failed to prove a compensable occupational injury based in part on the following reasons:

A. Claimant has the burden to establish a causal relationship between her alleged injury and her employment.

B. As found, the totality of the evidence in this case demonstrates that Claimant's job duties are numerous and varied. Claimant does not perform job duties which involve significant keyboarding up to 7 hours a day or continuous mouse work up to 4 hours per day. Additionally, Claimant does not perform job duties which involve handheld vibratory tools, handheld tools weighing in excess of two pounds, or lift up to ten pounds more than sixty times per hour. As found, there was a lack of persuasive evidence that Claimant's job duties required her to sustain continuous awkward posture for significant periods of time. Rather, the totality of the evidence was persuasive that Claimant performed several different types of job tasks that required the use of one, or the other, or both upper extremities at different times. Of note, repetition alone is not a risk factor under Rule 17. As such, a review of her job duties reflects that there was not requisite force or repetition to cause her conditions.

C. Pursuant to Rule 17, a specific set of steps should be followed to determine if Claimant's conditions are work related. In this instance, Dr. Cebrian and Dr. Sollender both performed a causation analysis pursuant to the Division's Rule 17 and their conclusions are credible and persuasive and establish that Claimant's conditions are not work related.

D. As found, there is insufficient persuasive credible evidence that Claimant's treating physicians or Claimant's IME physician, Dr. Hughes,

performed a causation analysis consistent with and required by Rule 17 in this case with regard to any of her diagnoses.

E. As found, the totality of the evidence is that claimant's job duties do not meet any primary or secondary risk factor known to be physiologically related to the claimant's diagnoses.

Given the foregoing, the ALJ determines and finds that Claimant has not met her burden of proof in establishing that she suffered a compensable occupational injury. Accordingly, 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.

## ORDER

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

1. Claimant's request for workers' compensation benefits is denied and dismissed with prejudice.

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

DATED: November 18, 2015

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

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## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained compensable lower back injuries on December 30, 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 injuries.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period December 30, 2014 through April 12, 2015.

## STIPULATIONS

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $350.00.

## FINDINGS OF FACT

1. Employer is a cleaning service provider owned by Denise Schellinger. Claimant's job duties involved cleaning houses for Employer.

2. On December 30, 2014 Claimant was driving her personal vehicle when she was involved in a motor vehicle accident during the course and scope of her employment with Employer. Claimant suffered lower back injuries as a result of the incident.

3. On December 30, 2014 Employer did not possess Workers' Compensation insurance.

4. Employer did not dispute that Claimant suffered lower back injuries during the course and scope of her employment on December 30, 2014. Employer also acknowledged that Claimant is entitled to receive medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

5. Claimant has received limited medical treatment and physical therapy through Arbor Occupational Medicine. However, because Employer did not possess Workers' Compensation coverage, Arbor declined treatment after two appointments. Ms. Schellinger has contacted Arbor and stated that she is financially responsible for Claimant's medical treatment but has not received a response.

6. Claimant has also received chiropractic treatment. Ms. Schellinger contacted Claimant's chiropractor and advised that Employer is financially responsible for the treatment. Claimant's chiropractor subsequently billed Employer and Ms. Schellinger has paid the bills.

7. Claimant seeks Temporary Total Disability (TTD) benefits for the period December 30, 2014 through April 12, 2015. She asserts that she was going to begin a new job on January 5, 2015 but could not perform her work duties because of her lower back condition. Claimant testified that she was unable to work because of the December 30, 2014 accident until she began employment with a new Employer on April 13, 2015. However, the record does not reveal that Arbor assigned Claimant work restrictions as a result of her lower back injury.

8. Claimant has established that it is more probably true than not that she sustained compensable lower back injuries on December 30, 2014 during the course and scope of her employment with Employer. On December 30, 2014 Claimant was involved in a motor vehicle accident while performing her job duties and suffered lower back injuries.

9. 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 injuries. Employer did not dispute that Claimant suffered lower back injuries during the course and scope of her employment on December 30, 2014. Employer also acknowledged that Claimant is entitled to receive medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries.

10. The parties agreed that Claimant earned an AWW of $350.00. An AWW of $350.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

11. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period December 30, 2014 through April 12, 2015. The record does not reveal that Arbor assigned Claimant work restrictions as a result of her lower back injury. However, Claimant's credible testimony reflects that she was unable to perform her job duties between December 30, 2014 and April 12, 2015. Claimant attempted to receive treatment for her lower back injuries, but was denied care after two visits. She is entitled to an award of TTD benefits because her December 30, 2014 industrial injuries 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 $350.00 by 66.67% yields a weekly TTD rate of $233.35.

12. Employer was not insured on December 30, 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 December 30, 2014 through April 12, 2015. The period covers 104 days.

Claimant's TTD rate is $233.35, increased by 50% for a lack of insurance, to a TTD rate of $350.00 each week. Multiplying $350.00 each week for a total period of 104 days yields a total TTD amount of $5,200.00.

## 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 compensable lower back injuries on December 30, 2014 during the course and scope of her employment with Employer. On December 30, 2014 Claimant was involved in a motor vehicle accident while performing her job duties and suffered lower back injuries.

*Medical Benefits*

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries. Employer did not dispute that Claimant suffered lower back injuries during the course and scope of her employment on December 30, 2014. Employer also acknowledged that Claimant is entitled to receive medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injuries.

*Average Weekly Wage*

9. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages

based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

10. As found, the parties agreed that Claimant earned an AWW of $350.00. An AWW of $350.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

*Temporary Total Disability Benefits*

11. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, 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).

12. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period December 30, 2014 through April 12, 2015. The record does not reveal that Arbor assigned Claimant work restrictions as a result of her lower back injury. However, Claimant's credible testimony reflects that she was unable to perform her job duties between December 30, 2014 and April 12, 2015. Claimant attempted to receive treatment for her lower back injuries, but was denied care after two visits. She is entitled to an award of TTD benefits because her December 30, 2014 industrial injuries 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 $350.00 by 66.67% yields a weekly TTD rate of $233.35.

*Penalties for Employer's Failure to Carry Worker's Compensation Insurance*

13. 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).

14. As found, Employer was not insured on December 30, 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 December 30, 2014 through April 12, 2015. The period covers 104 days. Claimant's TTD rate is $233.35, increased by 50% for a lack of insurance, to a TTD rate of $350.00 each week. Multiplying $350.00 each week for a total period of 104 days yields a total TTD amount of $5,200.00.

## ORDER

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

1. Claimant suffered a compensable lower back injury on December 30, 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 lower back injury as well as authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her December 30, 2014 industrial injury.

3. Claimant earned an AWW of $350.00

4. Respondent shall pay Claimant TTD benefits in the amount of $5,200.00.

5. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

a. Deposit the sum of $7,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to 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 $7,000.00 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.

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: November 25, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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

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**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. WC 4-976-398-01**

## ISSUES

➢ Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for his termination of employment, and are therefore excused from paying temporary total disability ("TTD") benefits (for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015) or temporary partial disability ("TPD") benefits (for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law)?

## STIPULATIONS

1. Claimant's average weekly wage ("AWW") at the time of injury was $1,101.84. The parties stipulated that the total AWW was made up of $925.88 in weekly wages and $175.96 in the value of housing benefits provided to Claimant by Employer.

2. Should the ALJ find that Claimant was not responsible for his termination, the parties agreed that Respondents will pay TTD and TPD benefits as follows: TTD benefits for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015, and TPD benefits for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law.

## FINDINGS OF FACT

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

1. Claimant is a 43-year-old male who was employed by Employer as a ditch rider between August 2006 and May 2015. Claimant testified at hearing that Employer is an irrigation utility that delivers water to farms and other users in the Montrose, Delta, and Olathe areas. Claimant testified that in the summer, the job involved being sure water was delivered properly to customers. He testified that in the winter months the job involved cleaning out drained ditches, including burning brush that accumulated, and performing maintenance on ditches and equipment. Claimant testified he also worked as a mechanic, and that at times he would spend time working in the shop repairing equipment and vehicles after his water route was done for the day.

2. Claimant sustained an admitted work injury to his low back on February 14, 2015.

3. Claimant testified that he had a prior work injury to his low back that was never formalized into a claim. Claimant testified that when he reported the prior low

back injury to his supervisor, Aaron English, he was ridiculed and told to take a few days off. Claimant testified that Mr. English told him he was "hung like a horse," and that "your d*** is too big, it threw your back out, that's all your problem is. Take a few days off, we will see what happens."

4. Mr. English, water master for Employer, testified at hearing. He testified he has worked as water master for four years. He testified that working as water master involves overseeing nine ditch riders and ensuring proper repairs take place, adequate water is in canals, and that water reaches customers in the correct amounts. Mr. English testified that ditch riders are responsible for their own sections of ditches, including opening and closing head gates, cleaning trash and debris out of the ditches, and taking phone calls and orders from customers.

5. Mr. English testified that he had been employed with Employer for 16 years. Mr. English testified that he liked a workplace to be fun. He testified that this involved "messing around," "horsing around," and "cracking jokes" with coworkers. He testified that this included engaging in pranks, and that he himself performed pranks on his coworkers during his time working for Employer. He testified that he performed pranks on coworkers for at least his first 10 years on the job, but that he did not perform pranks anymore.

6. Claimant testified that he had problems with Mr. English since before 2009, stemming from a series of incidents that Mr. English called "pranks." Claimant testified that he disagreed with Employer's promotion of Mr. English to water master. Claimant testified that he originally applied for the water master position, but withdrew his application. Claimant testified that it was "unbelievable" that Mr. English was promoted to water master given his history of pranks.

7. Mr. English testified that his pranks included using a "potato gun" made out of PVC pipe on work time. Mr. English testified that he shot golf balls and bottles of caulking out of the potato gun. He testified that he never shot the gun toward coworkers, and he did not believe that he shot the gun toward areas where coworkers were working.

8. However, Claimant testified that on one occasion he and a co-worker, Pat McWilliams, were working on a structure in a ditch when he saw Mr. English first shooting golf balls with the potato gun. Claimant testified that later Mr. English was shooting other items, including tubes of caulking or tubes of chalk, toward him and Mr. McWilliams as they worked.

9. Mr. English testified that he brought an Airsoft gun to use on work time. He testified that he fired plastic bee bees at coworkers. He testified that he did not recall shooting Claimant with the Airsoft gun. However, Claimant testified that Mr. English had shot him with a bee bee with the Airsoft gun at work.

10. Mr. English testified that he built bombs on company time and with company materials that were set to detonate when his co-workers got into the truck and

turned the ignition switch on. When asked how many times he had done that, he testified, "A couple, that I recall." He testified that he had wired a bomb to explode when a coworker started a truck on more than one occasion.

11. Claimant testified about a specific incident when a bomb constructed by Mr. English detonated when another employee, Josh Guard, started a company truck. Claimant testified that the truck was perhaps five feet from his right ear when the bomb exploded. He testified that the bomb exploded with enough force to buckle the hood of the truck, and Claimant testified that the explosion damaged his right ear. Claimant testified that he has had right ear problems since that explosion.

12. Mr. English testified the bombs he built were generally milk jugs full of acetylene. He testified they would explode when hooked to a spark plug ignition system. After testifying about the manner in which the bombs he built would explode, the ALJ advised Mr. English of his Fifth Amendment rights.

13. Claimant testified that Mr. English built bombs out of four-inch PVC pipe using welding gas, gluing the caps on the ends, and using silicone to put wires into the inside of the bomb. Claimant testified that Mr. English would detonate those bombs with a battery charger. He testified that Mr. English would put pipe bombs out in the shop's driveway, bring the leads across the driveway, and then detonate the bomb using the battery charger when coworkers drove by.

14. Claimant testified that he witnessed a pipe bomb explode while Mr. English was building it on a welding bench at work. Claimant testified that the bomb went off with enough force to put shrapnel from the PVC pipe into the shop's ceiling. Claimant testified he recalled Mr. English laughed because he was "glad it didn't blow his arms off."

15. Mr. English testified that he had filled milk jugs with an accelerant and that he would hide them in ditch banks so that when coworkers were clearing brush from the ditch banks using blowtorches, the jugs would explode into flame. Claimant testified that this happened to him when he was burning a ditch that was covered in weeds. He testified that he was fortunate that the "whoosh" of flames after the explosion moved away from him. Claimant testified that Mr. English laughed about the incident, but that Claimant took the event very personally because the flames could have moved toward him.

16. Claimant testified that in the winter it was not uncommon to have a fire on the ditch bank so that employees could stay warm while they worked. Claimant testified that he saw Mr. English put several flammable and explosive items into the fire, including cans of spray foam and 55-gallon barrels of tar.

17. Mr. English testified that spray foam is sometimes used in the workplace, and that spray foam is flammable. He testified that, although he did not remember specifically, he "was sure" he had taped together tubes of spray foam and put them into

a fire at work. He also testified that, although he did not remember specifically, he "was sure" he had also thrown gallons of gas into fires at work.

18. Mr. English testified that he has put his own feces in a bag and put the bag into a coworker's lunch. Mr. English testified that he has sat on a catwalk above a ditch and defecated toward a coworker in the ditch below him.

19. Mr. English testified that his and Claimant's personalities clashed. He testified Claimant did not like his pranks. Mr. English testified he did not know whether Claimant was nearby during any of the incidents when a truck bomb detonated.

20. Mr. English testified that in approximately 2009, when he was working as a ditch rider, Steve Fletcher had spoken to him about building bombs on company time. Mr. English testified that Mr. Fletcher asked him to stop building bombs because there had been complaints. When asked whether he built an additional bomb after Mr. Fletcher spoke to him, Mr. English testified: "I don't think I did."

21. Mr. English testified that he supervised Claimant beginning November 2011 when he was promoted to foreman. Mr. English first testified that he stopped performing pranks once he was promoted to a supervisory position in 2009. He later testified that as a crew foreman, he might have "play[ed] with [his] crew a little bit." He testified that he would continue to "shoot the potato gun, something like that." He testified he "did not recall" performing other pranks as a crew foreman. He testified that the pranks "all stopped" when he became water master in 2011.

22. Claimant testified that just after Mr. English was promoted to crew foreman, Mr. English told Claimant that he did not have any agricultural background. Mr. English told Claimant that Employer was hiring employees who did not know anything about farming, and that it appeared that Employer was hiring on "the buddy system." Claimant testified that Mr. English told him that Claimant got his job through Steve Martinez, and "that s*** is going to stop right now." Claimant testified Mr. English told him that he would do everything he could to get ditch riders with farming experience. Claimant testified he interpreted that conversation as "intimidation."

23. Steve Fletcher, general manager of Employer for four years, testified at hearing. He testified he supervised both Mr. English and Claimant. Mr. Fletcher testified that prior to Mr. English becoming water master in 2011; he had information that Mr. English and Claimant had some prior issues. Mr. Fletcher testified he knew about some of Mr. English's "pranks" and promoted him anyway.

24. Mr. Fletcher disagreed with the use of the word "bomb" with regard to the explosives Mr. English built. He first testified that, to him, a "bomb" is a life-threatening explosive, including a pipe bomb. He testified that what Mr. English was doing was putting acetylene into soda cans or milk jugs so that they would explode and make a loud "bang," not a massive explosion.

25. However, Mr. Fletcher later testified that he was not aware that one of the explosions set off by Mr. English dented a company truck. He testified he was not

aware that Mr. English built and detonated pipe bombs made out of PVC pipe. Mr. Fletcher was asked about Mr. English's practice of hiding jugs of acetylene in ditch banks so that they would explode when coworkers used blowtorches to clear ditches. He testified that an employee could have been injured or killed by such explosions.

26. Mr. Fletcher acknowledged that Mr. English was not an explosives or pyrotechnics expert. Mr. Fletcher testified that he was aware that Mr. English was creating dangerous situations involving fire in the workplace. Mr. Fletcher first characterized the "bombs" Mr. Fletcher built and detonated as only creating "loud bangs," but testified that for a "loud bang" to occur, there had to have been an explosion. Mr. Fletcher testified that Mr. English intentionally creating explosions and intentionally setting flammable substances on fire was dangerous conduct. He testified that that kind of conduct is unacceptable "in the position [Mr. English] was in."

27. Mr. Fletcher first testified that he knew that the kind of conduct Mr. English engaged in "goes on in the workplace in a lot of different areas." Mr. Fletcher testified that he had worked in mines previously where some of this type of conduct took place. He testified that explosions also took place in his mining job. However, he acknowledged that in a mine, explosions are for work purposes and are performed by explosives experts. He testified that explosives set off in the workplace by non-experts generally do not happen in the workplace, because they are unsafe.

28. Mr. Fletcher also testified that he had worked other jobs where employees shot coworkers with bee bee guns. He testified that employees shooting bee bee guns at each other is not acceptable behavior.

29. Mr. English testified that once he became water master, Claimant was required to report to him, which included calling in readings from Claimant's canals and giving clearance to supply water after a customer paid a late account. Mr. English testified that Claimant was required to call the office every day and speak either with Mr. English or Dennis Veo, the other water master.

30. When asked whether he was less concerned about Mr. English once he became a supervisor and was not out in the field, Claimant testified that "there was still plenty of game-playing" after Mr. English was promoted. Claimant testified that Mr. English would go out into the field and alter Claimant's water route. Claimant testified this included turning head gates on and off, and altering the proper flow of water to customers. Claimant testified that this at times affected the level of water that was delivered to customers, including to some members of Employer's board of directors, and made it look as if he was not performing his job correctly.

31. The ALJ discredits Mr. English's testimony that all of his "pranks" stopped in 2011, and credits Claimant's testimony about Mr. English's post-2011 conduct. Mr. English was only told to stop building bombs and admitted to still shooting his potato gun at work after his promotion to crew chief. In addition, Mr. English had no incentive to stop his "pranks" because Mr. Fletcher did not find his other conduct to be fireable offences, and in fact promoted Mr. English with awareness of such conduct.

32. Mr. Fletcher testified that in January 2013, Claimant approached him with complaints about Mr. English. Mr. Fletcher testified that Claimant asked that Mr. Fletcher terminate Mr. English, or in the alternative to allow Claimant to not have any contact with Mr. English.

33. Claimant testified he accumulated and brought information to Mr. Fletcher and other managers in January 2013 about Mr. English's conduct. Claimant testified that he did this after speaking with other ditch riders who wanted to come forward to management with issues they were having with Mr. English. Claimant testified that the other ditch riders agreed that if Claimant would come forward with complaints, then the other ditch riders would. Claimant testified that he went forward with his complaints because he could not see his job getting any easier. He testified that Mr. English was then his direct supervisor and could control his water route, and was making his job more difficult.

34. Claimant testified that after he brought his complaints to managers and the board, Mr. Veo, the other water master, asked him what could be done to rectify the situation. Claimant testified he told Mr. Veo: "[I]f it were me, I would fire him." Claimant testified he asked for Mr. English to be fired because he was afraid for his life and the lives of his coworkers. When asked why he did not bring these complaints to his superiors earlier if he was afraid for his life, Claimant testified that he had in fact been bringing complaints to his superiors for approximately eight years, but nothing had ever been done about his complaints.

35. Mr. Fletcher testified he reviewed Claimant's complaints, but told Claimant that those incidents occurred prior to Mr. English becoming a supervisor, and that type of conduct by Mr. English would no longer happen. Mr. Fletcher testified he told Claimant that he would not terminate Mr. English, and told Claimant that he would continue having contact with Mr. English.

36. Mr. English testified about Claimant's phone calls with him over time. Mr. English testified from his notes about a phone call with Claimant on June 13, 2014. Mr. English recalled that Claimant told him he did not want to speak with him anymore. Mr. English recalled that Claimant told him he might need to "go outside the company to get some satisfaction." Mr. English testified from his notes about a phone call on July 19, 2014, and recalled that Claimant again told him he did not want to speak with him, and gave Mr. English a phone number to call for the Colorado Department of Labor. Mr. English testified from his notes he did not know whether Claimant referenced the Department of Labor because of the explosions that Mr. English set off at work. Mr. English testified from his notes about a phone call on July 22, 2014, wherein he recalled Claimant again stating he did not want to speak with Mr. English, and asked for another person in the office to call him.

37. Claimant testified that he sent an email dated August 23, 2014 to Mr. Fletcher and George Etchart, the president of Employer's board of directors, with information about Mr. English's conduct. Claimant testified that he sent the email because he had come forward to management with complaints about Mr. English, and

that nothing happened. He testified that he believed management took his complaints lightly, and would not help him. He testified that as 2014 went on, he had a lot of things happen to his water route that he believed Mr. English was involved in. He testified that he believed it was an effort to force him to quit. Claimant testified that he was reaching a point where he was mentally unable to handle the things that had happened with Mr. English. He testified that he felt physically ill when he had contact with Mr. English. Claimant testified that he believed making a written complaint to the board and requesting for no contact with Mr. English was his last chance to ask for help.

38. Claimant testified that per Employer's personnel policies, if an employee could not rectify a problem with management, the employee should approach the board of directors. He testified that he believed that employees were encouraged to notify the board of directors in writing, which is why he wrote the email. Employer's Personnel Policies state as follows: "The Board of Directors will serve as the appropriate individuals for the purpose of hearing any complaint and/or grievance that cannot be resolved with the Manager. The employee is asked to provide the Board with a written summary of his or her complaint or grievance." Claimant's Exhibits, p. 62.

39. Claimant testified that he initially wrote the contents of the email by hand, and showed the draft to Zack Ahlberg, a member of Employer's board of directors. Claimant testified he asked Mr. Ahlberg if he thought it would cause Claimant to lose his job. Claimant testified that Mr. Ahlberg advised him to send the email, because the board needed to know what was going on. The August 23, 2014 email was entered into evidence. Claimant's Exhibit 4, p. 35.

40. Mr. Fletcher testified that in response to Claimant's August 23, 2014 email he and assistant manager Ed Suppes went to Claimant's residence in September 2014. Mr. Fletcher testified that he told Claimant that Mr. English was his immediate supervisor, and that he needed to communicate with Mr. English on a professional level. Mr. Fletcher testified that that "pranks" that Mr. English had engaged in were "in the past." Mr. Fletcher testified he told Claimant that he could either communicate with Mr. English or find a different job. Mr. Fletcher testified that Claimant said he would "look forward" to his communications with Mr. English.

41. Mr. Fletcher testified that he knew in September 2014 that there was a rift between Claimant and Mr. English. He testified that Claimant had asked on separate occasions to not have to speak to Mr. English anymore. He testified that one of these requests was in writing. He testified that Claimant told him that he felt unsafe at work because of Mr. English's conduct. Mr. Fletcher testified that Claimant told him that he was seeking counseling because of the stress he experienced dealing with Mr. English. Mr. Fletcher testified that, notwithstanding all of these factors, he still required Claimant to have contact with Mr. English.

42. Claimant testified that typically he would try to call into the office early enough to speak with and relay information with Mr. Veo so that he would not have to speak with Mr. English. He testified that this happened a majority of workdays. Claimant testified that prior to his meeting with Mr. Fletcher and Mr. Suppes in

September 2014, he had been exclusively communicating with Mr. Veo instead of Mr. English. Claimant testified that Mr. Veo knew that Claimant did not want to speak with Mr. English, so Mr. Veo came to work earlier to receive Claimant's calls.

43. Mr. Fletcher testified that after his discussion with Claimant in September 2014, for a time he stopped receiving reports from Mr. English about his and Claimant's communications.

44. Mr. English testified from his notes that Claimant called into the office the morning of October 13, 2014, and hung up when he heard Mr. English's voice. Mr. English testified from his notes that the same thing happened on October 14, 2014. Claimant testified that these few times, he would hear Mr. English's voice, "chicken out," and hang up. Claimant testified that he was not being confrontational, but was trying to deal with the problem, and to deal with Mr. English being his supervisor and get on with his job. Claimant testified that if he did not speak with Mr. English, he still called in his readings to another coworker, and did not fail to perform his job duties.

45. Mr. English testified that beginning approximately November 1, 2014, the ditch riding activity decreased for the winter season, so Claimant was not required to call into the office every day.

46. Mr. English testified that Claimant drove by his residence on March 14, 2015, and "flipped [him] the bird." Mr. English testified that Claimant took the same road later that afternoon, and "flipped [him] the bird once more."

47. Mr. English testified that Claimant would drive on Highway 348, approximately one block from Mr. English's home, on his way home. Mr. English testified that Highway 348 was "the main drag," and that lots of cars use Highway 348. Mr. English testified that Claimant was driving a white Chevy Tahoe.

48. Claimant testified that he did not drive by Mr. English's house and "flip him the bird." Claimant testified that, contrary to Mr. English's testimony, that during that time period he was not driving his Chevy Tahoe because it was parked for several months because of poor performance. He testified that during that time period he was driving his company truck.

49. Claimant also testified that he was seeing a counselor at the time to deal with his anxiety surrounding Mr. English. He testified that the counselor advised him to avoid Mr. English completely as much as possible, and so often Claimant would take a different route that would not go past Mr. English's house on Highway 348.

50. The ALJ finds Claimant's account of these incidents more probably true than that of Mr. English.

51. Claimant testified that he purchased an audio recorder in January 2015. He testified that the recorder was of poor quality, because he purchased the cheapest recorder he could find. He testified that he was unhappy with the recorder's

performance. He testified that he did not alter or delete any recordings, and would not have the expertise to know how to alter any recordings.

52. He testified that he did tell Mr. English ahead of time that he would be recording phone conversations between the two of them, but did not recall telling Mr. English that conversations were recorded prior to January 2015. He testified he did not record every phone conversation. He testified that he did not record phone conversations prior to April 2015.

53. Mr. English testified that he believed phone conversations between Claimant and him were being recorded "all the time," because Claimant had indicated to him on one occasion that he was recording phone conversations. Mr. English testified he had not reviewed any recordings other than the recordings entered into evidence at hearing.

54. Mr. English testified from his notes about a phone call with Claimant on April 18, 2015. Mr. English recalled calling Claimant with readings, and that Claimant asked him how many bombs he built while working for Employer, and how many bombs he had detonated close to other coworkers. Claimant agreed at hearing that he asked Mr. English those questions. Mr. English recalled Claimant also asking him whether he had killed somebody "in the hills with a shovel." Mr. English recalled saying he did not recall, and told Claimant he "would not do this with [Claimant] this morning."

55. Mr. English first testified that he did not know why Claimant asked those questions. Later though he testified that he had in fact built bombs on company time. When asked to clarify, Mr. English testified he was surprised by the question about killing another person, not about building bombs on company time.

56. Claimant testified that a farmer came to him and reported that Mr. English had told the farmer that he had killed a man in the mountains with a shovel. Claimant testified that he asked Mr. English about that incident, because if it were true, he would not want to work with an individual who had killed someone.

57. Mr. English testified from his notes about a phone call with Claimant on April 25, 2015. Mr. English recalled that the two discussed a clearance, and at the end of the conversation, Claimant said: "F*** you, mother*****," just before Claimant hung up. However, the recording in evidence from that conversation does not contain any expletives. The recording in evidence contains dialogue as follows:

Mr. English: "Got some work in a subdivision. And that's it."

Claimant: "What else?"

Mr. English: "That's all we got, man."

Claimant: "Seeya."

Mr. English: "Have a good one."

Claimant's Exhibit 9(c). Respondents' attorney stipulated on the record that the recording did not contain any expletives. Mr. English testified that, although the recording did not contain the language, that after Claimant said, "Seeya," and Mr. English said, "Have a good one," Claimant used the word "f***." Claimant testified that he did not use foul language with Mr. English on April 25, 2015. The ALJ finds Claimant's account more probably true than that of Mr. English.

58. Mr. English testified from his notes about a phone call with Claimant on April 28, 2015. Mr. English recalled Claimant asked him "how to get a promotion around here." When Mr. English answered that he didn't know, Mr. English testified that Claimant asked him whether "blowing s*** up" would help with a promotion. Claimant testified he also asked Mr. English whether "terrorizing other employees" would help with a promotion.

59. Mr. English testified that Claimant asked him about a sick day he took the day before, because Claimant saw Mr. English walking out of a convenience store. Mr. English testified that Claimant asked him whether he was aware that there was a policy against abusing sick leave. Mr. English testified he answered that he was aware of the policy.

60. Mr. English testified that he took Claimant's questions during these conversations to be "insubordination" by Claimant, and reported them to Steve Fletcher.

61. Mr. Fletcher testified, given the actions of Mr. English, he could understand why Claimant would be upset with Mr. English. Mr. Fletcher testified that Claimant was "obviously…dwelling in the past."

62. Claimant testified that he began professional counseling after his request to the board in August 2014 to stop contact with Mr. English was denied. Claimant testified that he sought outside help to learn how to cope with having contact with Mr. English. Claimant testified that he also wanted to tell someone his story and all the things that had happened with Mr. English.

63. Claimant testified that his counselor suggested that he first try to avoid Mr. English completely, because even speaking with Mr. English caused him a great deal of anxiety. Claimant testified that he felt physically ill when he was around Mr. English or had contact with Mr. English. Claimant testified that his counselor also recommended that Claimant ask Mr. English why he did the things he did.

64. Claimant testified that he had been instructed by Mr. Fletcher to speak with Mr. English and to deal with him professionally. Claimant testified that he had never been told that he could not ask Mr. English questions about his conduct.

65. Claimant testified that he asked Mr. English about bomb building because he wanted to know why Mr. English would want to build bombs at work and around other employees. Claimant testified that he asked Mr. English about potentially killing another person because if it were true then he would not want to work with Mr. English. Claimant testified it was important to know the extent of Mr. English's activities because

it was therapeutic. He testified that he was acting on the advice of his counselor, who advised him that if he had to work with Mr. English, he should ask Mr. English why he had acted the way he did.

66. Claimant testified he did not feel that the conversations and interactions he had with Mr. English were inappropriate. Claimant testified that asking someone about potential criminal acts, or about violation of company policies, were not acts of aggression. Claimant testified that he was not fearful of losing his job due to the questions he asked Mr. English. He testified that because Mr. English "got away with" doing so many inappropriate things, he thought that he could ask Mr. English questions about things he had done without any fear of losing his job. He testified that he did not feel he was out of line. He testified that he asked the questions he did because he was trying to "better [him]self" and make things work.

67. Claimant testified that although he could have spoken with Mr. English without asking him questions about things that he had done, that Claimant had difficulty controlling his anxiety and his fear for his and his coworkers' safety. Claimant testified that nothing had ever been done to Mr. English despite all the dangerous conduct he had engaged in at work. Claimant testified that he felt unsafe and in danger at work. Claimant testified that he still feared for his safety and the safety of his family leading up to and following the hearing date.

68. Mr. Fletcher testified that he decided to terminate Claimant, and did so on May 4, 2015. Claimant testified that he received a phone call from Mr. Fletcher while he was working asking him to meet in the office. When Claimant asked what the meeting was about, Mr. Fletcher said he would rather talk about it in person. Claimant testified that on the way into Mr. Fletcher's office, he asked the head mechanic what he knew about the meeting, and that the mechanic had heard news that Employer was going to promote him to the shop job. Claimant testified that when he went to Mr. Fletcher's office, he was expecting to receive a promotion. Claimant testified that Mr. Fletcher instead informed him that he was terminated.

69. Mr. Fletcher testified that he did not give Claimant the reason for his termination during their meeting. He testified he had spoken with Employer's attorney, Victor Rouschar, prior to the termination meeting, and that the attorney advised Mr. Fletcher to not give a reason for Claimant's termination. The attorney advised Mr. Fletcher to tell Claimant that Employer was an at-will employer, and Claimant was an at-will employee, and that Employer "really didn't need a reason" to terminate Claimant.

70. Mr. Fletcher testified that Claimant specifically asked him why he was being fired, and Mr. Fletcher specifically told Claimant he did not have to give a reason. Mr. Fletcher testified that Claimant specifically asked whether his firing had anything to do with his complaints or his conversations about Mr. English, and that Mr. Fletcher declined to answer that question.

71. Claimant recorded parts of the termination meeting. *See* Claimant's Exhibits 9(d) – (e). Claimant's Exhibit 9(d) contains dialogue as follows:

Claimant: So, no reason why you're letting me go?

Mr. Fletcher: Like I said, I really don't need one, so.

Claimant: Not any of the discussions I've been having with English, has nothing to do with this?

Mr. Fletcher: I'm not going to comment.

72. Claimant testified that he asked for a reason in hopes that there was something he could do to save his job. Claimant testified that he was about to leave the office, but then realized he was still living in a house owned and provided by Employer. He returned to speak with Mr. Fletcher. Mr. Fletcher first gave Claimant two weeks to vacate the house, but agreed to allow Claimant and his family 30 days to vacate per Claimant's request. Mr. Fletcher did state that: "Technically, I don't need to." Claimant's Exhibit 9(e).

73. Claimant also asked if there was anything he could do to save his job, or to perform alternate work, per the dialogue on Claimant's Exhibit 9(e) as follows:

Claimant: Nothing I can do to try to make things right and keep my job? Possibly get in the shop for you, or anything like that?

Mr. Fletcher: Not right now.

Claimant: Ok.

Mr. Fletcher: [Inaudible]

Claimant: Well, I sure hate to lose my job. And I hate to leave this company. But I understand you guys have to make your choices.

74. Claimant testified that he said he hated to lose his job because the ditch rider position was the best job he had in his life. He testified that moving into the shop would be his "dream job," and that he would want to do it for the rest of his life.

75. Mr. Fletcher testified that prior to terminating Claimant he thought that Claimant was a good employee, and a very good mechanic. He testified he had "high hopes" to move Claimant into Employer's shop as the head mechanic.

76. Mr. Fletcher testified that a ditch rider setting off an explosion close to another employee could be a fireable offense. However, Mr. Fletcher acknowledged that Mr. English set off explosions many times, but was never terminated. Mr. Fletcher agreed that allowing some employees to act in a certain way, but not others, could result in a rift in the workplace.

77. Mr. Fletcher testified that Claimant's lack of communication with Mr. English was a fireable offense. He testified that setting off explosions close to employees could be a fireable offense, but that it depended on the "severity of the explosions." He testified that setting fires on purpose was not a fireable offense. When asked whether putting one's feces in a coworker's lunch was a fireable offense, Mr. Fletcher testified that "there [are] always pranks, and I have seen that happen before in different places." He testified that defecating into a coworker's lunch is not a fireable offense. He testified that defecating towards another employee in the field is not a fireable offense, but could be "if it continue[d]."

78. Mr. Fletcher agreed that course language was commonplace at Employer's facility. He testified that personal rivalries were also common. He testified that in the case of Claimant, his communication issues with Mr. English constituted a fireable offense, but that the conduct that Mr. English engaged in was not sufficient to warrant termination.

79. Mr. Fletcher testified that between his conversation with Claimant in September 2014 and Claimant's termination in May 2015, he did not give Claimant any other warnings about his communications with Mr. English. Mr. Fletcher testified in the months prior to Claimant's termination, there was a discussion about promoting Claimant to head mechanic.

80. Mr. Fletcher testified that he agreed that Claimant, on several occasions verbally and in writing, reported to Employer potentially illegal acts performed by Mr. English. Mr. Fletcher testified that Claimant asked for accommodation because of those complaints, but that the accommodation Claimant requested – not having contact with Mr. English – was denied.

81. Mr. Fletcher testified that several other employees made complaints about Mr. English when he was promoted to water master. Mr. Fletcher testified the list of employees included, but was not limited to, Nick Moore, Gary Cooper (an equipment boss), and Steve Martinez (former crew boss). Mr. Fletcher testified that no other employee that had complained about Mr. English had been terminated, but no employee other than Claimant complained in writing about Mr. English.

82. Mr. Fletcher testified that other employees who had complained about Mr. English were able to continue communicating with Mr. English at work, but that none of these employees requested to not have contact with Mr. English. Mr. Fletcher testified that Claimant was not able to deal with Mr. English as cleanly as those other employees. Mr. Fletcher testified that, in his practice as a manager, employees are not required to "just get over" dealing with coworkers' questionable or dangerous conduct. He did testify, however, that he wrote a letter regarding Claimant's termination indicating that Claimant was unable to "forgive and forget" with regard to Mr. English's conduct.

83. Claimant testified that he did not know why he was terminated at the time of his termination, and was not told why. Claimant testified he was surprised when he was terminated because he "did not see it coming at all." Claimant testified that, based

on earlier conversations with Mr. Fletcher, he believed that he was going to be promoted. Claimant testified that he did not receive notice of the reasons for his termination until he received a letter from Mr. Fletcher through his attorney, stating that he was fired for insubordination. Claimant testified he was never made aware of the reasons for his firing at any time before receiving the letter. Claimant testified that other than his meeting with managers in September 2014 about his communications with Mr. English, he was never given a verbal or written warning up to and including the date he was terminated. He testified that he did not believe that he was at fault for his termination because he was just asking Mr. English questions.

84. Considering the totality of the evidence, the ALJ credits Claimant's testimony and the testimony of the witnesses that Mr. English

- built and set off pipe bombs and acetylene bombs to explode when coworkers started company trucks,
- hid accelerants in areas where workers were using blow torches,
- shot coworkers with bee bees,
- used a potato gun to shoot golf balls and tubes of caulk at coworkers,
- added accelerants and explosives to warming fires used by coworkers,
- defecated into coworkers' lunches, and
- defecated above ditches where coworkers were working.

85. The ALJ credits Claimant's testimony that he did not use profanity in conversations with Mr. English and that he did not "flip off" Mr. English. The ALJ finds it more probably true that these events did not occur.

86. Considering the totality of the evidence, the ALJ finds that Claimant did not precipitated the employment termination by a volitional act, which he would reasonably expect to result in the loss of employment. This finding is supported by Employer's failure to warn or discipline Claimant for his conduct between September 2014 and May 4, 2015, and Employer's tolerance of far more egregious behavior from other employees.

87. The ALJ finds it more probably true than not that "insubordination" was a pretext for firing Claimant given that:

- The following were NOT fireable offenses: setting off explosions near coworkers, placing accelerants in areas where coworkers were using blowtorches, defecating into coworkers' lunches; but being unable to "forgive and forget" such activities was grounds for termination;

- No credible evidence was presented that would support a conclusion that Claimant was not satisfactorily performing all of his job duties;

- Terminating Claimant without warning and the delay in providing an explanation for such termination;

- Mr. Fletcher's testimony that he discussed promoting Claimant to head mechanic in the months before firing him, that Claimant was a good employee, a very good mechanic and that Mr. Fletcher had "high hopes" to move Claimant into Employer's shop as the head mechanic; and

- Mr. English's comments to Claimant about the size of his genitals causing his work injury when Claimant reported his February 14, 2015 admitted back injury.

88. Considering the totality of the evidence, the ALJ finds Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that he would reasonably expect to result in loss of employment.

## 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. 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*.

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).

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 to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

To prove entitlement to temporary partial disability (TPD) benefits, a claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. ("the termination statutes"), provide that 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. Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for his termination. *See Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 20 P.3d 1209 (Colo. App. 2000).

An employee is "responsible" if the employee precipitated the employment termination by a volitional act, which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Given the situation at Employer's worksite and Claimant's reasonable expectation that his conduct would not result in the loss of employment, the ALJ finds and concludes that Claimant was not responsible for his termination.

As found, Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that he would reasonably expect to result in loss of employment. Therefore, the ALJ determines that Claimant has established that he is entitled to TTD benefits and TPD benefits for the periods set forth in the Stipulations and in the Order.

## ORDER

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

1. Respondents shall pay Claimant TTD benefits based on an average weekly wage of $1,101.84 from for the period beginning May 4, 2015 and ending June 9, 2015, and for the period beginning June 18, 2015 and ending June 30, 2015.

2. Respondents shall pay Claimant TPD benefits based on an average weekly wage of $1,101.84 for the period beginning June 10, 2015 and ending June 17, 2015, and for the period beginning July 1, 2015 and ongoing until terminated by law.

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

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

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

DATED: November 12, 2015

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

## ISSUE

Whether Claimant has established by a preponderance of the evidence that a left total hip arthroplasty is causally related to his March 5, 2015 work injury.

## FINDINGS OF FACT

1. Claimant has worked for Employer for approximately twenty three years as a pickup and delivery driver with duties including loading and unloading freight and packages from a semi-tractor trailer at both commercial and residential locations.

2. On March 5, 2015 Claimant was so employed when he suffered an admitted work related injury to his left hip and low back. Although the claim was admitted, Respondents are of the position that the need for a left total hip arthroplasty is related to Claimant's pre-existing osteoarthritis and not due to any hip strain or hip injury suffered on March 5, 2015.

3. Prior to March 5, 2015 Claimant performed his job duties without restrictions. Claimant was also active riding his bicycle on a regular basis and snowshoeing several times a year. Claimant on occasion rode his bicycle 21 miles each way to work. Claimant had regular gout flare-ups where his activities would be limited and he would miss work during the period of flare-up. Prior to March 5, 2015 Claimant had no reported pain complaints in his left hip.

4. On March 5, 2015 Claimant was lifting the trailer door on his truck while delivering products to the Larimer County Jail in Fort Collins, Colorado. Claimant used his left hand to reach across his body, bent down, and pulled up on the trailer door. The door stuck, Claimant pulled harder, and felt his left hip pop. Claimant had immediate pain in his left hip and left lower back.

5. Claimant continued to work the remainder of his shift that day and went home that evening.

6. The next day, March 6, 2015 Claimant worked his regular shift. Claimant felt pain in his left hip but hoped it would go away over the weekend with rest. At the end of his shift, Claimant reported the injury to Employer.

7. On March 6, 2015 Claimant filled out an Employee Notice of Injury form indicating that the injury occurred on March 5, 2015 in the a.m. He indicated on the form that he did not report the injury immediately because it felt like a strain. He reported the injury occurred in route to Fort Collins when he was opening the trailer door

and that he injured his left hip and left lower back. Claimant reported that the trailer door was hard to open when describing other conditions/hazards that contributed to the injury. Claimant also reported he did not require medical treatment. *See* Exhibit 9.

8. On March 6, 2015 Claimant's supervisor, Jeremy Thomas, filled out a Supervisor's Injury Investigation Report. Unlike the report Claimant filled out on the same day, Mr. Thomas indicated that Claimant reported the specific site where the injury occurred was unknown and that Claimant reported no specific incident that could be identified as causing the pain. Mr. Thomas noted that Claimant noticed charlie-horse pain in the middle of the day. Mr. Thomas also noted that Claimant reported having lower back pain for years that could possibly be related. *See* Exhibit D.

9. Claimant hoped that with rest over the weekend his pain would get better. On Monday, March 9, 2015 Claimant's pain continued and he sought medical treatment.

10. Claimant was evaluated on March 9, 2015 by Kevin Page, PA. Claimant reported that on March 5, 2015 he twisted his low back and hip area after lifting the overhead door of his semi. Claimant reported developing pain in his left lower back and left hip. Claimant reported a history of low back pain for roughly the last three years and pre-existing right-sided sciatica. PA Page noted Claimant had a non-antalgic gait, tenderness over the greater trochanter and lateral hip, but that he had 5/5 hip motion and strength. PA Page noted no signs of trauma, but noted hip pain on the left side with deep tendon reflexes and straight leg raises. PA Page assessed lower lumbar strain and hip strain. He anticipated maximum medical improvement in three weeks. *See* Exhibit 4.

11. On March 11, 2015 Claimant was evaluated by Jonathan Bloch, D.O. Dr. Bloch noted that Claimant was doing about the same and had left hip pain and left low back pain. Dr. Bloch noted that flexion of Claimant's left hip was limited due to pain. He assessed lower lumbar strain and hip strain. He indicated Claimant would start physical therapy. *See* Exhibit 4.

12. On March 18, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported overall that he was feeling better but Dr. Bloch noted on examination it appeared Claimant was walking worse. Dr. Bloch noted that Trendelenburg was positive but could be subjective due to effort. Dr. Bloch noted Claimant was a little bit tender to palpation at the lateral trochanteric bursa and that the straight leg raise was difficult secondary to the pain behavior Claimant displayed. He continued to assess lower lumbar strain and hip strain. Dr. Bloch opined that the objective examination was not necessarily physiologic and supportive of the need for narcotic pain medications. Dr. Bloch noted that just to be sure there was nothing more going on he would order an MRI of the hip to look for any internal pathology or derangement. *See* Exhibit 4.

13. On March 24, 2015 Claimant underwent an MRI of his left hip without contrast that was interpreted by Todd Greenberg, M.D. Dr. Greenberg found asymmetric severe left hip osteoarthropathy. He found cystic elements, synovitis,

capsulitis, and large proliferative spurs. He noted the features may represent isolated osteoarthropathy with femoroacetabular impingement. However, given the degree of swelling, Dr. Greenberg opined that strong consideration should be given to a monoarticular inflammatory arthropathy including an atypical presentation of rheumatoid arthritis, gout, or CPPD arthropathy. He concluded that Claimant had asymmetric severe left hip osteoarthropathy and that the underlying features were compatible with femoroacetabular impingement but concluded that a mixed proliferative and inflammatory arthropathy may be considered. *See* Exhibit 5.

14. On March 31, 2015 Claimant was evaluated by PA Page. PA Page reviewed the MRI results. PA Page noted that on examination Clamant had tenderness over the greater trochanter and tenderness to axial loading of his left hip and internal and external rotation with significant pain behaviors. He assessed lower lumbar strain, hip strain, and severe left hip arthritis. PA Page noted he would refer Claimant to Dr. White, hip specialist, and opined that Claimant's hip arthritis obviously had a pre-existing component to it but noted that Claimant reported that he was not having this type of pain or symptomatology prior to the fall. *See* Exhibit 4.

15. On April 15, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported he was not doing any better. Dr. Bloch noted that Claimant's gait was minimally without antalgia but that Claimant had a gross limp that came from the left hip. Dr. Bloch noted tenderness to palpation at the ASOS and acetabular and greater trochanteric regions. He noted range of motion was limited due to pain and stiffness. Dr. Bloch noted the recent MRI results. Dr. Bloch opined that causation of an ongoing basis was questionable. Dr. Bloch opined that the mechanism of injury of lifting the truck gate really did not seem to match the pathology identified on MRI, and opined that it was most likely that the MRI findings and subjective complaints were more consistent with chronic arthritic conditions, as well as chronic low back pain, than an actually injury that occurred on March 5, 2015 which seemed very mild in comparison to what was going on anatomically and objectively. *See* Exhibit E.

16. On April 16, 2015 Claimant was evaluated by Shawn Karns, PA. Claimant reported having issues with his left hip since March 5, 2015 when he was opening a trailer door and felt a pop in his left hip. Claimant reported since then he has had pain in the groin and over the lateral aspect of his hip that was gradually worsening. PA Karns noted limited left hip flexion with significant discomfort on rotational motion to the hip. PA Karns noted that x-rays taken showed severe degenerative changes to the left hip with bone-on-bone degenerative osteoarthritis and significant subchondral cystic change. PA Karns opined that at this point, due to the extent of Claimant's degenerative changes and based on Claimant's limitations, he would likely be a candidate for total hip replacement moving forward. PA Karns noted that Claimant wanted to move forward with surgical intervention and PA Karns noted he would review this with Dr. White and would recommend that Claimant make an appointment with Dr. White for further evaluation, but that Claimant could go ahead with scheduling for a total hip. Neither PA Karns nor Dr. White provided an opinion on the mechanism of injury or a causation analysis. *See* Exhibit 6.

17. On May 5, 2015 Claimant was evaluated by Edward Parks, M.D. Claimant reported that he was lifting a trailer door on March 5, 2015 when he sustained an acute injury to his left hip. Claimant reported having no prior pain. Dr. Parks reviewed the x-rays performed on April 16, 2015 and noted that Claimant had a complete collapse of the femoral head with bone on bone changes. Dr. Parks gave the impression of posttraumatic arthritis left hip and noted in plans and recommendations that he believed the best surgical solution for Claimant would be a hip replacement for this work related injury. *See* Exhibit 6.

18. On May 11, 2015 William Ciccone, M.D. performed a Rule 16 – Medical Record Review. Dr. Ciccone opined that Claimant suffered a minor sprain/strain to his low back and hip region while lifting the overhead door on the trailer. Dr. Ciccone opined that Claimant suffered no significant twisting mechanism and did not fall or suffer any type of impact to the hip or back. Dr. Ciccone opined that it was unlikely that the minor injury at work significantly aggravated or accelerated the chronic degenerative process in the left hip and noted that the hip arthrogram revealed no acute injury, labral tear, or loose body. He further opined that the collapse of the femoral head noted on radiographs can only be attributed to Claimant's severe arthritis as there was no impact in the work injury. Dr. Ciccone noted that he agreed with Dr. Bloch that the work relatedness was questionable and opined that Claimant's symptoms were consistent with Claimant's severe hip arthritis and that there was no acute work related injury. Dr. Ciccone opined that Claimant's pain was related to the natural history of the arthritic process and not the work injury and opined that the hip replacement should not be performed under workers' compensation. *See* Exhibit 7.

19. On May 27, 2015 Claimant was evaluated by Dr. Bloch. Dr. Bloch noted that Insurer had denied the total hip replacement. Dr. Bloch opined that his examination findings were consistent with chronic osteoarthritis of the hip and not with an acute injury, that the diagnostic studies were consistent with chronic arthritis and not an acute injury, and that the diagnosis was consistent with chronic arthritis and not an acute injury. Dr. Bloch opined that there was no significant mechanism of injury with bending over to pull up a trailer door. Dr. Bloch placed Claimant at maximum medical improvement (MMI) and released him from care with no work restrictions from a workers' compensation point of view. *See* Exhibit E.

20. May 29, 2015 Claimant was evaluated by Greg Smith, D.O. Dr. Smith noted he was asked to determine if the case had been put at MMI too soon. Dr. Smith reviewed the medical records and noted he did not have much difficulty with Dr. Ciccone's opinions. However, Dr. Smith thought that Claimant needed to undergo a functional capacity examination before MMI, and he also noted that other doctors believed the injury was work related. Dr. Smith opined that he would like to get a final review from a third hip specialist before the case was fully closed. Dr. Smith opined that opening a trailer door most likely did not cause a significant injury, however, he felt it reasonable and necessary for an additional evaluation and a functional capacity examination before the case was closed. *See* Exhibit E.

21. On June 17, 2015 counsel for Claimant submitted a letter to Dr. Smith indicating that it was his hope that Dr. Smith learned in his training for level II that if an individual is asymptomatic and becomes symptomatic from events at work, the need for care to return them to baseline is the responsibility of the workers' compensation carrier. Counsel for Claimant attached a recent order from an ALJ on the issue of pre-existing asymptomatic conditions. *See* Exhibit J.

22. On June 29, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith noted that Claimant had an upcoming hearing and opined that in his level II training he was taught that in Colorado if an individual is asymptomatic and becomes symptomatic from events at work then the need for care to return to baseline is the responsibility of the workers' compensation carrier. Dr. Smith opined that Claimant was previously asymptomatic. Dr. Smith noted that Claimant had been seen by two surgeons who both felt that Claimant had a work-related injury. Dr. Smith noted, if need be, that they would send Claimant to the University of Colorado for a third opinion in that regard. On examination Dr. Smith noted pain with palpation at the trochanteric margin with some swelling and mild warmth. Dr. Smith noted difficulty with abduction or internal or external rotation of the left hip and decreased muscle strength. Dr. Smith assessed left hip fracture, noted by MRI, ostoarthropathy with femoral acetabular impingement including dysplasia of the femoral head and neck junction, retroversion, and small pseudocyst representing a sealed paralabral cyst. Dr. Smith opined that Claimant qualified to undergo surgical repair as a workers' compensation injury. *See* Exhibit 4.

23. On August 10, 2015 Dr. Ciccone provided a supplemental report that included medical records he did not previously have at the time of his prior review. Dr. Ciccone continued to opine that lifting a trailer door is not consistent with a mechanism of injury that one would expect to cause a significant hip injury requiring surgery. He continued to opine that Claimant's symptoms and restrictions were related to his hip arthritis which was not work related. He opined that it is not uncommon for symptomatic hip arthritis to present with low back and buttock pain and noted that Claimant had been on chronic pain medications for three years for his left sided low back pain. *See* Exhibit H.

24. On August 24, 2015 Claimant was evaluated by Dr. Smith. Claimant reported left hip pain and left low back pain. Dr. Smith reiterated that Claimant reported he had no pain before his work injury. Dr. Smith opined that Claimant was biking and walking and had no problems before the work injury. Dr. Smith noted pre-existing arthritis but opined that Claimant had no pain before the injury and that after the injury the arthritis flared. Dr. Smith noted that Claimant still had a significant amount of pain and that Claimant most likely had some labral damage as well. He assessed low back pain with left hip pathology and strain. *See* Exhibit 4.

***Prior medical history***

25. On December 27, 2007 Claimant was evaluated at Kaiser Permanente by Kelly Jeong, M.D. Claimant reported right knee pain for eight days that felt like a gout attack. Claimant reported never having a gout attack in his knee and that he usually got them in his toes. It was noted that Claimant had approximately 8-10 gout attacks per year. *See* Exhibit I.

26. On August 5, 2008 Claimant underwent an MRI of his lumbar spine performed at Kaiser Permanente. The MRI showed bilateral lysis at L5 with anterior listehsis of L5 on S1 resulting in severe neural foraminal compromise in a position to be affecting the L5 nerve roots bilaterally. It was noted that disc material compresses the ventral thecal sac and displaces the left6 S1 nerve root posteriorly. It was also noted that asymmetric bulging disc at L4-5 worse off to the left side was compressing the left L5 root axilla. *See* Exhibit I.

27. On August 6, 2008 Dr. Jeong contacted Claimant and advised him of the significant abnormal lumbar spine MRI as the likely cause of Claimant's left leg pain. Dr. Jeong referred Claimant to neurosurgery for an evaluation. *See* Exhibit I.

28. Claimant was evaluated on September 26, 2008 by Deborah Nuccio, PA. Claimant reported five months of lower back pain and lower left extremity pain. Claimant reported that sometimes walking exacerbated his symptoms and at other times he could walk several miles without problems. PA Nuccio noted the option for surgery or injections and Claimant reported he did not want to consider either. *See* Exhibit I.

29. On January 30, 2009 Claimant spoke with Gayle Hutchinson, RN. Claimant reported that he would like to pursue injections as previously discussed with neurosurgery in September and reported he was having a lot of pain and felt he needed to do something about it. *See* Exhibit I.

30. On February 19, 2009 Claimant underwent an epidural steroid injection at L4/5 performed by Sandra Fritz, M.D. *See* Exhibit I.

31. On June 1, 2009 Claimant was evaluated by Dr. Fritz. Claimant reported 80% pain relief for two weeks from the last epidural steroid injection. Dr. Fritz performed another injection at L4/5. *See* Exhibit I.

32. On January 18, 2012 Claimant was evaluated by Dr. Jeong. Claimant reported one month of a gout attack in his left knee. Dr. Jeong noted Claimant had a history of gout attacks in his left knee, about 3-4 per year on average. Dr. Jeong noted Claimant was limping *See* Exhibit I.

33. During 2013 Claimant was evaluate a number of times for knee pain, gout in his knees, and osteoarthritis of his knees. *See* Exhibit I.

34. On May 29, 2014 Claimant was evaluated by Tyson Hagen, M.D. Dr. Hagen noted the history of gout and osteoarthritis. Claimant reported pain in his hands and knuckles and that he had pain with gripping and driving. Claimant also reported knee pain for 5 to 6 years and osteoarthritis in both knees. Claimant reported neck pain and stiffness for a few months, and diffuse muscle aches at times. Claimant reported he usually got a gout flare once per month. Claimant also reported radiculopathy pain in the left leg and Dr. Hagen noted he was chronically on gabapentin. Dr. Hagen performed an examination and noted pain in Claimant's left hip with flexion. Dr. Hagen also noted in the right hip no groin pain and full range of motion. *See* Exhibit I.

35. Dr. Hagen opined that some of Claimant's joint pain could be chronic gout. Dr. Hagen also noted the possibility that Claimant had seronegative RA but noted that the MRI of Claimant's knee in the past did not show changes consistent with rheumatoid arthritis. Dr. Hagen opined that chronic gout can cause RA like symptoms with symmetric inflammation and pain in multiple joints that is not as severe as the original gout flares. *See* Exhibit I.

36. On September 16, 2014 Claimant emailed Dr. Jeong. Claimant reported experiencing severe to debilitating joint pain that was starting to interfere with his job to the point that he had to miss 1-2 days per week at work. Claimant asked Dr. Jeong to confer with Dr. Hagen and get back to him with a treatment plan and to schedule an appointment. *See* Exhibit I.

37. On September 17, 2014 Claimant emailed Dr. Hagen. Claimant reported severe joint pain that was to the point that he was suffering debilitating symptoms and that it was so bad he had to miss 2-3 days per week at work. Claimant reported that he hurt from the inside out and literally couldn't move. Claimant asked that Dr. Hagen contact him to talk and schedule an appointment. *See* Exhibit I.

38. On September 30, 2014 Claimant emailed Dr. Hagen. Claimant reported that he saw his test results but felt like what he had at the time of the test was not gout. Claimant reported that he could not function at his job and that his pain was making daily life very uncomfortable. *See* Exhibit I.

39. During this period of time in September Claimant was taking time off work due to his knee joint and gout pain. Once this pain resolved, Claimant did not require medical attention and did not have any problems until his work injury in March of 2015.

40. Claimant returned to his regular level of activity after the September 2014 gout flare and again began riding bicycles, snow shoeing, and being active.

41. Prior to March 5, 2015 Claimant did not seek medical treatment for his left hip.

42. Claimant's testimony, overall, is found credible and persuasive. Claimant did not have daily or constant hip pain or hip symptoms prior to the March 5, 2015 work

injury. Although Claimant had a history of severe gout attacks/pain as well as left lower back pain and radiculopathy, Claimant remained active before and after gout attacks. After March 5, 2015 Claimant's activity level severely decreased due to his persistent left hip pain that was not present prior to March 5, 2015.

43. The opinions of Dr. Bloch and Dr. Ciccone have been considered and rejected. Dr. Bloch bases his opinion on a mechanism of injury that involved no twisting or force. As found, the injury involved twisting across Claimant's body and significant pulling when the trailer door stuck. Dr. Ciccone also initially based his opinion on a mechanism of injury that involved no twisting or force. Although he testified that if the injury occurred the way Claimant described, it would not change his opinion this is not found persuasive. The medical records also do not support Dr. Ciccone's opinion that Claimant's left hip was likely symptomatic before the March 5, 2015 injury nor does Claimant's credible testimony support the opinion that his left hip was symptomatic.

44. The opinions of Dr. Smith and Dr. Parks are found persuasive. The ALJ agrees and the medical records support that Claimant experienced no left hip symptoms or left hip pain prior to the work injury. As the injury caused immediate and significant limitations and pain in Claimant's left hip that were not present prior to the injury, it aggravated Claimant's underlying and pre-existing osteoarthritis and accelerated Claimant's need for treatment and need for a left total hip replacement.

## CONCLUSIONS OF LAW

### *Generally*

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

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

*Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

***Medical Benefits***

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Where relatedness, and/or reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO, April 7, 2003). 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). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to show, more likely than not, that the left total hip replacement is reasonable and necessary and causally related to his work injury. Although the MRI reflects that Claimant had pre-existing and significant osteoarthritis of his left hip, the work injury on March 5, 2015 aggravated Claimant's underlying osteoarthritis and accelerated his need for a left total hip replacement. Prior to March 5, 2015 Claimant was able to work full duty without restrictions, Claimant had no pain complaints specific to his left hip, and Claimant had not sought any medical treatment specific to his left hip. Claimant also was able to maintain a fairly high activity level prior to March 5, 2015. Although the records reflect at one medical appointment approximately one year prior to his work injury that he had pain with flexion in his left

hip, Claimant has met his burden to show, more likely than not, that he did not have significant limitations or pain in his left hip prior to March 5, 2014. The medical records reflect extensive treatment for gout, left knee pain/gout, and low back pain. Based on his history, the ALJ infers that Claimant is not one to shy away from medical treatment when he experiences pain. However, the records show that Claimant did not seek medical treatment at all for left hip pain complaints prior to his work injury. This supports Claimant's credible testimony that prior to the work injury, he was not suffering from left hip pain.

Claimant is also credible in explaining that the mechanism of injury involved twisting across his body while pulling up on a stuck trailer door. Dr. Bloch and Dr. Ciccone had an incorrect mechanism of injury and their opinions, in part, were based on the incorrect mechanism of injury. Although Dr. Ciccone testified that even if the door stuck and Claimant twisted, it still would not have caused the need for a left total hip replacement, the ALJ rejects this opinion. The ALJ concludes that the need for a left total hip replacement is due to Claimant's underlying severe osteoarthritis and due to his work injury which significantly aggravated his asymptomatic underlying osteoarthritis and accelerated his need for treatment. Although Claimant may have needed a left total hip replacement in the future based on his severe osteoarthritis, Claimant has established that he was asymptomatic in his left hip until the work injury on March 5, 2015. Therefore, the ALJ concludes that Claimant has met his burden to show, more likely than not, that the need for a left total hip replacement was aggravated and accelerated by his work injury and that the treatment is causally related to his work injury.

## ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that a left total hip arthroplasty is causally related to his March 5, 2015 work injury.

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

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

DATED: November 9, 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 claimant has proven by a preponderance of the evidence that the medical treatment she received to her left knee including the surgery performed by Dr. Kopich was reasonable and necessary to cure and relieve the claimant from the effects of her admitted work injury?

- 

## FINDINGS OF FACT

1. Claimant sustained an admitted work injury on February 27, 2015 when she slipped and fell in the parking lot of her employer. Respondent admitted for the injury and authorized medical treatment to claimant's left shoulder and low back.

2. Claimant was initially evaluated following her work injury by Mr. Zimmerman, a physician's assistant with Grand River Health and Safety, on February 27, 2015. Claimant noted she slipped on some ice and fell and complained of pain in her low back and left shoulder. Mr. Zimmerman diagnosed claimant with a low back strain and left shoulder pain and recommended conservative treatment including ice and ibuprofen.

3. Claimant returned to Mr. Zimmerman on March 9, 2015 and continued to complain of pain in her low back. Mr. Zimmerman recommended claimant undergo a course of physical therapy and referred claimant for an x-ray of the lumbar spine.

4. Claimant reported to her physical therapist on March 19, 2015 that her leg kept going to sleep and giving out on her. Claimant reported that her symptoms were originally in her back, but that about a week after her injury, her knee began bothering her more.

5. On March 31, 2015, claimant reported that the physical therapy resolved and was no longer a problem, but noted she was now experiencing pain in the medial aspect of her left knee. The medical records noted some concern for a possible meniscus tear and claimant was referred for a magnetic resonance image ("MRI") of her left knee.

6. Respondent filed a General Admission of Liability on April 6, 2015 admitting for a closed period of temporary partial disability ("TPD") benefits.

7. The MRI was performed on April 10, 2015 and showed a non-displaced subchondral fracture involving the medial tibial plateau and a complex tear involving the medial meniscus posterior horn with both vertical and horizontal components.

8. Claimant was examined by Dr. Kopich on April 21, 2015 with regard to her left knee. Dr. Kopich diagnosed claimant with an acute medial meniscus tear. Dr. Kopich noted that claimant had failed conservative treatment and claimant wished to have an arthroscopy like she had on her other knee. Claimant underwent surgery under the auspices of Dr. Kopich on April 27, 2015. Dr. Kopich performed a diagnostic arthroscopy and partial medial menisectomy.

9. Dr. O'Brien performed a medical records review independent medical evaluation ("IME") on July 13, 2015. Dr. O'Brien noted in his report that as a result of claimant's slip and fall, she sustained injuries that were limited to a minor lumbosacral strain/sprain and a minor left shoulder strain/sprain. Dr. O'Brien noted that claimant's MRI showed a meniscal tear but opined that there was no evidence of an acute tear. Dr. O'Brien noted that claimant's medical records did not document claimant reporting knee pain in her initial evaluations. Dr. O'Brien opined that if claimant had sustained a knee injury on February 27, 2015, claimant would have been able to detect pain at that site. Dr. O'Brien reviewed Dr. Kopich's operative report and opined that the report documented the degenerative nature of claimant's medical meniscus tear and the presence of grade IV chondromalacia of the medial femoral condyle. Dr. O'Brien ultimately opined that claimant's knee condition was not causally related to the work incident of February 27, 2015.

10. No testimony was presented at hearing in this matter.

11. The ALJ finds the report of Dr. O'Brien to be credible and persuasive and finds that claimant has failed to establish by a preponderance of the evidence that her knee condition is causally related to her admitted February 27, 2015 work injury.

## CONCLUSIONS OF LAW

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

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to prove by a preponderance of the evidence that her medical treatment to her left knee are causally related to her admitted February 27, 2015 work injury.

## ORDER

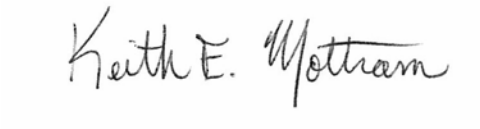
It is therefore ordered that:

1. Claimant has failed to establish that the medical treatment to her left knee is reasonable, necessary or related to her admitted February 27, 2015 work injury.

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

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

DATED: November 23, 2015



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

## ISSUES

1. Whether Respondent has proven by a preponderance of the evidence that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries on March 21, 2015 during the course and scope of his employment with Employer.

## PROCEDURAL MATTER

During Claimant's case-in-chief, he did not present any evidence as to whether Employer carried Workers' Compensation insurance on March 21, 2015. The Administrative Law Judge thus granted Respondent's motion for directed verdict and dismissed Claimant's request for a 50% increase in penalties pursuant to §8-43-408(1), C.R.S. for Employer's failure to carry Workers' Compensation insurance on March 21, 2015.

## FINDINGS OF FACT

1. Employer is a small night club that has provided alcoholic beverages to its clientele for over 20 years. Joe King and Terrie Baker own the business. Employer retains disc jockeys (DJs) to provide music to patrons on Friday, Saturday and Sunday nights. In approximately 1990 Claimant began providing DJ services for Employer on Friday nights and continued to perform as a DJ through March 21, 2015. Employer did not provide any training to Claimant.

2. Claimant also worked full-time as a baggage handler for Frontier Airlines. His job involved fueling airplanes, uploading and downloading aircraft and taxi duties. Claimant worked 32 hours each week and earned $10.00 per hour.

3. In addition to working his full-time job as a baggage handler and performing as a DJ for Employer, Claimant also provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant's e-mail address is BKExpress@hotmail.com. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals and was "operating a business as a DJ under the name DJ Express." Mr. King testified that he informed several individuals of Claimant's DJ services and Claimant accepted the work. Claimant also testified that he would mix music CDs and give them to individuals after writing "BK Expressions" on the CDs.

4. For approximately the past 10 years Claimant has performed DJ services for Employer on Friday nights. DJ Chazz provided DJ services for Employer on Saturday nights and a third DJ worked on Sunday nights. Each DJ was required to bring his own music to Employer to play for the customers because Employer had no music of its own.

5. Employer initially kept a "mixer" behind the DJ booth for use by the DJs to play their music. However, approximately seven years ago the mixer broke or became obsolete and was not replaced. Instead, Employer informed the DJs that they would have to utilize their own equipment to perform their DJ services. Claimant testified that BK Express and DJ Chazz jointly purchased a mixer that they "donated" to Employer for use by the DJs. The DJs kept the mixer behind the DJ stand for use on Friday or Saturday nights. However, if a DJ had an independent "gig" on a different night, the DJ would take the mixer from Employer and use it on the DJ's independent gig. Although the mixer may have resided at Employer for use by the DJs while performing their services for Employer, it remained the property of BK Express and DJ Chazz. However, approximately four years ago the donated mixer broke, and Claimant provided his own mixer whenever he worked for Employer. Claimant and all other DJs also were required to purchase their own music to play because Employer did not have any music.

6. Claimant was responsible for deciding what music to purchase for use in his DJ business, and for determining the "mix" of that music in order to entertain Employer's customers. Employer did not oversee the actual DJ services or instruct Claimant as to how to perform his DJ services. Each DJ was responsible for making his own independent decision as to appropriate music. Employer did not control the music selection other than to make sure customers were happy and not complaining. Claimant also acknowledged that Employer did not prohibit him from drinking alcohol while performing his DJ services. In contrast, Employer's bartenders, serving staff and all other workers were prohibited from drinking alcohol during working hours.

7. Claimant received a fixed contract rate of $135.00 each night he performed DJ services for Employer. Mr. King testified that he paid all DJs in cash on Mondays. Claimant's DJ performance lasted from 9:00 p.m. until closing time or approximately 2:00 a.m. Employer did not require Claimant to arrive at a specific time to set up his equipment. Whether Claimant arrived at 8:15 p.m. or 8:45 p.m. and left at 2:30 a.m. or 3:00 a.m. he received $135.00 for his services.

8. Employer did not require Claimant to perform DJ services on Friday nights. Instead, Claimant was free to accept other DJ "gigs" on a Friday night if the other gig paid more money than Employer. On those occasions when Claimant performed DJ services elsewhere, both Employer and Claimant would attempt to find another DJ. On a few occasions Claimant sent a DJ previously unknown to Employer to perform DJ services.

9. From 1989 through approximately 2008 Employer hired a janitor to clean and stock the bar each morning before opening. Sometime in approximately 2008 Employer could no longer afford the janitor. When Mr. King announced to the workers

that he could not afford the janitor, the workers decided that they could split the duties amongst themselves at the end of each night. Over time the DJs began mopping the dance floor, the bar area and the bathrooms at the end of the night. Mr. King and Ms. Baker both testified that mopping was a voluntary activity that DJs were not required to perform. In fact, Mr. King and Ms. Baker remarked that Claimant did not mop at the end of every shift because he sometimes left immediately after the end of his DJ performance.

10. On August 29, 2011 or approximately three years after Claimant began the additional tasks of mopping at the end of his DJ performance, Claimant signed a document stating that he was a contract laborer for Employer. The document specified that Claimant would be responsible for all Federal, State and unemployment taxes. The document reflects the intent of the parties to memorialize Claimant's status as an independent contractor even after he voluntarily assumed the additional tasks of mopping at the end of his DJ performance.

11. On March 21, 2015 Claimant was completing his DJ duties and announced that the lounge was closing. He directed three patrons that were in front of his DJ booth to proceed to the main bar area with all bottles and glasses because it was closing time. As Claimant was putting away his DJ equipment he noticed one of the patrons coming across the dance floor stating something that he could not understand. Claimant came out from behind the DJ booth to determine what the patron wanted. The patron took a swing at Claimant and an altercation ensued.

12. As a result of the altercation Claimant suffered a fractured left ankle. He received emergency treatment at the University of Colorado Hospital. Claimant ultimately underwent left ankle surgery to repair his fracture.

13. Ms. Baker testified that she was present at the lounge on the night of the altercation between Claimant and the unidentified assailant. Ms. Baker testified that after Claimant and the customer were separated, the patron shouted that Claimant owed him money and quickly left the lounge. Immediately afterwards, Ms. Baker went to Claimant to assist him and Claimant stated "Wow, I owe him money." Ms. Baker explained that neither Claimant nor any other individuals made any additional statements regarding the fight.

14. Respondent has proven that it is more probably true than not that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Respondent has demonstrated that Claimant was free from direction and control in the services he performed, both under the contract for performance of service and in fact. Based on the evidence presented at hearing, Claimant was not required to work exclusively for Employer. In addition to working his full-time job as a baggage handler and performing as a DJ for Employer, Claimant also provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals. Furthermore, on August 29, 2011 Claimant signed

a document stating that he was a contract laborer for Employer. The document specified that Claimant would be responsible for all Federal, State and unemployment taxes. The document reflects the intent of the parties to memorialize Claimant's status as an independent contractor.

15. Employer did not establish a quality standard for Claimant's DJ performances. Claimant was responsible for deciding music to purchase, use and "mix" in order to entertain Employer's customers. Employer did not oversee the actual DJ services or instruct Claimant as to how to perform his DJ services. Third, Employer did not pay Claimant a salary or hourly rate but instead paid Claimant $135.00 in cash for each DJ performances. Employer also did not provide training to Claimant about DJ services. Claimant had significant DJ experience and did not require supervision of his DJ services. Moreover, Employer did not provide tools or benefits to Claimant. Claimant has provided his own mixer for approximately four years whenever he works for Employer. Claimant and all other DJs also were required to purchase their own music to play because Employer did not have any music. Employer did not provide tools or benefits to facilitate Claimant's DJ performance. Finally, Employer did not combine its business operations with BK Expressions or Claimant.

16. Respondent has demonstrated that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Claimant provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant's e-mail address is BKExpress@hotmail.com. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals and was "operating a business as a DJ under the name DJ Express." Mr. King testified that he informed several individuals of Claimant's DJ services and Claimant accepted the work. Claimant also testified that he would mix music CDs and give them to individuals after writing "BK Expressions" on the CDs. Thus, Claimant was customarily engaged in the independent trade of a DJ and received payment for DJ services from multiple individuals and business in addition to the fixed contract rate he received from Employer.

17. Claimant's additional task of mopping at the end of a DJ performance did not change the fundamental nature of the services he performed for Employer. Claimant spent a fraction of his time performing janitorial duties and the vast majority of his time performing DJ services for Employer. Claimant was engaged in an independent business and was not wholly dependent on Employer for his income. The nature of the working relationship between Claimant and Employer reflects that Claimant was customarily engaged in the independent trade of a DJ while working 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. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." The second prong of §8-40-202(2)(a), C.R.S. as to whether an claimant should be deemed an employee is whether the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011). Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAP, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of

whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

5. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAP, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAP, Jan. 25, 2011).

6. As found, Respondent has proven that it is more probably true than not that Claimant was an "independent contractor" pursuant to §8-40-202(2) C.R.S. Initially, Respondent has demonstrated that Claimant was free from direction and control in the services he performed, both under the contract for performance of service and in fact. Based on the evidence presented at hearing, Claimant was not required to work exclusively for Employer. In addition to working his full-time job as a baggage handler and performing as a DJ for Employer, Claimant also provided DJ services for pay to other individuals and businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals. Furthermore, on August 29, 2011 Claimant signed a document stating that he was a contract laborer for Employer. The document specified that Claimant would be responsible for all Federal, State and unemployment taxes. The document reflects the intent of the parties to memorialize Claimant's status as an independent contractor.

7. As found, Employer did not establish a quality standard for Claimant's DJ performances. Claimant was responsible for deciding music to purchase, use and "mix" in order to entertain Employer's customers. Employer did not oversee the actual DJ services or instruct Claimant as to how to perform his DJ services. Third, Employer did not pay Claimant a salary or hourly rate but instead paid Claimant $135.00 in cash for each DJ performances. Employer also did not provide training to Claimant about DJ services. Claimant had significant DJ experience and did not require supervision of his DJ services. Moreover, Employer did not provide tools or benefits to Claimant. Claimant has provided his own mixer for approximately four years whenever he works for Employer. Claimant and all other DJs also were required to purchase their own music to play because Employer did not have any music. Employer did not provide tools or benefits to facilitate Claimant's DJ performance. Finally, Employer did not combine its business operations with BK Expressions or Claimant.

8. As found, Respondent has demonstrated that Claimant was customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Claimant provided DJ services for pay to other individuals and

businesses. He printed a business card with the business name BK Expressions and provided it to potential customers to advertise and market his DJ services. Claimant's e-mail address is BKExpress@hotmail.com. Claimant acknowledged that he accepted and received pay for DJ performances from other individuals and was "operating a business as a DJ under the name DJ Express." Mr. King testified that he informed several individuals of Claimant's DJ services and Claimant accepted the work. Claimant also testified that he would mix music CDs and give them to individuals after writing "BK Expressions" on the CDs. Thus, Claimant was customarily engaged in the independent trade of a DJ and received payment for DJ services from multiple individuals and business in addition to the fixed contract rate he received from Employer.

9. As found, Claimant's additional task of mopping at the end of a DJ performance did not change the fundamental nature of the services he performed for Employer. Claimant spent a fraction of his time performing janitorial duties and the vast majority of his time performing DJ services for Employer. Claimant was engaged in an independent business and was not wholly dependent on Employer for his income. The nature of the working relationship between Claimant and Employer reflects that Claimant was customarily engaged in the independent trade of a DJ while working for Employer. *See Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2015) ( whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer).

## ORDER

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

1. Claimant worked for Employer as an independent contractor. His request for Workers' Compensation benefits is thus denied and dismissed.

2. 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: November 12, 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

I. Whether Claimant was terminated for cause on May 15, 2015, and if so;

II. Whether Claimant's Temporary Total Disability Benefits should be terminated.

## FINDINGS OF FACT

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

1. Claimant was injured on April 6, 2015 during the course and scope of her employment while performing duties arising out of her employment. Claimant slipped and fell on ice in the break-room. She timely reported the injury to her supervisor. Respondents filed a General Admission of Liability (GAL) on April 17, 2015. The GAL admitted for TTD beginning April 7, 2015 at a rate of $329.51 per week based on an Average Weekly Wage (AWW) of $494.24.

2. Claimant sought treatment for her injuries on April 7, 2015 at CCOM. She was diagnosed with a sprain of the lumbar spine, sprains to the MCL of both knees, and a strain of the left rotator cuff. Dr. Johnson provided that Claimant was to remain off work at least until her next appointment on April 9. The next appointment actually occurred on April 13, 2015 with Joseph Mullen, PA-C. Claimant was to continue to remain off of work until April 19, with a reassessment on April 20.

3. Mr. Mullen reexamined Claimant on April 23, 2015. Mr. Mullen released Claimant to work with modified restrictions of requiring a change of position from sitting to standing 30 minutes per hour, no lifting more than 10 pounds, and no working more than 8 hours per day as Claimant's typical shifts were 10 hours. Claimant's restrictions as of April 27, 2015 were the same as April 23, aside from Mr. Mullen no longer mentioning the 8 hour restriction.

4. The claims adjuster for Travelers sent a letter to Dr. Johnson on April 27, 2015. The letter inquired as to whether Dr. Johnson thought Claimant would be able to perform a modified job.

5. A letter dated April 27, 2015 was sent to Claimant, stating that she was to return to work on May 1. There is no certificate of mailing indicating the date the letter was sent. The modified job offer did not include a statement from Claimant's physician that this job offer was within her restrictions.

6. Claimant testified at hearing that the first time her employer attempted to contact

her about returning to work was the letter dated April 27, 2015. Claimant is not sure exactly what date she received the letter, but she does remember it was “really close” between the time she received the letter and the date she was told to return to work.

7. Claimant contacted her direct supervisor, Alicia Beer, after receiving the letter. She testified that the first conversation she had with Ms. Beer was mostly about Ms. Beer not knowing exactly what Claimant was supposed to do in regard to returning to work because Ms. Beer had been out of the office recently.

8. Claimant testified that she was also contacted by Sharia King the same day. She explained that Ms. King told her that they were still working out the details of her return to work and that the sit/stand desk was not currently available. She does not recall Ms. King telling her when she needed to return to work. She does not recall receiving any other calls from her employer.

9. The next contact Claimant had with her employer was when she received a letter from her employer dated May 11, 2015.

10. The letter from Respondents dated May 11, 2015 stated that Claimant had until Noon on May 13, 2015 to respond to the letter or she would be terminated. The letter was not delivered to Claimant until 9:58am on May 13, 2015, a mere two hours before she was required to respond before losing her job.

11. Michael Chandler testified on behalf of Respondents in his capacity as a Human Resource Consultant for Respondent-Employer. He testified that it was his intention to terminate Claimant if she had not responded to the May 11 letter by 12:01pm on May 13. Mr. Chandler testified that he had personally only attempted to contact Claimant twice during the entire relevant time period: one voicemail and one email on May 8, 2015.

12. Mr. Chandler testified at hearing that it was his understanding that Claimant’s return to work date had been extended from May 1 to May 8. Mr. Chandler testified that “[Claimant] received a letter from Sharia King, and also, Sharia King called out to her and informed her of her return-to-work date.”

13. Mr. Chandler typed out a timeline of his recollection of events. Mr. Chandler acknowledged at hearing that he does not personally know if a letter was ever sent, and documentation of the sending of the letter is not noted in his recollection of events. This alleged letter is not in the record.

14. Ms. Alicia Beer testified on behalf of Respondents in her capacity as the Call Center Supervisor for Respondent-Employer. She testified that Claimant had been an employee for approximately 11 months. She testified that she did not contact Claimant until the day before she was set to return to work.

15. Ms. Beer testified that she did not contact Claimant again prior to her alleged

new return to work date of May 8. Ms. Beer testified that Claimant contacted her at 10am after Claimant received the May 11 letter just minutes before. Ms. Beer inquired as to why Claimant had not returned to work on May 8, and Claimant explained that she was confused because she had been told by somebody else that the adjustable sit/stand desk was no longer available.

16. Ms. Beer testified that she told Claimant she could return to work. Ms. Beer acknowledged that she never sent any written modified job offer to Claimant. She never personally attempted to contact Claimant between May 1 and May 10. She has no independent knowledge if anybody else left Claimant any voicemails during this time. Ms. Beer did not put anything in writing about Claimant allegedly being required to return to work on May 15. Ms. Beer did not inform Claimant that she would be subject to termination if she did not return to work on May 15th.

17. Claimant was terminated May 15, 2015. The only person that allegedly made multiple attempts to contact Claimant before terminating her was Ms. Sharia King. Ms. King did not testify at hearing.

## CONCLUSIONS OF LAW

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

A. Because Claimant's injury in this case was after July 1, 1999, §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply to assertions that Claimant is responsible for her wage loss. Those identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if claimant is responsible for her termination from employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004) Respondents shoulder the burden of proving, by a preponderance of the evidence, that claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office, 20 P.3d 1209 (Colo. App. 2000).*

B. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). Thus, the fault determination depends upon whether

claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, Respondents assert that Claimant was terminated for cause on May 15, 2015 due to violation of Employer's attendance policies and that Claimant "quit" her job in any event.

C. Claimant argues that Respondents terminated her based upon internal attendance policies and in so doing ignored the sections of the Workers' Compensation Act and Rules of Procedure addressing the requirements to follow when temporary disability benefits may be terminated when a claimant is capable of returning to work in a modified capacity. Simply put, Claimant asserts that Respondents elevated their internal attendance policies above the Act and Rules of Procedure when they terminated Claimant for a failure to follow attendance policies. Based upon the evidence presented, the ALJ agrees. Here, the evidence supports a finding that Claimant was on a leave of absence while Respondents attempted to accommodate her restrictions. While the evidence presented demonstrates that Claimant was aware of her employer's attendance policies and had used them to facilitate her leave of absence, the evidence also persuades the ALJ that substantial confusion surrounded Claimant's return to work date, because of ineffective communication and the failure of Employer to provide her with adequate notice of a specific modified job duty offer consistent with the Act and Rules of Procedure. The ALJ finds that use of internal attendance policies as a pre-text to a termination for cause argument is ineffective when the Act and the Rules of Procedure have not been followed. Even if Claimant violated Employers' attendance policies, the evidence in this case persuades the ALJ that Claimant had no duty under the Act to return to work as she had been restricted to modified duty work and was not provided with a modified duty offer consistent with the Act and Rules of Procedure. Here, the evidence supports a conclusion that Claimant did not know what her modified job duties would be and when and where she was to start them. The ALJ rejects Respondents' contention that Claimant committed a volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. Based upon the totality of the evidence presented, the ALJ concludes that Claimant is not responsible for the loss of her employment.

## ORDER

It is therefore ordered that:

1. Respondents shall pay ongoing temporary total disability benefits from April 6, 2015 and ongoing until terminated according to 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: November 27, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

## ISSUES

- Whether respondents have proven by a preponderance of the evidence that claimant willfully violated a safety rule in violation of Section 8-42-112(1)(b)?

- The parties stipulated prior to the hearing that claimant's average weekly wage ("AWW") is $1,162.28 based on $985.28 in wages and $177.00 per week in COBRA contributions.

## FINDINGS OF FACT

1. Claimant was employed with employer as a locate technician. Claimant's job duties required him to travel in a company vehicle to various job sites and locate utility lines.

2. Claimant testified that he was in a motor vehicle accident in the company vehicle on December 17, 2013 and was ticketed for careless driving. This motor vehicle accident did not result in injuries that are subject to the present claim.

3. Claimant testified he went to work on April 10, 2015 at the 5th Street hub (also referred to in testimony as "the shed"), which is a storage area owned by employer. Claimant testified he went to the 5th Street hub to log onto his computer to check his work ticket and called Mr. Seriaini to arrange to meet Mr. Seriaini at the job site. Claimant testified he spoke to Mr. Seriaini and made arrangements to meet him at the job site at approximately 8:30 a.m. or 9:00 a.m. Claimant testified he had originally planned on being at the job site at 8:00 a.m. According to the phone records, the phone call was made at 7:32 a.m. and lasted for 8 minutes. Claimant testified he went to the 5th Street hub in order to log into his computer and clock in for work.

4. While speaking with Mr. Seriaini, Claimant drove to his son's elementary school to drop off money for his son. Claimant testified he arrived at the school, dropped off the money for his son, then sent pictures from his personal phone to his son via text message. According to the records entered into evidence, the pictures were sent at 7:59 a.m.

5. Claimant testified he then began driving from his son's school to the job site to meet Mr. Seriani. Claimant testified as he drove down the road, he noticed a car approaching from the north (traveling south) over the railroad tracks and was concerned that the car was not going to stop at the stop sign. Claimant testified he checked his rear view mirror to determine if the sun was in the eyes of the driver crossing the railroad tracks. Claimant ended up rear ending the vehicle in front of him without breaking.

6. The accident occurred, according the records entered into evidence, at approximately 8:03 a.m. This is documented by the GPS records associated with the company vehicle which demonstrates that the vehicle was in motion at 8:02:56 and was not in motion at 8:03:57. According to claimant's cell phone records, he received a return text from his son at 8:03 a.m.

7. Claimant was issued a ticket as a result of the motor vehicle accident for careless driving. Claimant was not issued a ticket for texting and driving.

8. Claimant testified that it is against company policy to use the company vehicle for personal use. Claimant testified it is against company policy to use a phone while driving a company vehicle. Claimant testified he was ultimately fired by employer, but denied being told why he was fired.

9. Mr. Galvasini, claimant's supervisor, testified at hearing that claimant was terminated for using the company vehicle for personal reasons. Mr. Galvasini testified claimant argued with him when Mr. Galvasini told claimant he was terminated stating that Mr. Galvasini should have gone to bat for claimant with employer. Mr. Galvasini further testified that it is against company policy to use a personal phone or the company phone while the company vehicle is in motion. Mr. Galvasini testified that if an employee receives a phone call while operating a company vehicle, they are instructed to pull over in a safe spot to take the phone call. The ALJ finds the testimony of Mr. Galvasini to be credible.

10. Claimant testified at hearing that he was not looking at his phone when he rear ended the car in front of him. Respondents theory of the case is that claimant violated a safety rule by texting and driving resulting in the motor vehicle accident.

11. While the evidence demonstrates that claimant could have been texting and driving, the ALJ cannot state that the evidence establishes that claimant was texting at the time of the accident. A text came in to claimant's phone at the same time as the accident. However, no testimony establishes that claimant was looking at his phone at the time of the accident and the circumstantial evidence in this case does not establish that it is more probable than not that claimant was texting and driving at the time of the accident.

12. Notably, claimant was not cited for texting and driving by the police following the accident. Additionally, claimant's testimony at hearing regarding his actions immediately prior to the accident are consistent with his statements to the police and his employer immediately following the accident.

13. Because the evidence does not establish that it is more likely than not that claimant was texting and driving at the time of the motor vehicle accident, respondents request to reduce claimant's indemnity benefits for a violation of a safety rule is denied.

## CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 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, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents argue that claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker's "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial*

*Commission v. Golden Cycle Corp.,* 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. Before getting to the consideration of whether the claimant's conduct in this case was "willful", respondents must first establish that claimant violated a safety rule. In this case, circumstantial evidence was presented that claimant was texting and driving at the time of the motor vehicle accident. However, the evidence does not establish that it is more probable than not that claimant was texting and driving. Therefore, respondents request to reduce claimant's indemnity benefits based on a violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S. is denied.

**ORDER**

It is therefore ordered that:

1. Respondents request to reduce claimant's indemnity benefits based on a violation of a safety rule pursuant to Section 8-42-112(1)(b), C.R.S. is denied.

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

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

DATED: November 30, 2015

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-981-344-01

**FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer, Respondents.

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Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 13, 2015, in Denver, Colorado. The hearing was digitally recorded (reference: 10/13/15, Courtroom 4, beginning at 8:30 AM, and ending at 11:30 AM).

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

At the conclusion of the hearing, the ALJ directed counsel for Claimant and counsel for Respondents to file briefs addressing the following question: What happens when an insurance carrier files an admission based on an authorized treating physician's (ATP's) evaluations but then later seeks to withdraw the admission after an independent medical examiner (IME) indicates that the Claimant did not sustain a compensable injury. On October 21, 2015, the Respondents and the Claimant filed briefs. After considering the briefs, the ALJ hereby issues the following decision.

## ISSUES

The hearing was initiated by the Respondents' Application for Hearing, designating the issue of "withdrawal of admission." The issues to be determined by this decision concern whether the Respondents have proven that the Claimant did **not**

sustain a compensable occupational injury and as such may withdrawal the General Admission of Liability (GAL), dated June 11, 2015.

The Respondent bears the burden of proof, by a preponderance of the evidence, to prove that the Claimant did **not** sustain a compensable injury in order to withdraw the GAL.

## FINDINGS OF FACT

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

1. The Claimant was a production worker, working on windows and doors and was exposed to heavy lifting over a period of time. In November 2014, the Claimant noticed tingling and numbness in his left hand and reported this injury/occupational disease to his supervisor on November 17, 2014.

2. The Claimant visited the University of Colorado Hospital (UCHSC) Emergency Room (ER) on November 29, 2014 and was treated by Barbara K. Blok, M.D. Dr. Blok found that the Claimant suffered from a lesion of the ulnar nerve and diagnosed ulnar neuropathy causing symptoms due to overuse of arm. Dr. Blok suggested that the Claimant seek further treatment and only perform light duty work until follow up with an authorized treating physician (ATP) [Claimant's Exhibit 10].

3. The Claimant started treatment at OccMed Colorado on December 1, 2014 with Greg Smith, D.O. At OccMed Colorado, the Claimant was examined on numerous occasions by Dr. Smith and Jonathan Bloch, D.O., the primary care physician and authorized treating physician (ATP), from December 2014 through July 2015. Both Dr. Smith and Dr. Bloch consistently reported ulnar neuropathy of the Claimant's left elbow and created a treatment plan that involved massage therapy, steroid injections, and acupuncture. (Claimant's Exhibit 5). The Claimant was referred to Brian Fuller, M.D. for an EMG analysis and steroid injections. In the January 5, 2015 EMG analysis, Dr. Fuller concluded the results were abnormal. (Respondents' Exhibit A, Bates No. 0002).

4. Because the Claimant's lengthy course of treatment rendered pain complaints essentially unchanged, the Claimant was referred to In Sok Yi, M.D. Dr. Yi examined the Claimant on June 6, 2015 and he found that the EMG verified mild ulnar nerve compression and the physical exam demonstrated instability of the ulnar nerve. On this date, Dr. Yi suggested surgery and scheduled the surgery (Claimant's Exhibit 5).

5. The Claimant revisited Dr. Bloch on June 25, 2015 and July 9, 2015. During this time, the Respondents had not approved the ulnar release surgery. Dr. Bloch emphasized that he did not think causation was an issue because it was consistent with working two years in repetitive duties involving awkward arm motions

as well as forceful use of the arm. Further, he supported the surgery based on the mechanism of injury of chronic repetitive overuse of tools and motions required to do window repair (Claimant's Exhibit 5). The ALJ finds that the ATP, Dr. Bloch, has rendered an opinion that the Claimant's ulnar nerve compression is causally related to his work duties with the Employer over a period of time and the need for the surgery is causally related to work. Indeed, there is no persuasive evidence of any plausible alternative explanation for the cause of the Claimant's ulnar condition.

6. The Respondents' filed a GAL on June 11, 2015 for medical benefits and temporary total disability (TTD) benefits from May 27, 2015 and "ongoing". (Claimant's Exhibit 13).

7. Dr. Yi performed a left cubital tunnel release with anterior subcutaneous transposition surgery on July 22, 2015 (Respondents' Exhibit B, Bates No. 0010).

**Job Demands Analysis ("JDA")**

8. At the request of the Respondents, Joseph B. Blythe, MA, CRC (Certified Rehabilitation Counselor), performed the JDA on June 23, 2015 and it lasted a total of four hours. Because the Claimant was on work restrictions, another employee performed the duties while Blythe observed. Notably, the time-sheet evaluation indicated that the Claimant worked more than 10 hours a day, 79% of the time, and on average took a 30 minute lunch break. The JDA evaluated the amount of "Force Time" the Claimant spends in his job position, finding an average of 10.5 minutes of "Force Time" per one hour. The JDA also evaluated the amount of "Left Elbow Flexion Time," finding an average of 4.2 minutes per one hour, totaling between 39.9 and 48.3 minutes per an average day of work, meaning 10+ hours (Respondents' Exhibit I).

9. The JDA job description includes lifting, transferring, carrying, pulling, pushing, standing, walking, bending, reaching, and handling windows frequently or occasionally (Respondents' Exhibit I, Bates Nos. 0073-0075).

10. Blythe's JDA was utilized by the Respondents' IME in formulating his opinion.

**Independent Medical Examination (IME) by Jonathan L. Sollender, M.D.**

11. The Respondents referred the Claimant to Dr. Sollender for an IME on August 3, 2015. Dr. Sollender was of the opinion that the ATP and other treating physicians were inaccurate in the diagnosis because there had been no causation analysis as the Division of Workers' Compensation Medical Treatment Guidelines (MTG) allegedly required (Respondents' Exhibit A, Bates No. 0003). The ALJ specifically notes that the MTG are not rules of requirement but rather **guidelines** to be considered by treating physicians. Dr. Sollender also included a Distress Risk and Assessment Method evaluation ("DRAM") raising concerns regarding the

Claimant's psychological health or "mental well being" (Respondent's Exhibit A, Bates No. 0006). Essentially, Dr. Sollender is a plastic surgeon and not a psychiatrist. None of the other physicians who have treated the Claimant raised similar concerns. The ALJ finds Dr. Sollender's opinion in this regard not persuasive and lacking in credibility.

12. Dr. Sollender's examination took place over 51 minutes in which he was unable to physically examine the Claimant's left arm due to the fact that it was still dressed in post-surgery dressings and splinted. Dr. Sollender examined the Claimant's right arm (Respondents' Exhibit A, Bates No. 0004-0005).

13. In his testimony, Dr. Sollender stated that the work the Claimant performed could not be repetitive enough, awkward enough, or forced enough to rise to the level of a cumulative trauma condition, contradicting almost every other treating physician, and most notably, ATP. Dr. Sollender's explanation of what was **not** enough was somewhat nebulous and presumably based on Joseph Blythe's JDA. The ALJ finds Dr. Sollender's explanation in this regard lacking in credibility and unpersuasive.

14. Dr. Sollender offered no persuasive, plausible alternative cause of the Claimant's ulnar condition to which the Claimant may have been equally exposed outside of work.

**Ultimate Findings**

15. The ALJ finds the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller, and Dr. Yi more credible than the opinions of Dr. Sollender because their opinions are based on a lengthier course of treatment, especially Dr. Bloch as an ATP. Dr. Sollender only saw the Claimant one time for a 51-minute IME. For the reasons stated herein above, the ALJ finds Dr. Sollender's IME opinion lacking in credibility.

16. Between conflicting medical opinions, the ALJ makes a rational choice to accept the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller and Dr. Yi for the reasons stated herein above, and to reject the opinions of Dr. Sollender's.

17. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant did **not** suffer a compensable injury or occupational disease resulting from his work in window production. Indeed, the Respondents failed to prove that the Claimant's ulnar condition was **not** caused by his factors of his work and not by factors to which he was equally exposed outside of work. The Respondents have failed to prove that the Claimant's condition **cannot** be fairly traced to the conditions of his employment as a proximate cause not from a hazard to which the Claimant would have been equally exposed outside his employment, with a pinpointed onset of November 17, 2014.

## CONCLUSIONS OF LAW

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

### Credibility

a. In deciding whether a party 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." *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); s*ee Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684, 687 (Colo. App. 2008); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1076 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000). The weight and credibility of evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 338 P. 2d 284, 285 (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* C.R.S. § 8-43-210; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501, 506 (Colo. App. 1995). As found, the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller, and Dr. Yi are more credible than Dr. Sollender's opinions because of their lengthier treating relationships and knowledge of the Claimant's condition.

### 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, 431 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254, 1256 (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, 414 (Colo. App. 1995). 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, 1234 (Colo. App. 2001). As found, between conflicting medical opinions, the ALJ made a rational choice to accept the opinions of Dr. Bloch, Dr. Smith, Dr. Fuller and Dr. Yi, and to reject the opinions of Dr. Sollender's.

### Withdrawal of Admission Standard

c. An employer is required to continue paying pursuant to an admission of liability and may not unilaterally withhold payment until a hearing is held to determine if there is sufficient evidence to permit withdrawal of the admission. *Rocky Mountain Cardiology v. Indus. Claims Appeals Office*, 94 P.3d 1182, 1185 (Colo. App. 2004)

(citing *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001)). "Hearings may be set to determine any matter, but, if any liability is admitted, payments shall continue according to admitted liability." § 8-43-203(2) (d), C.R.S.

d. Section 8-43-203(2) (d), C.R.S., does not require a showing of "fraud, mistake, or excusable neglect," in order to withdraw a general admission of liability. *See In the Matter of the Claim of Sherry Faulkner v. Alexander Dawson School*, W.C. No. 4-294-162 1999 WL 398050 *1, at *2-3 [Indus. Claim Appeals Office (ICAO), May 21, 1999]. A respondent, who has all the facts pertinent to a claimant's claim, cannot withdraw a general admission of liability. *Indus. Comm'n v. Johnson Pontiac*, *Inc.*, 344 P.2d 186, 187-88 (Colo. 1959); *Continental Casualty Co. v. Indus. Comm'n*, 367 P.2d 355, 358 (Colo. 1961). Giving the benefit of the doubt to the Respondents, they arguably did not have all the facts, *i.e.,* the benefit of Dr. Sollender's after-the-fact IME which, ultimately was rejected by the ALJ. If accepted, the Respondents could have withdrawn the GAL.

e. The Claimant argues that this case falls within the purview of § 8-43-303, C.R.S (Claimant's Brief, p.1). A case is only eligible for reopening, however, pursuant to that section if it has been closed by a final admission, or otherwise dispositively settled. *See In the Matter of Sherry Faulkner*, 1999 WL 398050 at *3 citing *Cibola Construction v. Indus. Claim Appeals Office*, 971 p.2d 666 (Colo. App. 1990). A general admission of liability cannot be subject to reopening because it is not dispositive. *Id.* As found, the GAL herein could be subject to withdrawal if the Respondents could prove, by a preponderance of the evidence that the Claimant did **not** suffer a compensable injury, a burden that the Respondents failed to sustain.

**<u>Occupational Disease</u>**

f. An "occupational disease" means 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. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). the Respondents failed to prove that the Claimant's ulnar condition was **not** caused by his factors of his work and not by factors to which he was equally exposed outside of work. The Respondents have failed to prove that the Claimant's condition **cannot** be fairly traced to the conditions of his employment as a proximate cause not from a hazard to which the Claimant would have been equally exposed outside his employment, with a pinpointed onset of November 17, 2014. *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.**

**Burden of Proof**

g. A party seeking to modify an issue within, or withdrawal, either a general or final admission, must prove by a preponderance of the evidence that the admitted award was inappropriate. *See City of Brighton v. Rodriguez*, 318 P.3d 496, 507-08 (Colo. 2014). 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,* 592 P.2d 792, 800 (1979); *People v. Hung Ma,* 104 P.3d 273, 275 (Colo. App. 2004). As found, the Respondents failed to demonstrate that it is more probable than not that the Claimant's injury was **not** compensable. Therefore, the Respondents have failed to prove by a preponderance of the evidence that withdrawal of admission is appropriate because they failed to prove that the Claimant did **not** sustain a compensable injury.

## ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents may not withdrawal the General Admission of Liability, dated June 11, 2015.

B. The Respondents shall continue paying the Claimant medical benefits and temporary total disability benefits of $466.04 per week from May 27, 2015 and 'ongoing," pursuant to the General Admission of Liability, dated June 11, 2015

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

DATED this_____day of November 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 November 2015, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

## STIPULATIONS

I. The parties stipulated that although the claim was fully contested, an injury did occur on January 29, 2015, and said injury arose out of and in the course and scope of Claimant's employment as a psych tech for the CMHIP. This stipulation is approved. Consequently, the ALJ finds and concludes that Claimant sustained a compensable injury to his low back on January 29, 2015 and this order does not address that issue further.

II. The parties also stipulated that in the event of a determination that Claimant's compensable low back injury caused a disability resulting in Claimant's inability to work; his average weekly wage is $1,274.49.

III. Finally the parties stipulated that if it is proven that Claimant's low back injury led to his lost time from work, the dates Claimant was off work due to his compensable injury were January 29, 2015, through January 31, 2015; April 21, 2015; and April 23, 2015, through June 22, 2015.

## REMAINING ISSUES

Given the above stipulations, the remaining issues for determination involve Claimant's entitlement to medical and temporary total disability benefits. The specific questions answered herein are:

A. Whether the Claimant's medical treatment after April 19, 2015, including the requested lumbar spine surgery is related to Claimant's January 29, 2015 industrial injury, and;

B. Whether Claimant's January 29, 2015 injury or an intervening event is the cause of Claimant's lost time from work.

## FINDINGS OF FACT

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

1. Claimant is employed as a psychiatric technician at the Colorado Mental Health Institute in Pueblo. His duties occasionally call on him to lead and/or assist in restraining agitated, combative patients.

2. On January 29, 2015, Claimant was involved in restraining a patient when he was head-butted in the face and head two to three times. Claimant suffered injuries on the right side of his head in the area between his eye and temple. The patient was then taken to the ground and restrained during which Claimant injured his low back.

3. Claimant reported the incident and was referred to Centura Centers for Occupational Medicine (CCOM) for medical treatment. Claimant was evaluated on January 29, 2015 by Dr. Brian McIntryre. Dr. McIntyre removed Claimant from work until February 2, 2015. Claimant was returned to modified work on February 2, 2015 following a follow-up evaluation with Physician Assistant Steven Byrne. PA Byrne imposed restrictions of no lifting, pushing or pulling over 20 pounds. PA Byrne restricted Claimant from "direct physical management of patients" and instructed Claimant to alternate between sitting, standing and walking. Claimant was also referred to physical therapy (PT) for strengthening for return to unrestricted duty.

4. Claimant continued to follow with CCOM for his January 29, 2015 injury. On February 12, 2015, Claimant returned to CCOM where he was seen by Dr. Murray. Dr. Murray documented Claimant's primary problem as intense aching low back pain. Claimant self reported a pain level of 4/10 describing his pain as "constant" and "aching". Claimant was returned to modified duty without change in his restrictions.

5. On February 26, 2015 Claimant was re-evaluated by PA Byrne. Claimant reported he was doing much better. Although he reported a pain level of 4/10, Claimant noted that he pain was non-radiating and located in the center of his buttocks on both sides. Claimant's PT was continued and he was released to full duty work.

6. During a follow-up appointment on March 12, 2015, Claimant reported pain located in his lower back at a 3/10 level. Claimant reported that he was doing much better. His pain was again reported to be in the center of his buttocks on both sides without radiation. Claimant's PT and massage therapy were continued and he was returned to full duty work.

7. On March 26, 2015, Claimant was evaluated by Dr. Merchant during which encounter, Claimant reported little improvement in his symptoms since his last visit. His pain had increased and returned to 4/10 in intensity and noted to be present 40 percent of the time. Dr. Merchant noted that Claimant had been discharged from physical therapy on March 5, 2015 with what the therapy discharge note was "inconsistent improvement in objective measurements". Dr. Merchant noted that Claimant's recovery had "stalled". Valium was added to Claimant's treatment plan to assist with his sleep and an MRI ordered to "rule out structural pathology". The stated reason for the MRI is documented as follows: "Persistent low back pain S/P patient takedown Nov 2014".

8. Claimant then went on vacation from April 10, 2015, through April 19, 2015. He spent five days of that vacation in Cancun, Mexico with his girlfriend. Claimant had requested the time off to go on vacation and purchased his tickets in January 2015, before his industrial injury. Claimant testified that he took a 24 × 15 inch wheeled

suitcase weighing approximately 10 pounds with him to Mexico. Claimant explained while he was in Mexico he relaxed on the beach, soaked in a hot tub, went out to eat and went on a dinner/drinks cruise. He denies any injury while in Cancun.

9. As noted above, prior to leaving on vacation, Claimant was working full duty for Respondent-Employer, although he testified that he had been transferred to a different, less combative unit.

10. Shortly after his return from vacation Claimant underwent the MRI which had been ordered by Dr. Merchant on March 26, 2015. The MRI was completed on April 21, 2015 and revealed a "broad based and slightly eccentric left-sided disk herniation" causing "central canal stenosis" at the L4-5 spinal level. The ALJ finds that Claimant likely was unable to complete the requested MRI before leaving for vacation, choosing instead to schedule it for shortly after his return.

11. On April 23, 2015, Claimant returned to the treating physician reporting increased pain at a 6/10 level present approximately 60 percent of the time. He was also reporting increasing difficulty with work secondary to pain. Claimant was provided with a prescription for Percocet, referred to Dr. James Sceats for a neurosurgical evaluation and given work restrictions. Claimant went off work as of April 23, 2015 and remained out of work until June 22, 2015.

12. Dr. Sceats evaluated Claimant on May 5, 2015. Dr. Sceats noted the predominantly left-sided disc herniation at L4-5 causing significant stenosis superimposed on pre-existing congenital spinal stenosis. He felt the Claimant would benefit from an L4-5 microdiskectomy on the left.

13. Wendy Stalkfleet, a claims adjuster for Broadspire, the third party administrator for Respondent-Employer, began adjusting this claim in April of 2015. As part of her investigation into the worsening of Claimant's condition in April of 2015, Ms. Stalkfleet contacted Claimant. She asked Claimant on April 24, 2015, about his vacation. He told her that he had put in for vacation in January. He told her he was down due to back pain and did nothing.

14. Claimant admitted that he had been called by Ms. Stalkfleet in April of 2015. He admitted that he told her that he had taken time off but that he was down due to back pain and did nothing. He did not tell the adjuster about the trip to Mexico.

15. Claimant testified that he was having significant problems at work prior to his vacation in April of 2015. Respondent challenges this assertion. In support of their position Respondent-Employer called Kim Ortiz, Claimant's lead nurse as a witness at hearing. Ms. Ortiz testified that she was Claimant's supervisor from mid-March through the vacation in April. She saw him on a daily basis. He was able to do his full job duties, without problems. She did not see any signs of pain, and Claimant did not complain to her of pain. Claimant testified that he tried to be stoic and not show evidence of his pain for fear of being marked for subsequent attack by combative

patients. The ALJ finds Claimant's testimony in this regard reasonable in light of the safety concerns for other staff and patients alike. In its totality, the ALJ finds Claimant's testimony credible, convincing and consistent with the content of the medical records.

16. Anthony Cordova, who handles workers' compensation claims on behalf of Respondent-Employer was involved with this claim. He was aware that the Claimant had been returned to work shortly after the incident and had been working full duty prior to his vacation. Mr. Cordova testified that he found the imposition of restrictions and Claimant's removal from work immediately after his vacation, due to a worsening of symptoms, suspicious. The ALJ infers from the evidence presented that Mr. Cordova was concerned that Claimant's worsening condition was due to an intervening injury/event.

17. Mr. Cordova acted upon his suspicions by checking Facebook. According to Mr. Cordova's testimony, he found a Facebook page for Claimant's girlfriend. In reading this Facebook page, Mr. Cordova learned that Claimant and his girlfriend had gone on vacation to Cancun, Mexico. The pertinent Facebook pages associated with Claimant's girlfriend were printed and admitted into evidence as Respondent's Exhibit I. The Facebook pages contain pictures which the ALJ finds consistent with Claimant's testimony that he relaxed on the beach during his trip to Mexico. Specifically, the pictures depict a tropical landscape with palm trees, a beach and some lounge chairs under an umbrella. There is also a picture of a couple of drinks on a table. Based upon the Facebook pages submitted, the ALJ finds no support for Respondent's suggestion that Claimant suffered an intervening injury while on vacation.

18. Based upon the evidence presented, the ALJ finds that Claimant, more probably than not, suffered an L4-5 disc herniation while he fought with and restrained a combative patient on January 29, 2015. Moreover, the evidence presented persuades the ALJ that Claimant's disc herniation was not caused or aggravated by an event occurring while Claimant was on vacation in Mexico.

19. Respondent's contrary suggestion, i.e. that Claimant's disc herniation, and therefore, his disability and need for treatment, including the recommended back surgery was caused or aggravated by an intervening event is not supported by the evidence presented. While Respondents established that Claimant did go on vacation, there is a dearth of evidence to support their conclusion that he was injured on that vacation. Rather, the evidence presented persuades the ALJ that Claimant was demonstrating signs consistent disc herniation prior to leaving for vacation. Indeed, Claimant had a positive straight leg raise test, centralized buttock pain, leg pain and a modest increase in that pain before leaving for vacation. As a consequence, Dr. Merchant ordered an MRI and documented that Claimant's recovery had stalled. Based upon the evidence presented, the ALJ finds the increase in Claimant's symptoms over time, more probably than not, due to the natural progression of symptoms associated with an untreated disc herniation and not an intervening injury as suggested by respondents. Consequently, the ALJ finds that Claimant has proven that his need for

treatment after April 19, 2015 is directly related to and caused by his January 29, 2015 work-related low back injury.

20. The Claimant's time off work from January 29, 2015 through January 30, 2015 and April 21, 2015 is directly related to his compensable low back injury occurring on January 29, 2015. Moreover, Claimant's lost work time from April 23, 2015, through June 22, 2015, was caused by the disability associated with the worsening symptoms of his work related condition. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that he is entitled to temporary disability benefits for these time periods.

## CONCLUSIONS OF LAW

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

*General Legal Principles*

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. 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.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004); See also *Ackerman v. Hilton's Mechanical Men, Inc.,* 914 P.2d 524 (Colo. App. 1996)(ALJ's findings may be based on reasonable inferences from circumstantial evidence). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions; the motives of the witness; whether the testimony has been contradicted by

other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil,* 3:16. As found, there are some inconsistencies in the record concerning Claimant's testimony.

*Medical and Indemnity Benefits*

D. 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 Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A claimant is only entitled to benefits as long as the industrial injury is the proximate cause of the Claimant's need for medical treatment. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v.* Ball, 172 Colo. 510, 474 P.2d 622 (1970); *Section 8-41-301(1)(c), C.R.S.* 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). The Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. *Section 8-43-201, C.R.S.* Respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. *Section 8-42-101((1)(a), C.R.S.*

E. Furthermore, any natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents contend that such an injury occurred in this case while Claimant was on vacation in Mexico. While Respondent's concede that Claimant's need for treatment up to April 21, 2015 is related to his January 29, 2015 work injury, they argue that the claimed intervening injury was sufficient to sever the causal connection between Claimant's compensable back injury and his need for treatment beginning April 21, 2015 and continuing, including the recommendation for low back surgery. Moreover, Respondents, while conceding that Claimant's time off of work immediately after the incident of January 29, 2015, through February 1, 2015, appears related to the work injury, assert that the claimed intervening injury is sufficient to cut off any entitlement to compensation on April 21, 2015, and from April 23, 2015, through June 22, 2015, because Claimant's disability and lost time is unrelated to his January 29, 2015 work injury. As found, the ALJ is not persuaded primarily as a consequence of Respondent's failure to persuade the ALJ that an intervening injury occurred. Because Claimant has proven that his need for treatment after April 19, 2015

is directly related to and caused by his January 29, 2015 work-related low back injury and Respondents did not challenge the reasonableness or necessity of such treatment, Respondents are obligated to provide it. *Section 8-42-101(1)* (a), C.R.S. Finally, because the evidence presented establishes that Claimant was unable to return to his usual job due to the effects of his compensable work related injury, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to temporary disability benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-103(1)(b), for the time periods stipulated to by the parties at the outset of the hearing in this matter at a rate of sixty-six and two-thirds percent of his stipulated AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week.

## ORDER

It is therefore ordered that:

Claimant's average weekly wage, by stipulation, is $1,274.49.

1. Claimant has proven by a preponderance of the evidence that his need for treatment after April 19, 2015, including the microdiskectomy procedure recommended by Dr. Sceats is related to his January 29, 2015 compensable low back injury. Consequently, Respondent shall pay for all medical treatment provided to Claimant after April 19, 2015, by providers at CCOM, including their referrals, including but not limited to the MRI and the low back surgery recommended by Dr. Sceats.

2. Claimant has proven by a preponderance of the evidence that he suffered work injury related wage loss for the time periods of January 29, 2015 through February 1, 2015, April 21, 2015, and April 23, 2015, through June 22, 2015. Consequently, respondents shall pay temporary disability benefits for these time periods in accordance with C.R.S. § 8-42-103(1)(b), at a rate of sixty-six and two-thirds percent of his stipulated AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury, Respondents request for application of the three-day waiting period to the temporary benefits ordered to be paid herein is denied and dismissed. *Section 8-42-103(1)(b), C.R.S.*

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

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

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

DATED: November 20, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

## ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right biceps tendon on May 17, 2015.

2. Whether Claimant has established by a preponderance of the evidence that the medical treatment he has received for his right biceps tendon is causally related to his May 17, 2015 work injury.

3. Whether Claimant has established by a preponderance of the evidence that the medical treatment he received on May 17, 2015 at ExitCare First Choice Emergency Room and on May 18, 2015 at Panorama Orthopedics was emergent treatment.

## STIPULATIONS

1. Claimant's average weekly wage is $953.04.

2. If the claim is found compensable, Claimant would be entitled to temporary total disability benefits from June 24, 2015 through July 4, 2015.

3. If the claim is found compensable, Claimant would be entitled to temporary partial disability benefits from July 5, 2015 through August 3, 2015.

## FINDINGS OF FACT

1. Claimant works for Employer as a tool technician.

2. Prior to May 17, 2015 Claimant had no problems with his upper extremities.

3. On May 17, 2015 Claimant was asked by Employer to help out in the tool department as Employer was short-handed. Claimant began assisting customers with checking in and checking out tools as well as assisting customers with loading and unloading tools.

4. Claimant began work on May 17, 2015 at approximately 10:00 a.m. At approximately 11:30 a.m. Claimant assisted a customer with unloading a wood chipper

from the back of the customer's pick-up truck. The wood chipper weighed approximately 250 to 300 pounds and was approximately 4.5 feet tall by 2.5 feet wide.

5. As Claimant and the customer were attempting to unload the wood chipper, Claimant took the brunt of the weight of the machine and felt an immediate pop and tingle up his right arm.

6. Claimant left work approximately 5-10 minutes later and advised his Employer that he was not feeling well. Claimant did not report the injury.

7. Claimant was afraid to report the injury because he had recently ingested edible marijuana. Claimant knew Employer had a policy of drug-testing employees when an injury was reported and Claimant did not want to lose his job or have a positive drug test.

8. Claimant left work and began to drive home, intending to ice and rest his arm. On the drive home and while attempting to turn the steering wheel, Claimant felt excruciating pain. Claimant stopped at an urgent care center that was on his way home.

9. On May 17, 2015 Claimant was evaluated at ExitCare First Choice Emergency Room by Michael Fallon, M.D. Claimant was diagnosed with a tendon injury. His discharge instructions indicated a distal biceps tendon disruption and that Claimant was to follow up with orthopedics and to wear a splint until he was evaluated by orthopedics. Claimant was referred to Panorama Orthopedics. *See* Exhibit 5.

10. On May 18, 2015 Claimant was scheduled to work for Employer in the afternoon. Claimant called in the morning and spoke to a supervisor. Claimant reported he would not be in to work that afternoon and that he had suffered an injury outside of work. Claimant admittedly lied to the supervisor and reported that he was not injured at work.

11. On May 18, 2015 Claimant was evaluated at Panorama Orthopedics by David Schneider, M.D. Claimant reported to Dr. Schneider that he lifted a wood chipper at work when he felt a burning sensation down his arm with pain in his biceps tendon. Dr. Schneider noted weakness with elbow flexion and an obvious palpable defect in the right elbow that was very consistent with a biceps tendon rupture. Dr. Schneider recommended an MRI of the right elbow. Dr. Schneider noted that Claimant was going to go back to work to file a workers' compensation claim and noted Claimant was still within his appropriate time window. *See* Exhibit 6.

12. At the appointment with Dr. Schneider Claimant advised Dr. Schneider that he had initially not reported it as a work injury because of his fear that he would be drug tested and fired. Dr. Schneider advised Claimant it was in his best interest to report the injury.

13. After his appointment with Dr. Schneider Claimant decided to go to Home Depot to report the injury. Claimant arrived at Home Depot and asked to speak with the supervisor he had spoken with earlier that day on the phone. She had left for the day. Claimant then spoke with supervisor Ruiz. Claimant told supervisor Ruiz that he had called in that morning and reported that he had gotten hurt helping a friend move yesterday. Claimant reported, however, that he had really gotten hurt at work helping a customer load a wood chipper. Claimant asked supervisor Ruiz whether he would have to take a drug test and told supervisor Ruiz that he had taken marijuana pills for his back. Supervisor Ruiz advised Claimant he would have to file paperwork and send Claimant for a drug test. *See* Exhibit C.

14. While at Home Depot, Claimant filled out an Incident Witness Statement. Claimant reported that at 11:30 a.m. on May 17, he was unloading a wood chipper from the back of a customer's pickup truck with the help of the customer when the tool came off the back of the truck fast. Claimant reported he tried to catch the tool to keep it from hitting the ground and that he felt a pull and a tingle up his arm. Claimant reported he felt sick and asked to leave and went to an urgent care. Claimant reported that he didn't want to say anything about it happening on the job because he knew he would have to go for a drug test. Claimant reported he had used edible marijuana for back pain, as pain pills made him sick. Claimant reported that he saw an orthopedic surgeon who was sending him to have an MRI done tomorrow. Claimant reported that it was a very small amount of marijuana that he used and that he was not a frequent user. *See* Exhibit 7.

15. Employer referred Claimant to one of their authorized providers for medical treatment and also sent Claimant for drug testing.

16. On May 19, 2015 Claimant was evaluated at Midtown Occupational Health Services by Craig Anderson, M.D. Claimant reported injuring his right elbow lifting a wood chipper out of a truck. Claimant reported a pop, pain, and tingling in his distal biceps area radiating up to his right shoulder along with severe weakness. Dr. Anderson noted on examination that Claimant's right distal arm at the distal biceps showed bunching and palpable defect of the distal biceps tendon. Dr. Anderson requested an MRI of Claimant's right elbow and referred Claimant to Dr. Schneider, orthopedist. *See* Exhibit 9.

17. On May 19, 2015 Claimant underwent an MRI of his right elbow joint without contrast that was interpreted by David Cosper, M.D. Dr. Cosper identified a full thickness complete tear of the biceps tendon with surrounding hemorrhage and edema. *See* Exhibit 10.

18. On May 19, 2015 Claimant underwent drug testing that resulted in a clean test.

19. On May 21, 2015 Claimant was evaluated by Dr. Anderson. Dr. Anderson noted that the MRI revealed a complete rupture of the distal biceps tendon, that

Claimant would need surgery, and that Claimant had been referred to Dr. Schneider. *See* Exhibit 9.

20. On June 3, 2015 Claimant was evaluated by Dr. Schneider. Dr. Schneider recommended that Claimant undergo right distal biceps repair and noted that the surgery would be scheduled as soon as possible. *See* Exhibit 11.

21. On June 17, 2015 Claimant was evaluated by Dr. Anderson. Dr. Anderson noted that Claimant had learned his claim was under denial and advised Claimant that he needed to have the tendon repaired as soon as possible and to discuss having it done under his own insurance. *See* Exhibit 9.

22. On June 25, 2015 Claimant underwent right distal biceps repair surgery. On July 1, 2015 it was noted by Ashley Nicholson, PA, that Claimant was healing well following surgery and that Claimant would start physical therapy. *See* Exhibit 11.

23. On September 16, 2015 Claimant underwent an Independent Medical Examination performed by Allison Fall, M.D. Dr. Fall opined that the treatment Claimant had received to date was medically reasonable, necessary, and appropriate for the injury. Dr. Fall opined that both the report of acute onset while at Home Depot lowering a wood chipper machine as well as the other reported mechanism of injury of helping a roommate move would be consistent with causing the type of injury Claimant suffered. *See* Exhibit 12.

24. Claimant's testimony is found credible and persuasive. Although Claimant admits he purposefully lied to Employer when first reporting how he was injured, Claimant is credible in explaining his false report and his fear of termination for his past use of marijuana.

## CONCLUSIONS OF LAW

### *Generally*

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

***Compensability***

The claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden. Claimant is found credible in explaining his job duties as well as the act of assisting a customer unload a wood chipper when he suffered an acute injury to his right biceps. The mechanism of injury described by Claimant is consistent with the injury he suffered and the opinion of Dr. Fall in this regard is found persuasive. Although Claimant provided a false report to Employer and indicated initially that he had been injured helping a roommate move, Claimant is credible in explaining why he provided a false report. Claimant had used marijuana in the past and knew Employer had a policy of drug testing their employees upon report of an injury. Claimant was fearful of a positive drug test and was fearful of reporting his injury as he believed he might lose his job if his drug test came back positive. However, the day after the injury Claimant realized his injury was significant and realized that he needed to accurately report the injury and seek treatment. Claimant admitted his initial false report in the Incident Witness Statement he filled out. Claimant admitted that he didn’t report the injury because of drug testing and Claimant appears to still be concerned with losing his job while filling out the Incident Witness Statement as he wrote that he used marijuana for back pain and only used a small amount and was not a

frequent user. Although Claimant indeed provided a false report, Claimant is credible in explaining the false report, his reason for providing the false report, and is credible in explaining how the injury actually occurred.

### *Medical Benefits*

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

Claimant has met his burden to show a causal connection between the work injury that he suffered on May 17, 2015 and his subsequent treatment. The ALJ finds Claimant credible in explaining the mechanism of injury and it is not disputed that the treatment has been reasonable and necessary. As the injury is found work related Claimant has established a causal relationship between his injury and his treatment.

### *Emergency Treatment*

Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Of course, the claimant may obtain "authorized treatment" without giving notice and obtaining a referral from the employer if the treatment is necessitated by a bona fide emergency. Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

Claimant has established that the medical treatment he sought on his way home from Home Depot on May 17, 2015 at ExitCare First Choice Emergency Room qualifies as authorized emergent treatment. Claimant is credible that he planned on going home and icing his right arm but that on the drive home his pain was excruciating, causing him to stop at ExitCare which was on his way home. The ALJ concludes that the excruciating pain Claimant suffered qualified as an emergency and that therefore the emergent treatment was authorized. However, the Claimant has failed to establish that the treatment he received on May 18, 2015 at Panorama Orthopedics was emergent treatment. The emergency and pain immediately following his injury that he

experienced on the drive home had ended, he had already been seen by a medical professional, and he had received a referral for orthopedics. There was no "emergency" requiring immediate treatment prior to notifying Employer of the potential claim. On May 18, 2015 prior to attending the appointment with Panorama Orthopedics, Claimant should have reported the injury to Employer and allowed Employer to refer Claimant for treatment rather than seeking unauthorized treatment on his own.

## ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his right biceps tendon on May 17, 2015.

2. Claimant has established by a preponderance of the evidence that the medical treatment he has received for his right biceps tendon is causally related to his May 17, 2015 work injury.

3. Claimant has established by a preponderance of the evidence that the medical treatment he received on May 17, 2015 at ExitCare First Choice Emergency Room qualifies as authorized emergent treatment.

4. Claimant has failed to establish by a preponderance of the evidence that the medical treatment he received on May 18, 2015 at Panorama Orthopedics qualifies as authorized emergent treatment.

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: November 17, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge

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